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National Reporter System—United States Series

THE
FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 198
PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS, CIRCUIT
AND DISTRICT COURTS, AND COMMERCE
COURT OF THE UNITED STATES

OCTOBER — NOVEMBER, 1912

ST. PAUL
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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE CIRCUIT AND DISTRICT COURTS AND THE COMMERCE COURT

NORTHERN PAC. RY. CO. v. MAERKL

(Circuit Court of Appeals, Ninth Circuit. August 5, 1912.)

No. 2,053.

1. COMMERCE (§ 27*)—EMPLOYER'S LIABILITY ACT—"EMPLOYED IN INTERSTATE COMMERCE"—"ENGAGED IN INTERSTATE COMMERCE."

Where an employé of defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant, when working in repair shops connected with an interstate track, engaged in repairing a car used by defendant indiscriminately in both interstate and intra-state commerce as occasion required, defendant was at the time "engaged in interstate commerce," and the employé was employed by defendant in such commerce, within the meaning of Employer's Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), and an action for his injury or death may be maintained against defendant thereunder.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2377-2380; vol. 8, p. 7649; vol. 3, pp. 2392-2394; vol. 8, pp. 7649-7651.

What law governs master's liability for injuries to servant, see note to Mexican Cent. Ry. Co. v. Jones, 48 C. C. A. 232.]

2. MASTER AND SERVANT (§ 226*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTING CAUSES OF INJURY.

That an employé may have assumed the risk from one of two contributing causes of an injury will not defeat his right to recover, where the other cause is one for which the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. ACTION (§ 45*)—JOINDER—INJURY RESULTING IN DEATH.

Under Employer's Liability Act April 22, 1908, c. 149, § 9, added by amendment by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), which provides that "any right of action given by the act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

parents, and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury," where an employé receives an injury for which he is entitled to recover under the act, and such injury subsequently results in his death, damages for his suffering, as well as for his death, may be recovered by his personal representative for the benefit of all the beneficiaries.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-448; Dec. Dig. § 45.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action at law by Anna Maerkl, administratrix of the estate of George Maerkl, deceased, against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was originally brought by George Maerkl, on the 9th of August, 1910, to recover from the plaintiff in error, defendant below, damages for personal injuries sustained by him while employed as a car carpenter in repairing a refrigerator car at the railway shops at South Tacoma, Wash. In the construction of such cars the center sills upon which the floor of the car rests are six inches thick, nine inches broad, and run the full length of the car. These center sills rest on other heavy timbers placed crosswise over the trucks, called "needle beams," and at each end they are mortised into heavy cross-timbers called "end sills." The flooring of the car is held on top of the center sills and fastened thereto with heavy spikes or nails. Between the center sills are braces, extending from one sill to the other, called "packing," and the sills and packing are then inclosed with a lining, called "sheathing." When new center sills are to be placed in a car, the car is placed on one of the heavy repair tracks under the shed in the railway company's yards, and is raised up by means of jackscrews. The trucks are removed, and then the car is ready for the car repairers, who begin their work of dismantling and repairing the car by removing the needle beams, then removing the ceiling, then taking out the packing between the center sills, and then the end sills. When the end sill is removed, if the spikes or nails driven through the floor have broken off, or if the floor was not spiked to the center sills in the first instance, the center sills will necessarily fall of their own weight.

The original complaint alleged, among other things, that the car in question was being used in interstate commerce, and the negligence alleged was in substance that the defendant company furnished the plaintiff another carpenter to work with him, and that while the plaintiff was under the car his fellow workman removed the end sills, whereupon the center sills of the car fell on the plaintiff, inflicting the injuries for which the action was originally brought, and also alleging that the car was improperly constructed, by reason of the fact that the center sills were not fastened to the floor by means of spikes driven through it into the sills, so that, when the end sills and other support to the center sills were removed, the center sills necessarily fell, in inflicting the injury referred to.

Maerkl having, by reason of his injuries, died shortly after the commencement of the action, leaving a widow and children surviving him, the widow was appointed administratrix of the estate of the deceased, and thereafter filed, by the permission of the court, what was designated a "supplemental complaint," in which were repeated the allegations above mentioned, and which further set out the death of Maerkl as a result of his injuries, and the names of his surviving wife and children, and which also alleged in substance that by reason of his injuries sustained through the negligence of the defendant company, the said Maerkl was damaged in the sum of \$5,000, and that by reason of his said injuries and of his death resulting therefrom the said widow and children were further damaged in the sum of \$20,000 in being deprived of support by him and of his companionship and comfort.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In its answer to the complaint of the administratrix the railway company denied the alleged negligence on its part, admitted the negligence of Maerkl's fellow servant, and set up as affirmative defenses assumption of risk by Maerkl, his contributory negligence, and the negligence of his fellow servant, to which answer the plaintiff replied, and the cause came on for trial before a jury. Upon the impanelment of the jury the defendant asked the court to require the plaintiff to elect whether she would proceed to try "the action brought by the deceased during his lifetime for injuries which he received, and which is contained in the amended complaint filed by the administratrix, or whether upon the cause of action brought for damages resulting in the wrongful death of the deceased, and which is brought now by the administratrix and included in the said amended complaint." The motion being denied, the defendant company reserved an exception, and assigns the ruling as error. The defendant company also moved the court to dismiss the action on the ground that the plaintiff admitted the negligence of a fellow servant, which motion was likewise denied, with a like exception by the defendant, and assignment of error here.

Upon the close of all of the evidence the defendant asked the court to instruct the jury to return a verdict in its favor, "for the reason that the evidence fails to prove facts sufficient to entitle the case to go to the jury, and for the reason that the evidence shows that, if the injury was caused by the negligence of any other person than the plaintiff, it was the negligence of a fellow servant, and for the reason that the evidence shows that the plaintiff assumed the risk at the time and place he did, and was also guilty of contributory negligence in failing to exercise ordinary care for his own protection, and for the reason that she cannot maintain this action as administratrix under the evidence and under the law." That motion was likewise denied, and an exception taken by the defendant. The jury was then instructed by the court, to which instructions certain objections and exceptions were taken, and the following verdict returned:

"We, the jury impaneled in the above-entitled case, find for the plaintiff, and assess the total damages to be recovered herein at the sum of nine thousand five hundred and seventy-six and $\frac{80}{100}$ dollars (\$9,576.80), of which the sum of \$936.80 is the damages incurred by George Maerkl in his lifetime, and the sum of \$8,640.00 is the damages sustained by his widow and children by reason of his death.

"E. B. Judson, Foreman."

The defendant company subsequently moved for judgment non obstante veredicto, which motion was denied, and the defendant allowed an exception to the ruling.

George T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, Wash., for plaintiff in error.

Boyle, Warburton & Brockway, of Tacoma, Wash., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge (after stating the facts as above). [1] It was stipulated by the parties:

"That the car under which George Maerkl, the deceased, was injured, at the time was a Northern Pacific refrigerator car; that the defendant is now, and at the time of the injury of the said George Maerkl was, the owner of a line of railway extending from the state of Wisconsin to the Pacific Coast, and also certain branch lines in the state of Washington, and during said time was transacting an extensive interstate and intrastate business as a common carrier; that in its business as a common carrier refrigerator cars were extensively used indiscriminately in both interstate and intrastate transportation as occasion might arise; and that the car in question had been

so used for a long time, and was at the time of the injury of said George Maerkl being repaired by the defendant in its yards for use in interstate and intrastate commerce as occasion might arise."

The case shows that Maerkl, with three other carpenters, was put to work on the car on a certain Saturday, and that on that day they took down the transoms, needle beams, and ceiling; the deceased and one of his coworkers working at one end of the car and the other two at the other end. The following Monday the deceased returned to work upon the car, and while he was underneath it, removing the packing from between the center sills, his coworker removed one of the end sills, resulting in the immediate falling of the center sills on Maerkl, inflicting injuries from which he shortly died; the evidence going to show that the flooring of the car had never been fastened to those sills.

Two of the points urged on the part of the plaintiff in error are that the car, at the time of Maerkl's injury, was not used in interstate commerce, and that, therefore, he was not employed in such commerce, and as a further consequence that the act of Congress commonly known as the "Employer's Liability Act" does not apply to the case.

It appeared from the evidence that the place where the repairing was done was on the main line of the defendant company, between Tacoma, Wash., and Portland, Or., and was connected with it by switches over which the cars needing repairs were run, and over which, after repairing, they were again put into the service of the company for use in interstate and intrastate commerce as occasion required; and the parties are agreed that this particular car upon which the deceased was at work when injured had been for a long time indiscriminately used in interstate and intrastate commerce, and was to be again so used when repaired. That a car so used is one of the instruments of interstate commerce does not admit of doubt. *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 474, 30 Sup. Ct. 155, 54 L. Ed. 280. And in *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27, 32 Sup. Ct. 2, 56 L. Ed. 72, in holding that the Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), as amended March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1911, p. 1314]), embraces all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce, the court said:

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is: Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it another way: Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the re-

quirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it; that is to say, it is no objection to such an exertion of this power that the dangers to be avoided arise, in whole or in part, out of matters connected with intrastate commerce. Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employes, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace, not only to that train, but to others."

It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic. In *Colasurdo v. Central Railroad of New Jersey*, 180 Fed. 832, it was held by the Circuit Court, and affirmed by the Court of Appeals for the second Circuit (192 Fed. 901), that the Employer's Liability Act of Congress of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. Supp. 1911, p. 1322]), applies to a repairer of a switch used for both interstate and intrastate commerce. We are of the opinion that it is also applicable to the case of the deceased, Maerkl.

That act provides, among other things, that every common carrier by railroad, while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband, and children of such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. The third and fourth sections of the act are as follows:

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been

guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé."

[2] The pleadings, as well as the brief of the plaintiff in error, admit that Maerkl's coworker was guilty of negligence, and that such negligence was one of the proximate causes of his injury; and there was evidence tending to show, not only that the flooring of the car was not nailed to the center sills, but that that neglect could have been readily detected by proper inspection. In view of the evidence, and of the verdict of the jury based upon it, we must, of course, take it as true that the defendant company was guilty of negligence in failing to have the flooring of the car properly fastened to the center sills, and, in view of the statute referred to, that Maerkl was not bound by any negligence of his fellow servant, nor are his heirs or representative. The verdict, in view of the evidence, must also be taken as conclusive that Maerkl was not guilty of any contributory negligence. In respect to the defense set up of assumption of risk by him, it is sufficient to say that a risk arising out of the carrier's neglect, and of which the employé had no knowledge, was not one which can be held to have been assumed by him. Moreover, one of the acts which confessedly was one of the proximate causes of the injury complained of was an act of a fellow servant of the deceased, which, under the act of Congress in question, is unavailing to the employer company; and, that being so, it would not avail the plaintiff in error, even if the deceased could be held to have assumed the risk of the defendant's negligence in failing to see that the flooring was properly fastened to the center sills, since the law is that it is only necessary for the plaintiff to show that one of the co-operating causes of the injury complained of was a negligent act or omission for which the master is responsible. *Kreig v. Westinghouse & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; *Standard Oil Co. v. Brown*, 218 U. S. 78, 30 Sup. Ct. 669, 54 L. Ed. 939; *Deserant v. Cerillos Coal R. R. Co.*, 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; *Morgan v. Robinson*, 157 Cal. 348, 107 Pac. 695; *Seaboard Air Line v. Witt*, 4 Ga. App. 149, 60 S. E. 1012; *Labatt on Master & Servant*, § 813.

[3] The question remains whether there is substantial basis for the contention of the plaintiff in error to the effect that recovery cannot be had in the same action both for the injury sustained by the deceased and for his death, even where, as here, the action is brought by the representative of the deceased for the benefit of all of the ben-

eficiaries. But for the amendment of the act of April 22, 1908, the position would be well taken, for that act contained no provision for the survival of the cause of action thereby given to the injured employé for personal damages sustained by him. But on the 5th day of April, 1910, Congress amended the act of April 22, 1908, by changing section 6 thereof, and by adding the following section as section 9:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and if none, then of such employé's parents, and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury." Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325).

It thus appears that Congress by the amendment of 1910 provided for the survival of the cause of action given by the act of April 22, 1908, to the employé for his personal injuries, and conferred that cause of action, not upon the estate of the injured employé in the event of his death, but, first, upon the surviving widow or husband and children of such employé, with the further provision that "in such cases there shall be only one recovery for the same injury."

We are of the opinion that the plain meaning of these statutory provisions is that, where one receives an injury in the employment of a railroad company under such circumstances as entitles him or her, as the case may be, by virtue of the statute, to recover from the company damages therefor, and that such injury results in the death of the injured person, damages resulting from the personal suffering, and from such death, not only may be recovered by the personal representative of the deceased in one action, but *must* be recovered in one action only, if at all, for the benefit of those specified in the statute.

It results that the judgment in the present case must be, and is, affirmed.

EASTERN OREGON LAND CO. v. MOODY. †

(Circuit Court of Appeals, Ninth Circuit. July 15, 1912.)

No. 1,956.

1. SPECIFIC PERFORMANCE (§ 97*)—CONDITIONS—PAYMENT OF PRICE.

Where a contract for the sale of real property required payment of the amount due thereon as a condition precedent to defendant's covenant to convey, payment of the amount due was a prerequisite to the vesting of any right in complainant to compel specific performance, as no estate vested in nor right to a conveyance accrued to complainant as long as the condition remained unperformed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

2. SPECIFIC PERFORMANCE (§ 97*)—CONDITIONS—TENDER OF PRICE—EFFECT.

Where complainant was only entitled to a deed to certain land after having paid all sums due under the contract and interest, a tender of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 7, 1912.

payment conditionally on the delivery of a deed was not equivalent to payment so as to entitle complainant to enforce specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

Necessity of tender of performance by plaintiff in order to enforce specific performance, see note to *Hosmer v. Wyoming Ry. & Iron Co.*, 65 C. C. A. 91.]

3. TENDER (§ 13*)—REQUISITES—PRESENT ABILITY.

Where, at the time complainant made a conditional tender of the amount due under a contract for the sale of land, the total amount was \$7,076.21, and it appeared that at that time complainant's bank account was overdrawn, and that not until some months thereafter he obtained a loan of \$7,000, but it did not appear that he was able to produce the balance, it was not shown that he had present ability to make the tender good so as to render his offer to pay equivalent to an actual production and tender of the money.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 29-32; Dec. Dig. § 13.*]

4. VENDOR AND PURCHASER (§ 170*)—TENDER—PARTICULAR SUM.

Complainant's offer to pay defendant "the balance due on the contract" with defendant for the sale of certain land was not a tender of a specific sum sufficient to cover all liability on the contract, and was therefore not equivalent to an actual production and tender of the money so as to entitle complainant to specific performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344-348; Dec. Dig. § 170.*]

5. VENDOR AND PURCHASER (§ 187*)—INSTALLMENT CONTRACT—DEFAULT—WAIVER.

A vendor's receipt of interest due on a contract for the sale of land while it was in arrears was not a waiver of the vendee's subsequent default in meeting the terms of the vendor's notice of termination of the contract, unless payments in arrears were made within a specified time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. § 187.*]

Gilbert, C. J., dissenting.

Appeal from the Circuit Court of the United States for the District of Oregon.

Suit in equity by Z. F. Moody against the Eastern Oregon Land Company to compel specific performance of a contract for the sale of land, in which defendant filed a cross-bill for cancellation of the contract. Decree by Circuit Court (180 Fed. 532) for complainant, and defendant appeals. Reversed, with instructions.

Huntington & Wilson, of Portland, Or., and Garret W. McEnerney and W. S. Goodfellow, both of San Francisco, Cal., for appellant.

Martin L. Pipes, of Portland, Or., and W. H. Wilson, of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The plaintiff, Z. F. Moody, during the time mentioned in this action resided and had an office at The Dalles, in Oregon, where his son, M. A. Moody, was his agent. The defendant has its office in San Francisco, Cal., but was represented by an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agent, George T. Parr, residing at Moro, in Oregon, and by attorneys Huntington & Wilson, residing at The Dalles, Or.

The contract in question bears date January 2, 1902. By its terms the plaintiff, as party of the first part, agreed to pay for certain lands in Wasco and Sherman counties, Or., \$8,457.75, as follows:

| | |
|---|------------|
| Upon the execution of the contract..... | \$1,457 75 |
| On or before January 1, 1903..... | 1,750 00 |
| On or before January 1, 1904..... | 1,750 00 |
| On or before January 1, 1905..... | 1,750 00 |
| On or before January 1, 1906..... | 1,750 00 |

It was agreed by the plaintiff that interest should be paid at the rate of 8 per cent. per annum from the date of the contract payable semiannually on each of said sums, until the same should be fully paid. It was further agreed that the plaintiff should pay all taxes which might come due and payable on the described premises until the conveyance should be executed as provided in the agreement. The defendant agreed, as the party of the second part, that upon the payment of said sums and interest it would convey to the plaintiff the described premises. It was further agreed that in case the plaintiff should make default in the payment of any one or more of the sums of money agreed to be paid for a period of six months the plaintiff would surrender the possession of the premises to the defendant, and the defendant was empowered to take possession of the premises and terminate the contract. The payment of the sums and interest and the strict performance by the plaintiff of all the covenants and agreements contained in the contract, to be by the plaintiff kept and performed, were made conditions precedent to the said conveyance, and time was declared to be the essence of the contract. Payments were made on this contract by the plaintiff as follows:

| | |
|--|------------|
| February 13, 1902: Payment on the first installment of the principal, due January 2, 1902..... | \$1,457 75 |
| January 24, 1903: First payment of interest due July 2, 1902, \$280; and interest due January 2, 1903, \$280; and interest on overdue interest, \$14.20..... | 574 20 |
| June 2, 1903: Second payment of interest due July 2, 1903..... | 280 00 |
| December 31, 1903: Third payment of interest, due January 2, 1904..... | 280 00 |
| December 29, 1905: Fourth payment on interest due July 2, 1904, \$280; due January 2, 1905, \$280; due July 2, 1905, \$280; and due January 2, 1906, \$280, total \$1,120; and interest on overdue interest, \$67..... | 1,187 00 |
| August 13, 1906: Fifth payment of interest due July 2, 1906..... | 280 00 |

The only payment made on account of the principal was made on February 13, 1902, which, by the terms of the agreement, should have been paid on January 2, 1902. The plaintiff defaulted in this payment 1 month and 12 days, and defaulted on all four of the other payments on account of the principal. On August 11, 1906, the defendant notified the plaintiff that the defendant terminated the contract of January 2, 1902, for the sale of land therein described by reason of the plaintiff's failure to make the payments which by said contract plaintiff had agreed to make.

The plaintiff was then in default with respect to all the installments

on account of the principal except the first. He was in default 3 years, 7 months, and 12 days with respect to the second installment; 2 years, 7 months, and 12 days with respect to the third; 1 year, 7 months, and 12 days with respect to the fourth; and 7 months and 12 days with respect to the fifth and last installment. He defaulted in the payment of the first installment of semiannual interest, due July 2, 1902, 6 months and 22 days; and on the second installment, due January 2, 1903, 22 days. He paid the third installment 1 month before it was due, and the fourth installment 2 days before it became due. He defaulted in the payment of the fifth installment, due July 2, 1904, 1 year, 5 months, and 27 days. On the sixth installment, due January 2, 1905, he was in default 1 year lacking 4 days; and on the seventh installment, due July 2, 1905, he was in default 6 months, lacking 4 days. The eighth installment, due January 2, 1906, he paid December 29, 1905, or 4 days before it came due. The ninth installment, due July 2, 1906, he did not pay until August 13, 1906, or after he had been in default 1 month and 11 days; and he did not then pay, or offer to pay, the interest on the principal from July 2, 1906, to August 13, 1906, amounting to \$63.77.

During a period of $4\frac{1}{2}$ years in which nine semiannual payments of interest became due, he failed to make six payments, including the last due July 2, 1906, at the time agreed upon, and only made three payments on or before the time when they became due. For none of these defaults was there a waiver on the part of the defendant of any of the terms of the contract.

How did the defendant treat these defaults?

On December 14, 1903, defendant's agent notified the plaintiff by letter that on January 2, 1904, the second and third payments on his contract would fall due, as follows:

| | |
|--------------------------------------|---------|
| Second payment..... | \$1.750 |
| Third payment..... | 1.750 |
| And interest to January 2, 1904..... | 280 |

The agent of the defendant stated that the defendant had requested him to collect all amounts maturing so that he could have his books in shape for the directors' meeting of the company on January 12, 1904. The agent stated further that he took occasion to notify the plaintiff before hand so that he could make arrangements to meet the indebtedness promptly when due. To this letter, M. A. Moody, the son and agent of the plaintiff, Z. F. Moody, replied by letter, under date of December 18, 1903, stating that his father was then in California; expected him home about the first of the year. The son wrote further that he understood from his father that his arrangements with the company anticipated that the company would carry along the principal until he could conveniently retire it, if the interest was kept paid promptly on its due day. To this letter the defendant, by its agent, Parr, replied under date of December 21, 1903, that there was no definite promise given by the plaintiff regarding the payments. The agent stated that he would endeavor to carry the account without payments as long as possible; but, the company having called upon him for payment, he had no alternative in the premises. If,

however, the plaintiff would send half of the amount due and interest, he would see that it was satisfactory with the company to allow the other payments to continue one year. This demand was not complied with, and the deferred payment was defaulted; but on December 31, the semiannual interest of \$280 was paid with the promise that after the New Year the principal payments would be adjusted with the defendant. On January 1, 1904, defendant's agent acknowledged receipt of the check for \$280, being interest due January 2, 1904, and noticed the promise of the plaintiff that the principal payments would be adjusted in a short time. This promise was not kept, and the promised payment was defaulted.

On January 28, 1904, defendant's agent telephoned to plaintiff demanding payment. Plaintiff's agent replied by letter that it was not entirely convenient to make the payment then, but he thought he could arrange it soon. He stated that he would bear in mind the fact that defendant was anxious to reduce the amount at an early date, and he promised to favor the defendant as quick as he could. This promise was not kept and the promised payment was defaulted. On June 17, 1904, defendant's agent demanded of plaintiff by letter payment of the interest of June 2, 1904. On June 27th, defendant's agent corrected the error in the demand as to the date when interest was due, and stated it as being July 2, 1904. No notice was taken of this corrected demand, and payment was defaulted. On August 25, 1904, defendant's agent notified the plaintiff that the defendant company was requesting information regarding arrangements made with the plaintiff for an extension of time on payments due on the contract. The agent stated that in replying to his letter the defendant company had sanctioned his actions in the matter, and stated that they preferred to have the interest paid semiannually, as provided for in the agreement. The agent thereupon requested the plaintiff to comply with this part of the contract, and he would carry the payments along until such time as the defendant should demand that collections be made. No notice was taken of this letter by the plaintiff, and no payment of the interest then due was made; plaintiff defaulted.

On December 6, 1904, defendant's agent notified the plaintiff by letter that on January 2, 1905, there would be due on the contract, \$5,250, and accrued interest, \$571.20, making the total amount due, \$5,821.20. The agent stated further in this letter that of this amount he expected a payment of \$1,750, and accrued interest, \$571.20, making a total of \$2,321.20. Plaintiff was requested to give careful attention to this demand, as he must have this amount indicated by the 2d proximo. No attention was paid to this demand by the plaintiff and payment was defaulted. On July 12, 1905, defendant's agent notified the plaintiff by letter that on July 2d there would be due on account of interest on his contract the sum of \$873.60, and demand of payment was made. No attention was paid to this demand by the plaintiff and payment was defaulted. On December 15, 1905, the defendant's agent having received a letter from the president of the defendant

company, the agent went to The Dalles and submitted this letter to M. A. Moody, plaintiff's agent at that place. The letter is as follows:

"Eastern Oregon Land Co., Columbian Bldg.,

"San Francisco, Cal., December 14, 1905.

"Mr. George T. Parr, Moro, Or.—Dear Sir: In relation to the contract of Z. T. Moody I herewith inclose you a statement of the account as it appears on our books. From this account you will note that Governor Moody is far in arrears with interest and principal. The company has heretofore instructed you to proceed with the collection of this account and to bring the necessary proceedings, if it is necessary, to recover possession of the land and damages on account of the loss sustained by it through the possession which Mr. Moody has had of the land. I want the matter immediately taken up by you and a prompt answer as to what Mr. Moody intends to do. If he refuses to pay in full all that is now due, I wish you to refer the matter to Messrs. Huntington & Wilson and instruct them to begin the necessary proceeding to collect the amount.

"Very truly yours,

Walter S. Martin, President."

The paper attached to the letter is as follows:

| Principal, | | Due on Moody Contract. | |
|----------------------------------|--|------------------------|------------|
| | | Interest. | \$7,500.00 |
| To July 1, '04, | | \$280. | |
| " Jan. 1, '05, | | 280. | |
| " July 1, '05, | | 280. | |
| " Jan. 1, '09, | | 280. | 1,120.00 |
| | | <hr/> | |
| | | \$8,620 | |
| Also inst. on deferred interest, | | | 67.20 |
| | | | <hr/> |
| | | | \$8,687.20 |

After a conversation with plaintiff's agent concerning the matter referred to in this letter, defendant's agent agreed to accept the interest in full to January 2, 1906; the plaintiff stating that he was tired of paying 8 per cent. interest. He requested defendant's agent to write to the defendant company that he would look for the money outside, or borrow it for a less rate of interest, if he could not raise it from his own resources. He said he would pay it within a few months. The defendant's agent thereupon wrote to the defendant company as follows:

"Moro, Oregon, Jan. 1, 1905.

"Mr. E. A. Wasserman, Asst. Secretary, San Francisco, Cal.—Dear Sir: Last Friday we called upon Hon. M. A. Moody of The Dalles with reference to the account of his father, Z. F. Moody. Received from him a check for \$1,187.00 which is the full amount of interest on the account to January 2, 1906. Mr. Moody stated that he was very anxious to pay off the indebtedness as he objected to paying eight per cent. and he was endeavoring to make a loan on the outside, and if he could not he would meet the obligation in a few months from his own resources. We promised him to present the matter and if satisfactory to the company would allow the account to continue until he could make some arrangement. Kindly advise us if this is satisfactory, and oblige,

Yours very truly,

Eastern Oregon Land Co.,

"By Geo. T. Parr, Agt."

In reply to this letter defendant's agent received from the defendant company the following letter:

"Eastern Oregon Land Co., San Francisco, January 9, 1906.

"Mr. George T. Parr, Moro, Oregon—Dear Sir: We are in receipt of the draft covering the amount of interest due on Gov. Moody's contract. As I stated to you before we are anxious to arrive at some conclusion with him about the principal as well as the interest. All of which is now overdue. I must ask you to immediately take this matter up and get a settlement from Gov. Moody of the principal. We do not wish to have contracts so long in arrears. We recognize that it is necessary to give a leave way in deserving cases but Gov. Moody has imposed on our forbearance more than the conditions warrant and we must therefore require a satisfactory settlement at the present time. * * *

"Very truly yours,

Walter S. Martin, President."

This letter defendant's agent submitted to the plaintiff's agent, with this statement: That if the plaintiff could pay \$1,000 on the principal, it was possible to get the defendant company to accept that and continue the other payments for a longer period. He promised defendant's agent that he would send a check for that amount in a short time. Plaintiff failed to keep this promise, and did not send the check, and payment as promised was defaulted.

Parr afterwards received a letter from the defendant dated March 22, 1906, containing the following paragraph:

"Referring to our letter under date of January 9th we stated at that time, that we were anxious to arrive at some conclusion on the contract of Gov. Moody. As before stated, we do not think the conditions warrant us in giving the Governor any more time, as we feel that we have been very lenient with him as the principal as well as the interest is now long in arrears, we desire to have this matter immediately taken up and a settlement made."

After the receipt of this letter, Parr had a conversation with the plaintiff, Z. F. Moody, or his agent, M. A. Moody, concerning these overdue payments. Parr suggested to M. A. Moody that he should do something regarding the making of a payment on that account; that the company was insisting that he settle, and Parr said:

"Now, Mr. Moody, if you cannot pay \$1,000 send \$500. Make some kind of a payment so as to show that you are doing the best you can."

Moody then promised Parr that he would send \$500 in a few days. Moody failed to keep this promise and defaulted in this payment, and afterwards being called up by telephone by Parr and asked the reason why he had not made the payment, Moody promised he would send the money. He failed to keep this promise and defaulted in the promised payment.

On July 2, 1906, he also defaulted in the payment of the interest then due amounting to \$280.

It was provided in the contract that, if the plaintiff should make a default in any one or more of the sums of money agreed to be paid for a period of six months, the plaintiff would surrender the possession of the premises, and the defendant was empowered to take possession of the premises and terminate the contract. When the notice of August 11, 1906, was given, the plaintiff had been more than six months in default of all the principal sums agreed to be paid by the plaintiff. The contract was thereupon placed in the hands of the

defendant's attorneys, Huntington & Wilson, residing at The Dalles Or., who, on that date, wrote to the plaintiff the following letter:

"The Dalles, Oregon, Aug. 11, 1906.

"Hon. Z. F. Moody, Salem, Oregon—Dear Sir: We are directed and authorized by the Eastern Oregon Land Company, the party of the second part of that certain contract made and executed by you as party of the first part, bearing date January 2, 1902, to demand of you the surrender of possession of all the premises described in said contract: you are hereby notified that said Eastern Oregon Land Company terminates this contract by reason of your failure to make the payments which by said contract you agreed to make. You are now in default in the payments which you by said contract agreed to make, in the sum of seven thousand dollars and interest at the rate of eight per cent. per annum from January 2, 1902, and interest upon each semiannual payment of interest at the legal rate from the date such semiannual interest payment became due. We hereby notify you that unless you surrender possession of all of said premises on or before the 21st of August, 1906, or pay the entire amount now due upon said contract on or before said last-named date, we shall commence suit to foreclose your interest in and to said contract and said premises. The Eastern Oregon Land Company is now ready and willing and hereby offers to convey to you by warranty deed all of said tracts of land described in said conveyance upon the payment of the amount due from you upon said contract.

"Huntington & Wilson, Attorneys for Eastern Oregon Land Company."

On August 17, 1906, the defendant's attorneys sent the following letter to the plaintiff, correcting the former letter as to the date of the last default on account of the payment of interest, and referring to the payment of interest due July 2, 1906:

"The Dalles, Oregon, August 17, 1906.

"Hon. Z. F. Moody, Salem, Or.—Dear Sir: In our letter to you of the 11th we made an error in stating the amount of which you are in default on the contract referred to; we should have stated the default of interest from January 2, 1906, instead of January 2, 1902; Mr. Parr tells us that the interest has been paid now to July 2, 1906.

"Yours very truly,

Huntington & Wilson."

On August 13, 1906, M. A. Moody, plaintiff's agent at The Dalles, mailed to Parr at Moro, Or., a check for \$280 in payment of the interest due July 2, 1906. No payment was made or offered to be made of the interest from July 2, 1906, to August 13, 1906, and plaintiff made no reply to Huntington & Wilson's letter of August 11, 1906.

On August 19th (?), the plaintiff mailed to Parr, as agent for the defendant, the following letter:

"Salem, August 14 (?), 1906.

"Mr. G. T. Parr, Dear Sir: I recd. note today from H. and W. stating that you had advised them that the interest was paid up to last July but did not say whether or not they were to give further time. Please advise me here and oblige,
Yours, etc.,
Z. F. Moody."

In the record the above letter is dated August 14th. It is stated, however, that the date is uncertain on account of its illegibility. The defendant claims that the date is August 19, 1906. This is probably the correct date, as the letter refers to the preceding note from Huntington & Wilson, dated August 17th.

From the receipt of the letter of August 11, 1906, to October 22,

1906, neither the plaintiff nor his agent communicated in any way with the defendant's attorneys, Huntington & Wilson, into whose hands the defendant had placed the business of closing up or terminating the contract of January 2, 1906. Negotiations for extension of time for payments were, however, carried on by the plaintiff and his agent with Parr, at Moro, who had ceased to have charge of this business for the defendant. There is no claim that Parr had authority to extend the time of payment, or that he assumed to do so. He testified with respect to this matter as follows:

"Q. You may state whether or not at the time of the payment of the interest in December, 1905, or at any other time, you ever agreed with Mr. Moody that the time of payment of the overdue installments of principal should be extended. A. No, sir.

"Q. You may state whether or not you ever made any such promise or offer to Gov. Z. F. Moody. A. No, sir; I told him that I would submit the matter to the company and do what I could for him.

"Q. You may state whether or not the suggestion about the extension of time of payment of the principal was ever made by you, or was that made by Mr. Malcolm Moody? A. I always took the position of trying to collect the money.

"Q. That does not quite answer the question that I asked; state whether or not the suggestion about the extension of time came from you or from Mr. Moody. A. The requests for extension came from Mr. Moody."

Parr further testified that about the 15th of August he had a conversation with the plaintiff, in person, as follows:

"A. * * * He then informed me that he had received a letter from Huntington & Wilson demanding payment of the full amount, and that he was very much surprised that the company had taken that action. I told him at that time that I knew nothing about it whatever; that I had not been advised that they had taken steps to collect the amount. He wanted to know if I could not arrange with the company to accept \$1,000 now and the balance the 1st of next January; that is, the balance January, 1907. I told him that I did not know, that I would try to get them, and that probably I could. That was practically all the conversation I had with the Governor."

Afterwards witness had a conversation with M. A. Moody. He testified with respect to that conversation as follows:

"A. Mr. M. A. Moody said, in substance, the same as his father, that the company had sent a letter through Huntington & Wilson demanding the full payment, or they would begin foreclosure proceedings within 10 days, and Mr. M. A. Moody at that time wanted to know if I could not arrange to have the company accept \$1,000 and the balance the 1st of January. I told him that I did not know. He said, 'Cannot you send a telegram to San Francisco and find out?' I did not place very much importance to the situation, and I told him that I thought it would be best to wait until I returned from the Locks, when I would write to the company and explain fully and try and get the extension asked. * * *

"Q. During that conversation on the 17th—that is, the conversation that you had with him when you were on your way to the Locks—did you say to him that you would be satisfied if he would pay part of the principal? A. No, sir; I never took that responsibility upon myself. I told him that I would endeavor to have the company accept that and give him an extension until January, 1907."

M. A. Moody testified that on the 17th of August he had a conversation with Parr upon the subject; that Parr was apparently sur-

prised the defendant should have given plaintiff notice rescinding the contract. His testimony continues:

"A. As I said before, Mr. Parr seemed to me surprised that the company demanded the rescinding of the contract, and said that he was satisfied that they would be willing to accept a portion of the balance of the principal.

"Q. What did you answer? A. I told him that, since they had placed it in the hands of their attorney, I was afraid to make a partial payment; that I thought it would be better to pay it all."

From this testimony it appears that plaintiff abandoned negotiations for an extension of time on August 17th, and announced his purpose to pay the debt in full. Parr places his knowledge of plaintiff's change of purpose three days later. He testifies that about August 20th he had a conversation with M. A. Moody, as follows:

"He told me that he had decided to pay all cash. Said he would send me a draft the next day for the full amount, and wanted to know if I made the deeds, or if it was necessary to send them to San Francisco. He said, 'You go ahead and have the deed made out, and I will send you the draft to-morrow'—that is, the next day."

The draft was not sent, but on the following day, August 21st, Moody called up Parr on the telephone and said that he had not sent the draft, but requested Parr to forward the deed, make it out and forward it to San Francisco for execution, and send it to the First National Bank of the Dalles, or any other place that was satisfactory to Parr, and he would pay over the money. The deed was to be made to E. E. Ferguson. On the same day plaintiff by his agent wrote and sent to Parr the following letter:

"Z. F. Moody, General Commission Merchant,

"The Dalles, Or., Aug. 21, 1906.

"Geo. Parr, Agent E. O. L. Co., Moro, Or.—Dear Sir: Confirming our conversation by telephone to-day we will be ready to pay the balance due on the contract with your company made January 2, 1902, as soon as you can execute and deliver the deeds for the land according to the terms of the contract. Please make the deeds to E. E. Ferguson and notify me by return mail whether you prefer to receive the money and deliver the deeds here at The Dalles or at Moro. Yours truly, Z. F. Moody, pr. M. A. M."

This was the last day in which plaintiff had the right under the terms of the defendant's demand to pay the amount due on the contract, and obtain from the defendant a deed for the premises.

[1] The payment of the principal, sums due on the contract, and interest, and the strict performance by the plaintiff of all the covenants and agreements contained in the contract to be by the plaintiff kept and performed, were made conditions precedent to the said covenants, and time was declared to be the essence of the contract.

"Where a contract is thus conditional—that is, where it rests upon a condition precedent—until the performance of the condition it cannot be enforced, because, until that time, there is not true contract. * * * The fact that a contract depends upon a condition precedent, which has not yet been performed, is always a complete defense to a suit for its specific enforcement. Equity, therefore, never relieves against the nonperformance or breach of conditions precedent, since no estate vests, or right accrues, as long as the condition thus remains unperformed." Pomeroy on Contracts, § 334.

The payment of the amount due on the contract in this case was therefore a prerequisite to the vesting of any right in the plaintiff to a conveyance of the land described in the contract. No such payment was made, but it is claimed that a tender of payment was made by the plaintiff which was equivalent to a payment. A tender of payment to be the equivalent of a payment must be:

[2] 1. Unconditional.

In *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 577, 14 Sup. Ct. 928, 38 L. Ed. 822, the Supreme Court of the United States had before it the question of whether the covenants of certain contracts for the sale of land, payable in installments, were dependent and concurrent, or independent, and the payment of the purchase price a condition precedent to the covenant of conveyance on the part of the land company that it would convey. The court held that, if the terms and provisions of the contracts were to be understood in their plain and obvious meaning, they clearly expressed the intention of the parties to be that the purchaser should first pay the purchase price of the lands contracted for before he was entitled to demand a conveyance therefor; that it was clear that the purchaser could not have legally demanded from the land company a deed or conveyance for the lands until after the purchase money had been fully paid; that the payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance. In support of this doctrine the court cites numerous authorities both in England and in this country.

In *Kelsey v. Crowther*, 162 U. S. 404, 408, 16 Sup. Ct. 808, 810 (40 L. Ed. 1017), the action was for the specific performance of a contract for the sale and purchase of land. The plaintiff had made a payment on the purchase price, and by a covenant in the agreement of sale had 30 days for the examination of a title. If the title was approved, defendant contracted that he would, at once, on payment of the balance of the agreed purchase money, execute and deliver a full and perfect warranty deed conveying to the purchasers the entire title to the premises. Defendant also agreed to at once furnish an abstract of title to the premises. Defendant failed to furnish the abstract of title; but, notwithstanding this fact, the plaintiff tendered to defendant the balance of the purchase price and demanded the conveyance of the property. The tender was, however, made on the next day after the period of 30 days had expired. The trial court entered a decree in favor of the defendant, denying the specific performance of the contract. The Supreme Court of the United States approved this decree, saying:

"His (defendant's) failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an action for damages brought by Crowther, (defendant). But if they (complainants) wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance. To entitle themselves to a decree for a specific performance of a contract to sell land it has always been held necessary that the purchasers should tender the purchase money."

In *Kentucky Distilleries & Warehouse Co. v. Warwick*, 109 Fed. 280, 283, 48 C. C. A. 363, the Circuit Court of Appeals for the Sixth Circuit, applying this doctrine in a similar case, held that a purchaser of real estate who is required by the contract to deposit the price with a third party by a day certain—time being of the essence of the contract—is bound to pay in or tender the money within the time stated to entitle him to enforce specific performance, notwithstanding the failure of the vendor to furnish an abstract of title within the time required by the contract.

In *Englander v. Rogers*, 41 Cal. 420, there was an action for the recovery of a deposit on the purchase price of real estate. The covenants of the vendor and vendee were mutual and dependent, and it was held that neither could put the other in default except by actually tendering a performance on his own part. The court says:

"To entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred a tender of the unpaid portion of the purchase money; or some sufficient excuse for the omission to tender it. The only allegation of the complaint on this point is that the plaintiff 'has been ready and willing during all the time aforesaid, and has offered to accept and take the conveyance, pursuant to said agreement, and to pay the balance of said purchase money.' It is not an averment that he tendered the purchase money. To constitute a valid tender in such a case, the party must have the money at hand and immediately under his control, and must then and there not only be ready and willing but produce and offer to pay it to the other party on the performance by him of the requisite condition."

In *Powell v. D. S., etc., R. R. Co.*, 12 Or. 488, 490, 8 Pac. 544, 546, it is said:

"A mere readiness to perform at such time is not sufficient, but the plaintiff must aver a tender of performance on his part."

In *McCourt v. Johns*, 33 Or. 561, 565, 53 Pac. 601, 602, Judge Wolverton, speaking for the court, said:

"The statute has provided that 'an offer in writing to pay a particular sum of money is, if not accepted, equivalent to an actual production and tender of the money'; but it was not the intention of the Legislature thereby to dispense with the readiness and ability on the part of the one making the tender to pay in substantial accord with its terms."

In the present case the plaintiff did not tender performance unconditionally but conditionally upon the delivery of a deed of conveyance. The terms of plaintiff's letter of August 21st were:

"We will be ready to pay the balance due on the contract with your company made January 2, 1902, as soon as you can execute and deliver the deeds for the land according to the terms of the contract."

This was not a notice that the plaintiff was then ready to pay the amount due, but that at a future time, and conditionally upon the delivery of the deed, he would be ready to pay the amount due.

[3] 2. A tender of payment, to be the equivalent of an actual production and tender of the money, must be made by one who has the present ability to make the tender good, and the burden of proof is upon the plaintiff to show that he has such ability.

The statute of Oregon providing for a tender in writing "does not

dispense with the necessity of the parties having the money in fact." *Holladay v. Holladay*, 13 Or. 523, 537, 11 Pac. 260, 266.

The plaintiff in this case was not himself a witness in the case, but it appears from a statement of his bank account that on August 21, 1906, his account in bank was overdrawn in the sum of \$1,145.20, and that M. A. Moody, his son, had no account in bank. But the latter testified he had arranged to obtain the money from one Dr. E. E. Ferguson, to whom the title to the land was to be conveyed in the deed. Dr. Ferguson was a witness in the case. He testified that he loaned M. A. Moody \$7,000. He gave the money in a check dated October 22, 1906, two months after the tender, and took Moody's note, dated back to August 21, 1906. From this testimony it appears that neither the plaintiff nor his agent had this money in hand on August 21st. They were therefore not able on that date to pay the amount due on this contract; but, even if this money had been available on this date, it would not have been sufficient to pay the amount due on the contract. The amount due on the contract on that date was \$7,000 in principal and interest from July 6, 1906, to August 21, 1906, amounting to \$76.21, making a total of \$7,076.21. There is no testimony in this record that the plaintiff was ready and able to pay the full amount due on the contract at that time. The most that can be said of this evidence is that plaintiff knew where he could secure \$7,000; but there is no evidence that the additional sum of \$76.21 had been secured, or was ready to be paid with the principal sum.

In *Lilienthal v. McCormick*, 117 Fed. 89, 96, 54 C. C. A. 475, 482, the controversy as in this case arose in Oregon. There was an insufficient tender of payment upon a liability arising upon contract. Upon that subject this court said:

"There was no actual tender of any money. It is true that the statute of Oregon provides that an offer to pay a particular sum of money is, if not accepted, equivalent to the actual production and tender of the money; but the Supreme Court of that state have declared that this statute does not dispense with readiness and ability on the part of the person making the offer to pay the money at the time the offer is made. *Ladd v. Mason*, 10 Or. 308, 314. The evidence does not affirmatively show that the offer made covered the full amount then due. The law is well settled that there can be no valid tender of part of an entire debt. The mistake in the sum offered, if any, must be regarded as the mistake and misfortune of the defendants."

[4] 3. A tender of payment, to be the equivalent of an actual production and tender of the money, must be to pay a particular sum of money, which must be a sum that would be in full of all liability on the contract.

The statutes of Oregon make "an offer in writing to pay a particular sum," if not accepted, the equivalent to the actual production and tender of the money.

The tender in this case on August 21st was first by telephone by M. A. Moody to Parr requesting Parr to make out and forward the deeds to San Francisco for execution, and send it to the First National Bank of The Dalles, or any other place that was satisfactory to Parr, and they would pay the money. The second tender was by letter signed

by Z. F. Moody, by M. A. M., dated August 21st, confirming the telephone conversation of that day, and stating that:

"We will be ready to pay the balance due on the contract with your company made January 2, 1902, as soon as you can execute and deliver the deeds for the land according to the contract."

The tender was not to pay a particular sum of money, but the balance due on the contract. This was not sufficient. The tender is not sufficient unless it is of a specific amount and offered to be paid without annexing any terms or conditions. *Pulsifer v. Shepard*, 36 Ill. 531, 537. It follows that the tender was not sufficient to meet the terms of defendant's notice of August 11, 1906, and under that notice defendant was entitled to terminate the contract by reason of plaintiff's default in making the payments therein required.

On October 22, 1906, the plaintiff by letter addressed to defendant's attorneys, Huntington & Wilson, at The Dalles, Or., referred to their letter of August 11, 1906, demanding payment of \$7,000 and interest under the contract of January 2, 1902. Plaintiff refers to his offer verbally and in writing that he was ready to pay the amount due on the contract upon the tender of a deed conveying to him the land referred to therein, and he states that on the 20th inst. he learned for the first time that the defendant had refused to comply with its contract and make the deed called for. The plaintiff thereupon tendered to the defendant company the sum of \$7,000 and interest due on payments, \$171.15, the sums due on said contract, and demanded from the defendant a warranty deed conveying to him the land described in the contract. The interest here tendered in addition to the principal sum was the interest from July 2 to October 22, 1906, and was in effect an admission that a tender of the interest due on August 21, 1906, of \$76.21 was necessary to make good the tender of that date, assuming that the tender was otherwise sufficient. On the same day Huntington & Wilson admitted the tender mentioned in plaintiff's letter, but stated that they were not in a position to deliver such a deed. Thereupon plaintiff brought this action for a specific performance of the contract of January 2, 1902. In plaintiff's amended complaint and defendant's answer and in defendant's cross-bill and plaintiff's answer to the cross-bill the issues are presented substantially as have been stated, and the facts recited are, in substance, the material facts contained in the evidence.

The court below held, among other things, that the acceptance by the defendant on August 14 or 15, 1906, of the installment of interest due July 2, 1906, amounting to \$280, waived the default in the payment of the principal sum then due, and directed a decree in favor of the plaintiff. Plaintiff's complaint for specific performance is not based upon the theory that defendant had waived plaintiff's default with respect to such payments. The complaint is formed wholly upon the theory that a sufficient tender of payment had been made to meet the terms of defendant's notice of August 11th, and the subsequent action taken by the plaintiff is consistent with that theory, and inconsistent with the theory that plaintiff understood that there was a waiver

of default on the part of the defendant by its acceptance of the interest due July 2, 1902. In plaintiff's letter to Parr of August 19th, he refers to the fact that plaintiff had received a note from Huntington & Wilson in which it was stated that Parr had advised them that interest had been paid up to July 2, 1906; but, says the plaintiff in his letter, they "did not say whether or not they were to give further time." This is absolutely inconsistent with the theory that plaintiff understood that defendant had waived plaintiff's default by the acceptance of interest. Neither the plaintiff nor his agent in any conversation with Parr indicated that either of them understood that defendant had waived default; on the contrary, their effort was first to secure an extension of time in making further payments, and, failing in that, their claim has been that a sufficient tender had been made.

[5] We do not understand how, upon the issues upon which the case was tried and the conduct of the plaintiff, he can now claim that the receipt of interest by the defendant was a waiver of the subsequent default in meeting the terms of defendant's notice.

In defendant's cross-bill it sets up its defense to the action, and then offers to repay to the plaintiff all moneys theretofore paid by him to the defendant on account of the contract, to wit, the sum of \$4,-058.95, and prays the plaintiff's suit for a specific performance be dismissed, and that the contract of July 2, 1902, be canceled.

We are of opinion that such should be the order of the court, and that plaintiff should have leave to accept defendant's offer to repay the money plaintiff has paid to defendant on account of the contract.

The decree of the Circuit Court is, accordingly, reversed, with instructions to proceed in accordance with this opinion.

GILBERT, Circuit Judge (dissenting). There are certain salient facts in this case, which, it seems to me, present insuperable obstacles to the most inequitable result which will follow from the conclusion reached by the majority of this court:

The contract, while it makes time of the essence thereof, contains no provision that failure to make payments, either of principal or interest when due, shall work a forfeiture or be ground for rescission. All that is prescribed as the penalty for default is that, in case the purchaser shall make default in the payment of any one or more of the sums of money therein agreed to be paid "*for a period of six months,*" the purchaser shall surrender the possession of the premises to the vendor, and the latter may take possession of the same and terminate the contract.

The delays in payments of principal and interest prior to August 11, 1906, have absolutely nothing to do with the decision of the case on its merits, further than to define the attitude of the parties to the contract on and after August 11th, for those delays were fully acquiesced in and waived by the vendor. It accepted all semiannual payments of interest, whether they were made before, at, or after the time when they fell due, and it accepted accrued interest on all delayed payments, and it assented to the request of the purchaser that the payment of installments of principal should be deferred until it

should be convenient to him "to meet the obligations." This is shown by the letter of August 25, 1904, written by Parr, the agent of the appellant, in which he said:

"The company wrote us a letter a few days since requesting to be advised regarding the arrangements made with you for extension of time on payments due on contract for the purchase of land. We replied that we had extended the time until it would be more convenient for yourself to meet the obligations. In replying to this letter the company sanctioned our actions in the matter, but stated that they preferred to have the interest paid semi-annually as provided for in the agreement. We would therefore thank you to comply with this part of the contract, and we will carry the payments along until such times as the company demands that collections be made."

"Whether time is or is not of the essence of the contract, if the vendor has waived strict compliance with its terms as regards time of payment, he cannot thereafter rescind or forfeit the contract without notifying the purchaser of his intention to do so unless payment is made, and allowing him a reasonable time for performance." 39 Cyc. 1384; *Maffett v. Or. & Cal. R. Co.*, 46 Or. 443, 456, 80 Pac. 489; *Watson v. White*, 152 Ill. 304, 38 N. E. 902; *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383; *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096; *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; *Mo v. Bettner*, 68 Minn. 179, 70 N. W. 1076; *O'Connor v. Hughes*, 35 Minn. 446, 29 N. W. 152.

The decision of the case on its merits depends, therefore, on what occurred on and after August 11, 1906. On that day the interest had been paid to January 2, 1906. The semiannual installment of interest due on July 2, 1906, was still unpaid, and there was unpaid on account of principal, \$7,000. On that date, *Huntington & Wilson*, attorneys for the appellant, wrote to the appellee, demanding that he surrender possession of the lands described in the contract, and notifying him that the appellant—

"terminates this contract by reason of your failure to make the payments which by said contract you agreed to make. * * * We hereby notify you that unless you surrender possession of all of said premises on or before the 21st of August, 1906, or pay the entire amount now due upon said contract on or before said last-named date, we shall commence suit to foreclose your interest in and to said contract, and said premises. The Eastern Oregon Land Company is now ready and willing, and hereby offers to convey to you by warranty deed, all of said tracts of land described in said conveyance upon the payment of the amount due from you upon said contract."

It is to be observed that this is not a notice of a rescission of the contract. It is notice that, unless payment is made on or before the date named, the appellant will sue to foreclose the appellee's interest in the contract. It is well settled that a notice of a rescission must be absolute, and wholly inconsistent with a further recognition of the binding force of the contract.

"No particular form of notice is necessary unless prescribed by the contract or by some statutory provision. However, the notice should be clear and unambiguous, and convey an unmistakable purpose to rescind or forfeit the contract." 39 Cyc. 1386.

But assuming the communication to have been a distinct notice of rescission unless the contract were performed within the ten days therein limited, the facts show that it was never rescinded. On August 13, 1906, two days after the date of the notice, the appellee paid

the installment of interest which fell due on July 2, 1906, and the appellant accepted and received the same. On August 17, 1906, the appellee's agent had a conversation with Parr, the agent of the appellant, in which the latter said that he was satisfied that the company would be willing to accept a portion of the balance of the principal, but the appellee's agent answered that, since the matter had been placed in the hands of attorneys, he was afraid to make a partial payment; that he would let him know the following day whether he would pay a portion of the balance or pay it all. On the following day he told the appellant's agent that he had decided to pay it all. The latter said it would be satisfactory, and that he would send for the deed.

In the transactions between the parties on and after August 11, 1906, there are to be found two sufficient reasons why in equity the decree of the court below should be affirmed. In the first place, the appellant, by its conduct and by the letter of its attorneys of August 11, 1906, waived all prior defaults in payment, whether of principal or of interest, and extended the time of the contract to and including August 21st, with an express offer to convey the land to the appellee on his payment of the balance due at that time. By the terms of the contract all the payments might be made to the appellant "at its agency at The Dalles," and in pursuance of that provision, which was in no way altered by the notice of August 11th, Malcolm A. Moody, the son of the appellee, and acting as manager of his affairs, on August 21st addressed the agent, both orally and in writing, informing him that the money was ready to be paid, and in answer thereto the agent informed him that he would order the deed and would notify the attorneys, and the agent made no objection to receiving the money due on the contract or to making the deed. The testimony of Malcolm A. Moody that on August 21, 1906, he had the money available with which to pay what was due on the land, should be accepted as true. The objection is made that his testimony shows the availability of only \$7,000, which was to be advanced by Dr. Ferguson, and that there is no proof that Moody had the additional \$76.21. But it ought to be assumed that one who has \$7,000 to pay on the purchase of land, and is himself engaged in business, has also at his command, as he testified that he had, the additional \$76.21, just as it should be assumed that, if he proved that he had \$7,076, he had also the additional sum of 21 cents.

No answer was made to the appellee's offers to pay by the appellant, then or at any time, and, in fact, it is evident that it was not its intention to make a conveyance to the appellee at any time after the date of the letter of August 11th, and that the offer of conveyance contained in that letter was not made in good faith. The appellant not being prepared to convey, any further tender by the appellee would have been futile.

"If for any reason, a tender would be only an idle or useless ceremony, no tender is necessary." Am. & Eng. Encl. (2d Ed.) 692.

The offer of the appellee to pay on August 21st was by the appellant's agent accepted as sufficient, and he stated that he would procure the deed.

"Unless the objection to the sufficiency of the tender is made at the time of the tender, such objection is considered to be waived." 39 Cyc. 1549.

"A tender of the purchase money, however, in connection with mutual and concurrent promises by the vendor, means merely a readiness and willingness, accompanied by an ability to produce the money, provided the vendor will concurrently do the act which is required of him." 39 Cyc. 1563; Scanlan v. Geddes, 112 Mass. 15; Miller v. Smith, 140 Mich. 524, 103 N. W. 872; Clark v. Weis, 87 Ill. 438, 29 Am. Rep. 60; Smoot et al. v. Rea & Andrews, 19 Md. 398; Warren v. Crew, 22 Iowa, 315; Comstock v. Lager, 78 Mo. App. 390.

In the case last cited the court said:

"The word 'tender,' as used in connection with mutual and concurrent promises, does not mean the same kind of an offer as when used in reference to the payment or offer to pay an ordinary debt due in money, when the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, and the transaction is completed and ended; but it only means a readiness and willingness, accompanied with the ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness and ability implies an offer or tender in the sense in which these words are used in reference to mutual and concurrent undertakings. It is not an absolute and unconditional agreement to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement."

Said the court in Smoot et al. v. Rea & Andrews:

"To entitle a purchaser to demand a deed, it is sufficient that he is ready, and offers to comply with the contract on his part, and has the ability to perform it."

On August 21, 1906, after receiving the offers of the appellee to pay the purchase money in full, Parr wrote a letter to the secretary of the appellant, which he signed "Eastern Oregon Land Company, by George T. Parr, Agent," in which he said that he had met Mr. Moody at The Dalles, "and he informed me that he was ready and willing to pay the balance due on his contract upon delivery of a warranty deed covering the land embraced in the contract. I then conferred with Messrs. Huntington & Wilson, and they advised that under the laws of the state of Oregon we could not refuse deed if Mr. Moody was ready to pay over the balance due, with interest. They have no doubt already written you explaining the laws governing such matters in this state. We have, accordingly, in compliance with the request of Mr. Moody, prepared and herewith inclose warranty deed," etc. It thus distinctly appears that the appellant's agent made no question of the readiness and ability of the appellee to make the payment. The offer of payment was not accepted for the sole reason that the appellant was not prepared to deliver the deed. I think there can be no question that the advice so given by the appellant's attorneys to the appellant's agent correctly stated the law of the case. The evidence is undisputed that the appellant never tendered the deed, or executed the same, and it was not until October 20, 1906, and after several letters had passed between the parties, that the appellant made known to the appellee its refusal to carry out the contract.

The conclusion which is reached by the majority of this court seems to be based mainly upon the decisions in *Kelsey v. Crowther*, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. Ed. 1017; *Kentucky Distillery & Warehouse Co. v. Warwick*, 109 Fed. 280, 48 C. C. A. 363; and *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822. *Kelsey v. Crowther* goes no further than to hold that one who brings a suit for specific performance must allege an actual tender of the purchase price. That proposition is not involved in the present case, for it is not disputed that the appellee made a good and legal tender on October 22, 1906. The decision of the case wholly depends on the question whether, prior to that time, the contract had been rescinded, and it is the question whether, upon the facts established, the appellant could rescind without tendering a deed, that we have to deal with. The conditions of the contract for conveyance and payment so extended by the letter of August 11th were concurrent and dependent, and there could be no rescission unless, upon the offer of the appellee to pay the purchase money within the time stipulated, the appellant tendered a conveyance in accordance with its notice. In that respect the case differs from *Kentucky Distillery & Warehouse Co. v. Warwick* and *Loud v. Pomona Land & Water Co.* In the first of those cases the conditions were held not concurrent for the reason that the contract required that the purchaser deposit the purchase price with a third party on a day certain as a condition to the conveyance. In the second case the conditions were held not concurrent for the reason that the contract provided that:

"After the making of the payment and full performance of the covenants hereafter to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey."

And the court based its decision on the use of the word "after," which word is italicized in the opinion.

The provision of the contract in the case at bar is that:

"The party of the second part covenants and agrees that, upon the payment of said sums and interest, it will convey," etc.

Such a covenant is concurrent with the covenant to pay the purchase price, and it is uniformly so held. *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671; *Shinn v. Roberts*, 20 N. J. Law, 435, 43 Am. Dec. 636; *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184. Such also have been the decisions of the Supreme Court of Oregon, the state within which lie the lands in controversy in this suit, and in which the contract was to be performed. *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239; *Ward v. Warren*, 44 Or. 102, 74 Pac. 482; *Scott v. Smith*, 58 Or. 591, 115 Pac. 969. A contract precisely similar to that which is here involved was construed in *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, in which Judge Rudkin for the court said:

"It is first claimed that the covenants in this agreement are independent. A court will not readily presume that a vendor intends to part with his title without receiving the purchase price, or that the purchaser intends to part with his purchase money without receiving a deed. In other words, a covenant to convey and a covenant to pay the purchase price will be held to be

concurrent and be dependent unless the contrary clearly appears to have been the intention of the parties, and the use of the words 'shall first pay,' as in this case, has no particular significance."

In *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219, it was held that:

"In contracts for the sale of land by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent unless a contrary intention clearly appears."

"In order to enable the vendor to rescind on account of default of the purchaser, he must perform all precedent covenants on his part to be performed, and must be ready and willing to perform concurrent covenants, and must notify the purchaser that he is ready and willing to perform the concurrent covenants." 39 Cyc. 1375.

"If the covenants of the vendor to convey and the purchaser to pay purchase money * * * are mutual and dependent, the vendor must at law convey, or tender a proper conveyance before he can put the purchaser in default and thereby become entitled to rescind." 39 Cyc. 1537.

And the same rule applies to suits in equity. *Scott v. Smith*, 58 Or. 591, 115 Pac. 969; *Lewis v. Wellard*, 62 Wash. 590, 114 Pac. 455; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; *Roberts v. Braffett*, 33 Utah, 51, 92 Pac. 789; *Spolek v. Hatch*, 21 S. D. 386, 113 N. W. 75. In *Scott v. Smith*, Mr. Justice Bean said:

"As a general rule, the party who asks for the rescission of a contract for the sale of real estate must be himself without fault, and when, as in this case, the payment of the purchase money and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract without performance or a valid offer to perform on his part; and, so far as the question of time is concerned, both parties, after the day provided for the consummation, may be considered equally in default, and neither can hold himself discharged from the obligation of complete performance until he has tendered performance on his own side and demanded it on the other."

In *Lewis v. Wellard*, construing a contract between a vendor and a purchaser which provided, "This contract can be declared void by the first party (vendor) if second party violates any of the above agreements," the Supreme Court of Washington said:

"The contract made the making of the last payment and the delivery of the deed mutual, concurrent, and dependent obligations, and brings the case within the rule uniformly adopted by this court that, where obligations of such a character exist, neither party can put the other in default or claim a forfeiture without first tendering performance on his part."

In *Boone v. Templeman*, the court said:

"Where, in a contract for the sale of land, the price is made payable in installments due at different times, and the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition. Nonpayment alone does not put the vendee in default. The vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture or maintain a suit either for the whole price or for an intermediate installment."

In *Roberts v. Braffett*, it was said:

"So, too, when time is of the essence, yet if neither party has exercised his right to declare an end to the contract, or where the one party has remained silent and inactive, or has otherwise done something amounting to a waiver, or has treated the contract as still subsisting, he cannot, when the stipulations of the contract are mutually dependent and concurrent, legally place the other party in default until he himself has tendered performance or offer to perform. In such cases, in order that he may terminate the contract, the vendor must make tender or offer of a deed."

In *Spolek v. Hatch*, in a suit in equity brought to declare a forfeiture of a contract for the sale of real estate, the court held that:

"Where a vendor, in a contract for the sale of real estate which made time of the essence, consents to an extension of time for the payment of the balance due, he can maintain no action thereon without tendering the deed or demanding payment."

In the second place, I think the court below was correct in finding the equities to be with the appellee on the further and distinct ground that the acceptance and retention by the appellant of the installment of \$280 interest which was paid on August 13th was a waiver of the notice which had been given on August 11th and that thereafter, before there could be a rescission of the contract, a further notice was necessary. It is no answer to this to say that Parr, who received the money as the agent of the appellant, was not authorized to receive it. Nor is it material that he and the appellee were, on the day that the money was paid, ignorant of the notice which had been given two days before. The controlling fact is that the money was forwarded to the appellant's office at San Francisco, and that its officers knew of its receipt, and made no offer to return it to the appellee, and did not repudiate the action of their agent. That in fact their agent had, on August 13th, the authority to receive the payment, is implied in the dispatch which they thereafter sent him, of date August 20th, saying:

"Consult Huntington & Wilson before accepting principal or interest from Moody."

The acceptance of a payment on account of interest was wholly inconsistent with an intention to rescind the contract under the notice of August 11th. It was an acknowledgment of the continued existence of the contract. It was the acceptance of a benefit thereunder—the acceptance of an installment, in disaffirmance of a prior notice that had called for the payment of the whole sum due.

"Although time is of the essence of the contract, continued recognition of the contract by the vendor as still binding after default in respect of the provisions for payment of the purchase money is a waiver of the right to rescind or forfeit the contract on that ground." 39 Cyc. 1394.

"Where there are conditions in a contract for the sale of real estate, making time the essence of the contract and providing for a forfeiture in case of default, any acceptance of part payment on the contract is a waiver of the conditions as to all defaults then existing." *Paulman v. Cheny*, 18 Neb. 392, 25 N. W. 495.

It is wholly immaterial whether or not the appellee so understood the legal effect of this payment, and its acceptance by the appellant, or

thereafter regarded the notice of August 11th as still in force. The question is not what the appellee thought, but what was the legal effect of the act.

There was nothing therefore in the way to prevent a legal tender after August 21st, and such a tender was made by the appellee on October 22, 1906, which was acknowledged by Huntington & Wilson in the letter which they wrote to the appellee, saying:

"Your letter of October 22, 1906, has been handed to us by Mr. M. A. Moody, who has tendered us for you \$7,171.15 as the amount due upon the contract between yourself and the Eastern Oregon Land Company of date January 2, 1902. We admit that Mr. M. A. Moody on your behalf has demanded from us a deed under the terms of that contract. We are not in a position to deliver such deed. The above tender and demand were made on this date."

As the court below correctly said:

"The equities are with the complainant. The defendant has received its interest upon all deferred payments, and the entire balance due was tendered, so that it is losing nothing by its bargain. It is only just that the complainant should get the land."

BROWN CITY SAVINGS BANK v. WINDSOR.

(Circuit Court of Appeals, Sixth Circuit. June 26, 1912.)

No. 2,245.

1. INSURANCE (§ 150*)—CONSTRUCTION OF CONTRACT—STANDARD MORTGAGE CLAUSE.

A policy of insurance on mortgaged property expressly insuring the mortgagor in a stated sum, although it has a mortgage clause of standard form attached providing that any loss shall be payable to the mortgagee as his interest may appear and that as to the interest of the mortgagee only therein it shall not be invalidated by any act or neglect of the mortgagor, is primarily a contract for insurance of the interest of the mortgagor and remains such so long as he does not violate its conditions, and it is only in case of such violation that the secondary contract takes effect for the benefit of the mortgagee alone.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 305-307; Dec. Dig. § 150.*]

2. BANKRUPTCY (§ 159*)—VOIDABLE PREFERENCE—PREFERENTIAL MORTGAGE—PROCEEDS OF INSURANCE ASSIGNED TO MORTGAGEE.

An insolvent corporation within four months prior to its bankruptcy executed a mortgage to a bank to secure an antecedent debt under such circumstances as to render it a voidable preference. The mortgage required the bankrupt to keep the property insured and to assign the insurance to the bank, and provided that on its failure to do so the bank might effect the insurance, and that the sum paid therefor should be a lien on the property. At the time the mortgage was made, the bank applied for insurance, and on issuance of the policy paid the premium. The policy was issued to the bankrupt with a standard mortgage clause attached making any loss payable to the bank as its interest might appear and providing that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor. A part of the property burned, and the insurance, less in amount than the mortgage debt, was collected by the bank which charged against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it the amount of the premium paid. The bankrupt had not violated any condition of the policy to invalidate its interest therein. *Held*, that the insurance contract was no less a preference than the mortgage, and that its proceeds were a substitute for the mortgage pro tanto and recoverable by the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268-281; Dec. Dig. § 159.*]

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit in equity by John Windsor, trustee in bankruptcy of the Maple Valley Canning Company, against Brown City Savings Bank. Decree for complainant, and defendant appeals. Affirmed.

W. H. Witt, of Brown City, Mich. (Thos. A. E. Weadock, of counsel), for appellant.

W. R. Walsh, of Port Huron, Mich. (Walsh & Walsh, on the brief), for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

WARRINGTON, Circuit Judge. This cause, in bankruptcy, was heard in the court below upon bill of complaint and answer, cross-bill and answer, and replications. The Maple Valley Canning Company, a corporation of Michigan, doing business in Brown City of that state, was adjudged bankrupt July 16, 1906, and the trustee, Windsor, was appointed August 11th following. The important issues involve:

(1) The validity of a mortgage given by the bankrupt, as an alleged preference, bearing date April 10, 1906, recorded April 13th, to the Brown City Savings Bank, for \$4,187.02 (to secure it and certain other creditors) upon the real estate and plant of the bankrupt.

(2) Was the mortgage, as far as it purports to secure the bank, given in pursuance of a promise made by the bankrupt, on September 15, 1905, so to secure about \$2,038, which it then owed the bank, in consideration of the bank's releasing \$1,500 then in its possession (derived from collections it had made of invoices of the bankrupt and covered by instruments in the form of warehouse receipts previously given by it to the bank to secure advances), and consequently as regards the bank is the mortgage to be considered as of September 15th instead of the date it bears?

(3) The title to certain proceeds of insurance amounting to \$1,249, received by the bank June 7, 1906, under a policy of fire insurance issued in the name of the bankrupt May 10, 1906, with the standard mortgage clause attached, upon certain improvements situated on the mortgaged property, which were partially destroyed by fire on May 25, 1906.

Testimony was taken and documentary proofs were offered before a special examiner. The decree below was that the mortgage was invalid as against the trustee for reasons stated in the opinion, that the proceeds of insurance are a substitute for such invalid mortgage, and that the bank forthwith pay same with interest to the trustee. It was con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceded in the trial court that the mortgage, when considered as of its date, operated as a preference; and, independently of concession, this is clearly true. The effort to show an oral agreement of September 15, 1905, for a mortgage failed. It is not necessary to discuss the evidence at length, for the conclusion reached in this behalf was based on the facts. Our examination of the record satisfies us that the learned trial judge was right in concluding that:

"* * * The arrangement for giving a real estate mortgage was too vague and uncertain. I think it amounted only to a promise that a real estate mortgage would be given, if, after a little, no other way out of the difficulty could be found, and that in any event it should not be given to any one else."

We concur in the court's further conclusion that, while the bank seems to have given up such rights as it had to keep \$1,500 then on deposit to the credit of the bankrupt, it is not clear that any of this sum was applied to old debts rather than to the purchase of other assets which in ultimate effect became subject to rights in the bank substantially equivalent to those released. Furthermore, we think the weight of the evidence shows that the conversation, in which it is claimed that the alleged oral agreement was made, took place between and in the presence alone of the secretary of the bankrupt corporation and the president of the bank. The secretary was without authority to bind his company to such a promise, and the president of the bank was also a director of the bankrupt corporation and knew the extent of the secretary's authority. The mortgage cannot be said to have been a ratification of anything said by the secretary in September, because it does not appear that the directors or stockholders had knowledge of the alleged oral agreement. We are not called upon then to consider the validity of the mortgage of April 10th as if it bore date and was delivered September 15, 1905; nor the other interesting questions that would result.

[1, 2] We come next to the issue concerning the insurance proceeds. It is contended by the bank that the insurance was taken at its instance and solely for its protection; that it paid the premium, received the proceeds from the insurance company, and should be decreed to have a valid title thereto as against the trustee. At the time the policy of insurance was issued, the secretary of the bankrupt company was also agent of the insurance company. After testifying that the president of the bank at the time he got the mortgage made application for insurance, the agent continued:

"He wanted me to write a policy direct to the bank, and I told him I couldn't do it. Q. What further was said? A. I told him I would write it in the name of the company and attach a mortgage clause with a full contribution which would cover their interest just the same, and at that time he didn't seem to think that would do. * * * He said it wouldn't do; he wanted it to run straight to the Brown City Savings Bank."

The president of the bank, after testifying that he applied for insurance directly to the bank, stated:

"He wrote the policy and brought it over to me, and, on examining it, I found he had it running to the Maple Valley Canning Company, and I says:

'Mr. Dafoe, that is not what I want at all. I want the policy to the Brown City Savings Bank.' And he said it didn't make any difference, that he couldn't write it that way, and I had faith in him all right enough and I paid him for the policy."

Mr. Dafoe further testified:

"Q. Did the Maple Valley Canning Company at any time solicit from you as an agent, or did you solicit insurance for the Maple Valley Canning Company after the mortgage was given? A. Yes, we attempted to get insurance. Q. After the mortgage was given? A. Yes, sir. Q. Were you able to get any? A. No, sir. Q. Then the only insurance that was written after the mortgage was given was this policy upon the solicitation of the Brown City Savings Bank? A. Yes, sir. Q. And the premium was paid by the Brown City Savings Bank? A. Yes, sir."

Comparison of the sum received by the bank from the insurance company with the amount credited on the mortgage note indicates that the bank deducted from the insurance proceeds the amount of the premium it had paid; and we do not understand this to be denied. It is sometimes material whether the mortgagor or the mortgagee is to pay the premium (*Pendleton v. Elliott*, 67 Mich. 498, 35 N. W. 97); and the fact in the present case that the bank so reimbursed itself is of some importance as a test of whether the purpose really was to obtain insurance solely in the interest of the bank. Further, the mortgage contains this clause:

"The said mortgagor will also keep all buildings erected and to be erected upon said lands insured against loss and damage by fire, with insurers, and to an amount, approved by the mortgagee as a further security to said mortgage debt, and assign and deliver to the said mortgagee all insurance upon said property."

The mortgage also provided that, on default of the mortgagor to procure and maintain insurance, the mortgagee might effect such insurance and the sum paid therefor should be a further lien on the premises payable at once with interest at 7 per cent., and upon failure for 30 days to repay such insurance premium, the principal sum should at the option of the mortgagee become forthwith payable.

The policy in terms insured the canning company for one year from the 10th of May, 1906, to an amount not exceeding \$2,000; and provided that if, with the consent of the canning company, an interest under the policy should exist in favor of a mortgagee, the conditions of the policy should apply in the manner written upon or attached to the policy. There was attached to the policy a clause which appears in the margin.¹ It will be observed that this clause made any loss pay-

¹ "Michigan Standard Policy, Mortgagee Clause with full contribution.

"Loss or damage, if any, under this policy, shall be payable to Brown City Savings Bank, as first mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided, also, that the mortgagee (or trustee) shall notify this company

able to the Brown City Savings Bank "as first mortgagee * * * as interest may appear," and further that the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagor, etc. It is well to bear in mind the provisions that the mortgagor was *expressly* insured for \$2,000, with loss payable to the mortgagee as its "*interest may appear*," and at the same time to consider whether the mortgagor would not have been entitled to receive the insurance proceeds if prior to the loss it had paid the mortgage debt. At the time this mortgage was given and the insurance applied for, it could not, of course, be known what amount, if any, as proceeds of insurance would accrue, and so far as disclosed the value of the property as a going concern exceeded the amount of the insurance obtained, as also the amount of the bank's nominal interest under the mortgage; even as dead property its value was perhaps as much as the insurance; its cost was much more. It is objected that parol evidence is not admissible to vary the written policy (Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 578, 44 Am. Rep. 177, and cases there cited); but waiving this, and looking at the evidence as a whole, we are not satisfied that the contract was not the one written. It is insisted that, if the contract be considered in its written form, the effect of the clause attached was to insure the interest of the mortgagee solely, and that the insurance was not an incident to the property insured, but was a special agreement to protect the mortgagee against its loss. On the other hand, it is urged that this did not change the primary contract to insure the mortgagor's interest so long as it did not violate any condition of the policy, and so did not forfeit its right under it. Language may be found in decisions treating of the rights of mortgagees under policies containing clauses similar to the present

of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

"This company reserves the right to cancel this policy at any time, as provided by its terms, but in such case, this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

"In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim."

one, which regards the policies as operating to insure the mortgagors and mortgagees separately, and to give the mortgagees the same benefit as if they had taken out separate policies. However, we think there are but few decisions, which, when applied to their facts, go further than to protect the mortgagee against the mortgagor's violations of conditions of the policy; otherwise stated, the apparent object of the clause is to enable the mortgagee not in fault to recover, when a mortgagor in fault cannot recover, against the insurance company. Thus two distinct contracts are involved, one to indemnify the mortgagor, and the other the mortgagee. But the contract of the mortgagee may in a practical sense be said to be dormant while the mortgagor keeps the conditions of the policy, and to become active when he fails to keep them. The bank rests its claims in this respect on *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141, 154; *City Five Cent Savings Bank v. Penn. Ins. Co.*, 122 Mass. 165, 167; *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 168, 12 C. C. A. 531, 27 L. R. A. 614 (C. C. A. 8th Cir.); and other kindred decisions.²

Decisions of this class, as we understand them, are correctly interpreted in *Smith v. Union Ins. Co.*, 25 R. I. 260, 265, 266, 55 Atl. 715, 717 (105 Am. St. Rep. 882), in which a mortgagee brought suit to recover upon three policies of insurance in the standard form, each containing a clause similar to the one in question here. Judge Douglas said:

"Now all the elements of such a contract appear in this new form. Taken together with the rest of the policy, the company insure first Thomas Cullam (mortgagor) for any loss which may come to him by reason of the destruction of the property described. This contract is subject to certain conditions appropriate to the relation of owner to the insurer. So long as this relation exists and these conditions are performed, the contract with Cullam is in force. If loss occurs while it is in force, it is paid, by direction of the mortgage clause, to Smith to the amount of his mortgage, and the balance, if any, to Cullam; the amount paid to Smith extinguishes his mortgage debt fully or pro tanto. All this would have taken place under the old form of clause, and, when the conditions are as supposed, the new parts of the clause have no application. When Cullam parts with or loses his interest, fails to pay premiums, or violates the conditions of the policy, the new provisions become effectual. These deal with the interest of the mortgagee. 'This insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner,' etc., is the language which meets the new condition of affairs; and the closing paragraph conclusively shows that the subsisting agreement which springs into life when the contract with the owner dies is the familiar one of insurance of a mortgagee's interest—an indemnity for loss of the security—in which the owner has no part and from which he can claim no benefit. The contract thenceforth is between the insurer and the mortgagee only, and the relation of the original

² That is, decisions like *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 747, 67 N. W. 774, 58 Am. St. Rep. 719; *Pioneer, etc., Loan Co. v. Providence, etc., Co.*, 17 Wash. 175, 176, 49 Pac. 231, 38 L. R. A. 397; *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 490, 91 N. W. 5, 91 Am. St. Rep. 370; *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679, and note; *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439, 453; *Meriden Savings Bank v. Home Ins. Co.*, 50 Conn. 396, 399; *Reed v. Fireman's Ins. Co.* (N. J.) 80 Atl. 462, 465, 35 L. R. A. (N. S.) 343; *Cooley's Briefs on Law of Ins.* pp. 777-8.

insured to the property, and his acts or neglect concerning it, are of no account. And the two contracts combined in the policy and the mortgage clause are separable and independent from the beginning. When the first fails, or if it never attaches, the second begins and proceeds subject to its own conditions and limitations. This construction has been adopted by all the courts whose decisions on the subject have been brought to our attention."

It is to be observed that in the instant case the bankrupt did not violate any condition of the policy of insurance, and so was not in any respect in default upon the contract between it and the insurance company. True, as between the bankrupt and the bank, the bankrupt should have paid the premium in the first instance; but this did not concern the insurance company and did not impair its contract with the bankrupt. It is plainly deducible from the decisions cited that, where the mortgage debt is less than the recoverable insurance proceeds, the mortgagor (not in default), as well as the mortgagee, has an interest in such proceeds as certainly as he has in the property itself. We are not unmindful of Mr. Dafoe's statement that the bankrupt could not obtain separate insurance after the mortgage was given. The reason for this is not stated, and the fact does not seem decisive of the meaning that should be given to the policy that was admittedly written and accepted. If upon any hypothesis we may regard the contract of insurance as intended to vest in the owner any title to or interest in the proceeds of insurance in case of loss, it is reasonably plain that the right of the trustee is not to be tested alone by the general rule that insurance does not attach to the realty as an incident and the proceeds do not stand in its place. If it was not so intended by the contract—if in truth the parties were conscious that the mortgage would not stand the test of the bankruptcy act and were seeking to place possible insurance proceeds beyond the reach of that act—it is not easy, under the facts of this case, to perceive how the class of decisions before alluded to aids them. No such question was there involved or decided.

Another theory urged is that the mortgage at most was only voidable at the instance of creditors or their representative, the trustee; and since the mortgagee had an insurable interest, and the proceeds are not the same thing as the property and are less than the mortgage debt, no one has any interest in them except the bank. To support this contention reliance is placed on a class of decisions which pass upon rights of insured grantees of property under conveyances either void or voidable at the instance of the grantors' creditors, where the insurance policies were taken *in the names* of such grantees or their trustees, and it was held that the insurance proceeds were the individual property of the grantees and not recoverable by creditors of the grantors. For example, *Lerow v. Wilmarth & Trustee*, 9 Allen (Mass.) 382, is relied on and may be referred to as illustrative of counsels' argument. There a solvent husband conveyed real estate to a trustee for the benefit of the grantor's wife and children. Two years later the grantor gave his daughter some household furniture and insured it in his own name as trustee "for the benefit of whom it might concern," and it was subsequently destroyed by fire. It did not appear that he had any intention to delay or defraud creditors

by these gifts. Two years after effecting such insurance, he obtained a discharge in insolvency from all his debts due in July, 1857; but the plaintiff's claim was subsequently revived by a new promise. Suit on the claim so revived to subject the proceeds of insurance to its payment failed. Holding that the insurance money did not belong to the donor in his own right, and answering a contention that the transfer was a voluntary conveyance and fraudulent and void as to creditors to whom he was at its date indebted, Bigelow, C. J., said (at page 385 of 9 Allen):

"Be it so. This does not in our view at all change the rights of the parties to the funds in the hands of the supposed trustee. If the conveyance was void as to the creditors of the defendant, it was nevertheless perfectly good and valid inter partes. The title passed to the daughter, and she held the property by an unimpeachable right, as against all the world except the creditors of her father. It was only in the contingency that he might at some future day become insolvent that she was liable to be disturbed in her possession and use of the property which he had conveyed to her. But this contingency in no way affected her right to obtain insurance on the property in her own name, and for her own benefit. Her insurable interest was perfect and complete. The rights of creditors were not interfered with or impaired by the insurance effected on the property for her benefit. It was a valid contract, which she had a right to make, and the benefit which accrued to her from it cannot be defeated by third persons on the ground that she held the property by title which in a certain contingency might be defeasible. It cannot be said that the money received on the policy stands in the place of the property destroyed. It is in no proper or just sense the proceeds of the property. It is a sum paid by the insurer in consideration of a certain premium, as an indemnity for the loss of property in which the person insured has a legal and insurable interest. This indemnity cannot be taken away by setting up a contingent right or title in third persons in the property, in which the insured had a valid insurable interest at the time of the loss. If therefore the plaintiff could maintain the position that the transfer of the personal property to the daughter was void as to creditors, he would still fail to show a want of a valid insurable interest in her, or any right to hold the money in the hands of the supposed trustee."

Similarly, in *Nippes' Appeal*, 75 Pa. 472, in a case kindred in principle, though a longer time had intervened between the date of the voluntary conveyance (which the husband had made to his wife) and the commencement of the suit, Judge Sharswood reached a like result. Further cases of this class cited are *Bernheim & Co. v. C. & P. Beer et al.*, 56 Miss. 149, *Forrester v. Gill*, 11 Colo. App. 410, 53 Pac. 230, and notes to section 19, 1 *Moore on Fraudulent Conveyances*, p. 118. The facts of some of those cases show insolvency of the grantors and a purpose to defraud creditors at the times of conveyance and insurance. *McLean v. Hess et al.*, 106 Ind. 555, 7 N. E. 567; *St. Paul Ins. Co. v. Brunswick Co.*, 113 Ga. 786, 39 S. E. 483.

The decisive question is whether the principles of either class of the decisions relied on govern a case like this. We have found that the mortgage was given and received in violation of the bankruptcy law. We have seen that the mortgagee made application for insurance at the time the mortgage was executed, and that the negotiations in that behalf were conducted by the president of the bank and the secretary and manager of the bankrupt corporation—then also the insurance agent. We have pointed out that the policy of insurance

(so far as its provisions need repetition) actually given and received ran to the mortgagor, with loss if any payable to the bank as first mortgagee as its interest might appear. If we are right in our conception of the purpose of the mortgage clause, it at last amounts in this case to nothing more than an appointment of the mortgagee to the loss as far as its interest might appear. This results from the fact, as stated, that the mortgagor was in no respect in default under the policy at the time the loss occurred. It does not matter what the rights of the mortgagee would have been, if the mortgagor had violated any of the conditions of the policy. Nor can it signify that the form of the policy was such that, in case the mortgagor had brought suit upon it to recover the loss, the mortgagee could (aside from the question we are discussing) have required the proceeds of recovery to be applied to its debt; for that would have been true under the old form of appointment. The feature of importance is whether the mortgagor had such an interest in the policy that it could, as is stated in the opinion of the learned trial judge, in every circumstance have maintained suit upon it. We are constrained to believe that it could.

Now, more particularly as to the second class of cases relied on and in which the policies were issued in the names alone (or of the trustees) of the persons claiming the insurance proceeds, it is clear in each instance that there was but one insurance contract, and that it was made directly and exclusively between the insured and insurer. There is a manifest distinction between that class of contracts and the one now in dispute. Indeed, the very insistence that the mortgage clause in this case must be treated as though the insurance was taken in the name alone of the mortgagee amounts to a concession that the bank's title to the proceeds is dependent upon such a construction of the present contract. It is to be observed further that the preference mortgage was made when the mortgagor was obviously insolvent and to secure past indebtedness. This is no less true respecting the insurance contract and the proceeds of loss derived in virtue of it. Just as certainly as the mortgagor so insured the property and so observed the conditions of the insurance contract as, under any state of fact, to retain an interest in the insurance, just that certainly are both parties open to the charge that a preference was intended as to the insurance precisely the same as was designed in respect of the mortgage. This intent is not avoided by the circumstance either that the insurance was not greater than the debt or that the fire did not happen to destroy enough property to exceed the debt. Plainly, if the mortgagor had paid the debt before the loss occurred, it would have been entitled to the proceeds. *Smith v. Union Ins. Co.*, supra. It will not do therefore simply to assert that the proceeds belong to the mortgagee, nor that the creditors can lose nothing if title be declared to be in the bank. So also of the contention that the mortgagee had an insurable interest, subject only to the chance of the creditors taking steps to have the mortgage vacated. The answer is not that the bank had no insurable interest. It is that it did not insure that interest for its exclusive benefit and protection, and the

insurance transaction we think may safely be said to have been part of the mortgage scheme of preference; the far-reaching consequences of a contrary holding are apparent.

Strangely enough the question we are endeavoring to solve does not appear to have arisen under any of the bankruptcy acts; at least, no case directly in point has been cited, and we have not discovered any. The nearest approach that we have found appears in *Hanson v. Blake & Co.* (D. C.) 155 Fed. 342. The bankrupt, Hicks, had assigned to his wife a claim against an insurance company. She testified that the assignment of the policy was made to protect her from loss for money which she had loaned her husband, and that her husband thought she ought to be secured. Judge Hale said of this (page 360 of 155 Fed.):

"It is unquestioned, however, that this assignment was to secure a prior existing indebtedness. The assignment was made on August 25, 1903. Hicks' petition in bankruptcy was filed in this court December 2, 1903. The assignment was clearly a preference, and was in violation of sections 60a and 60b of the amended bankruptcy act of February 5, 1903. * * * Mrs. Hicks had no legal claim. She has no equitable lien upon any fund now before the court."

The court found that several creditors who had advanced moneys on the faith of promises of security were entitled to equitable liens, but the basis of each of those allowances was a present loan. The doctrine of equitable lien as respects a mortgagee in whose favor a covenant to insure mortgaged premises for the better security of the mortgagee was stated by Justice Bradley in *Wheeler v. Insurance Co.*, 101 U. S. 442, 25 L. Ed. 1055; but it is not helpful to the bank in the present case. So of the decision in *re West Norfolk Lumber Co.* (D. C.) 112 Fed. 759; for there the insurance seems to have been obtained simultaneously with the advancement of loans by a bank, and the effort to subject the insurance proceeds to the payment of creditors failed for that reason.

The case of *Palmer v. Smith*, 126 Mich. 352, 85 N. W. 870, may have involved the present question, though this is not certain. Palmer, as trustee in bankruptcy of Wright D. Smith, brought the action against Smith's wife to reach property alleged to have been conveyed in fraud of creditors. The bankrupt had conveyed to his wife the steam barge *Germania* for a nominal consideration, and she testified that she never paid anything for the transfer. The barge was insured, presumably in her name, though this does not appear. The barge burned, and she collected the insurance money and purchased the barge *Porter Chamberlain*, and owned a three-quarters interest at the time of the suit (354). The trustee recovered below, and the judgment was affirmed. According to the claim of the bank in the present case, the insurance proceeds derived from the loss of the *Germania* belonged to Mrs. Smith, and it is hard to discern why on that hypothesis the *Porter Chamberlain* did not also belong to her; but that was not the decision.

There remains an incidental question. The bank's nominal interest under the mortgage was \$2,843.22. By its answer it surrendered and waived its claim of security under the mortgage to the extent of \$765.-

48, leaving a balance of \$2,077.85. Deducting the sum received from the insurance and credited on the mortgage debt, a balance of \$880.55 remains; and it is averred that this sum is covered by the mortgage, is a present lien, and should be so decreed. It scarcely need be stated that this claim falls with the mortgage, and the bank's right in respect of it is at most only that of a general creditor.

While the case is not free from difficulty, yet, in view of its facts and circumstances, we are disposed to concur in the ruling below that the proceeds of insurance "were and are a substitute for such invalid mortgage," and to hold that the judgment should be affirmed, with costs.

LANG et al. v. CHOCTAW, O. & G. R. CO. et al.
(Circuit Court of Appeals, Eighth Circuit. May 27, 1912.)

No. 3,600.

1. FRAUDS, STATUTE OF (§ 63*)—MORTGAGES (§ 13*)—CONSTRUCTION AND OPERATION—AFTER-ACQUIRED PROPERTY.

Neither a statute of frauds requiring contracts for the sale of real estate to be in writing, etc., nor a statutory provision that a mortgage shall be a lien on the mortgaged property from the time of record, and not before, affect the validity of a railroad mortgage on after-acquired property, covered by its terms, although it was not acquired by the mortgagor until after the mortgage was recorded.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 97-104; Dec. Dig. § 63;* *Mortgages*, Cent. Dig. § 15; Dec. Dig. § 13.*]

2. RAILROADS (§ 191*)—FORECLOSURE SALE—PROPERTY PASSING.

The sale on a foreclosure of a railroad mortgage containing a general provision covering after-acquired property conveys title to such after-acquired property, although it is not specifically described in the proceedings or decree.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 624-633; Dec. Dig. § 191.*]

3. RAILROADS (§ 194*)—PURCHASER AT FORECLOSURE SALE—EXISTING LIENS.

A railroad company appropriated and used, without paying therefor, about 90 acres of land on the bank of the Mississippi river owned by complainants. After the greater part of the land had been lost by caving into the river, defendant acquired the railroad property through foreclosure sale. *Held* that, while complainants were entitled to recover a judgment against the original taker for the full value of the land taken, treating the transaction as a sale, such judgment could not be made an equitable lien as against defendant, except to the amount of the value of the land which remained and passed to it by the sale, and which it used.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 643-655; Dec. Dig. § 194.*]

4. LIMITATION OF ACTIONS (§ 118*)—COMMENCEMENT OF ACTION—SUIT TO ESTABLISH LIEN.

A suit to establish a personal judgment as an equitable lien, being on a separate and distinct cause of action, does not relate back to the commencement of the original action, and is subject to the defense of limitation.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 527, 528; Dec. Dig. § 118.*]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Suit in equity by Theresa L. Lang and others against the Choctaw, Oklahoma & Gulf Railroad Company and others. Decree for complainants for partial relief, and they appeal. Affirmed.

Wm. M. Randolph (George Randolph and Wassell Randolph, on the brief), for appellants.

Thos. S. Buzbee, for appellees.

Before SANBORN and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. This action is one brought to have a certain judgment obtained by appellants on the 27th of February, 1902, against the Memphis & Little Rock Railroad Company as reorganized, decreed a lien upon the railroad of one of appellees, the Choctaw, Oklahoma & Gulf Railroad Company, and to have a certain described tract of land decreed to be the property of the Memphis & Little Rock Railroad Company as reorganized, and subject to an execution on said judgment.

The principal matter involved in this controversy has been before the Supreme Court of the state three times and reported under the title of *Organ v. Memphis & Little Rock Railroad Co.*, 51 Ark. 235, 11 S. W. 96, *Memphis & Little Rock Railroad Co. v. Organ*, 67 Ark. 84, 55 S. W. 952, *Memphis & Little Rock Railroad Co. v. Organ*, 70 Ark. 195, 66 S. W. 922, and in this court as *Lang v. Choctaw, Oklahoma & Gulf Railroad Co.*, 160 Fed. 355, 87 C. C. A. 307. In those cases the essential facts are fully stated in detail, and it will be sufficient for the proper disposition of this case to quote from the statement of facts in *Lang v. Choctaw, Oklahoma & Gulf Railroad Co.*, supra, the following:

"The chief subject of this controversy is the railroad from Little Rock, in the state of Arkansas, to Hopefield, upon the west bank of the Mississippi river opposite Memphis. In 1887, the Little Rock & Memphis Railroad Company, hereinafter called the Little Rock Company, succeeded to the title to this railroad of the Little Rock & Memphis Railroad Company as reorganized, and mortgaged the railroad and its appurtenances to secure its bonds to the amount of \$3,186,000. The reorganized company, and its predecessor in title, had at various times between 1872 and 1887 appropriated to the use of its railroad without compensation about 90 acres of land on the west bank of the Mississippi river at Hopefield, to undivided interests in which the defendants had title. This land was used for a time by these predecessors, and it then caved into the river and disappeared, so that little of it is, or ever has been, in the possession or use of the Gulf Company. In 1880 the defendants commenced a suit in the circuit court of Crittenden county against the old reorganized company, in which they prayed that the amount due them for the use of this land and for the removal of earth and timber therefrom by that company and by its predecessor in title might be ascertained and paid, and that the reorganized company might be enjoined from using this land until this amount was paid. There was no claim to or prayer for any lien upon the railroad in the bill in that suit, or in the amended bill therein, which was subsequently filed. The final decree in that suit was rendered on February 27, 1902, and it was that the defendants should recover from the reorganized company \$17,956.36, and interest from September 23, 1901, and costs, and it granted no other relief. * * * On June 1, 1893, the Central

Trust Company, the trustee named in the mortgage of the railroad and its appurtenances made by the Little Rock Company in 1887, filed its bill in the court below to foreclose that mortgage, and on that day the court appointed a receiver of the railroad and its appurtenances, who took immediate possession thereof and held the same until he delivered this property to the purchaser under the foreclosure sale, which was made on October 25, 1898. The Little Rock Company was a party defendant to this foreclosure, and the decree which was rendered on October 22, 1894, provided that the property should be sold, that all equity of redemption of the Little Rock Company and all persons claiming under it should be thereupon foreclosed and forever barred, that in addition to the purchase price which should be bid the purchaser should pay 'all claims filed in this cause, but only when the court shall allow such claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto.' The decree also contained these provisions: 'The court reserves the right to retake and resell said property in case of the failure or neglect of the purchaser or purchasers, or his or their assigns, approved by the court aforesaid, to comply with any order of the court in respect to the payment of receiver's certificates, debts, or obligations, or of prior liens or claims above mentioned, within 20 days after service of such order upon such purchaser or purchasers, or his or their assigns. * * * All questions not hereby disposed of and determined are hereby reserved for further adjudication, the settlement of the same being held not to be necessary for the purposes of this decree. And the court reserves all right to make such further order at the foot of this decree as may seem just and proper.' While this suit was pending, and the railroad and its appurtenances were in the possession of the receiver, and on September 28, 1895, the defendants filed their petition of intervention therein, in which they alleged that by virtue of their claim against the old reorganized company, for which they had then secured the judgment for \$13,868.80, which was subsequently reversed, they had a lien upon the line of railroad between Little Rock and Memphis, which the Little Rock Company had mortgaged to the Central Trust Company, which was prior in lien and superior in equity to the lien of the mortgage, and prayed that the railroad should be first applied to the satisfaction of that lien. On August 7, 1896, they filed an amended and supplemental petition in this foreclosure suit, and prayed that the railroad then in the possession and under the control of the receiver of the court below should be adjudged by that court to be subject to their alleged lien for their claim against the old reorganized company, that such lien be declared to be superior and paramount to all other liens and claims, and that the railroad and its appurtenances be sold for the payment thereof, or that a sufficient amount of the proceeds of the sale in the foreclosure suit be segregated, set apart, and applied to the amount due them in preference to all other claims and demands whatsoever."

After the disposition in this court of the case of *Lang v. Choctaw, Oklahoma & Gulf Railroad Co.*, supra, appellants' application to have their judgment against the Memphis & Little Rock Railroad Company as reorganized decreed a lien superior to the mortgage involved in the foreclosure suit, and also to have a certain described tract of land, comprising 89.63 acres, claimed to have been acquired by appellees under the foreclosure proceedings, to be still the property of the Memphis & Little Rock Railroad Company as reorganized and subject to an execution upon said judgment, was tried in the court below, and a decree rendered that such tract of land was acquired by appellees in the foreclosure proceedings, and was not subject to execution upon appellants' judgment. The court further found the value of the land of appellants, which had been taken possession of and appropriated by the Choctaw, Oklahoma & Gulf Railroad Company, appellee, consist-

ing of one and a fraction acres, and adjudged that such amount should be paid to appellants. From that decree appellants have prosecuted this appeal.

Two questions are presented: First. Did the title to the before described tract of land pass under the foreclosure to appellee? Second. Are appellants entitled to a lien upon the railroad of appellee for the full amount of their said judgment obtained against the Memphis & Little Rock Railroad Company as reorganized?

[1] Upon the first question, the facts, in addition to those before stated, are that the Memphis & Little Rock Railroad Company as reorganized executed a trust deed May 2, 1877, covering all of their property, specifically describing the railroad depot grounds and appurtenances; said trust deed containing the following provision:

"And also all and singular all lands, real estate, property of every kind, real, personal, or mixed, books of account, records, muniments and evidences of title, and choses in action which are now owned or may hereafter be acquired by said railroad company, party of the first part."

The property in question was not conveyed to the Memphis & Little Rock Railroad Company as reorganized until July 27, 1887, 10 years after the executing of the before-mentioned mortgage. After the company obtained title to this land the mortgage was foreclosed under a power of sale contained therein, and all of the property mentioned therein and then owned by mortgagor was sold, and the same acquired by the Little Rock & Memphis Railroad Company, September 1, 1887. The Little Rock & Memphis Railroad Company, on the 1st of September, 1887, executed a mortgage to the Central Trust Company, as trustee, being the mortgage before mentioned as having been foreclosed in the Circuit Court of the United States for the Eastern District of Arkansas, under which foreclosure proceedings the appellees acquired title. Appellants, in their brief, say:

"The whole case of the appellees must rest on the expression in the mortgage, made by the Memphis & Little Rock Railroad Company as reorganized, dated May 2, 1877, following the specific description of what was declared to be intended to be conveyed by that mortgage, in these words: 'And also all and singular all lands, real estate, property of every kind, real, personal, or mixed, books of account, records, muniments and evidences of title, and choses in action which are now owned or may hereafter be acquired by said railroad company, party of the first part.'"

Appellants, in their brief, further say:

"We do not deny that a deed of conveyance may be made to convey after-acquired property, nor that a mortgage may lawfully be made to embrace after-acquired property, and concede that such deeds may be made and such mortgages executed lawfully."

Appellants say that the statute of frauds of the state of Arkansas declares:

"No action shall be brought * * * to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in, or concerning them * * * unless the agreement, promise, or contract, upon which such action shall be brought, or some memorandum, or note thereof, shall be made in writing, and signed by the party to be charged

therewith, or signed by some other person by him thereunto properly authorized."

And the statute of the state, relative to mortgages, which provides:

"All mortgages, whether for real or personal estate, shall be proven and acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proven or acknowledged, and when so proven or acknowledged shall be recorded, if for lands in the county, or counties, in which the lands lie"

—and the further statute that:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property, from the time the same is filed in the recorder's office for record, and not before"

—are pertinent, and argue that, in view of these statutory provisions the clause in the mortgage of May 2, 1877, relating to the after-acquired lands, did not have the effect to include them therein, and such land did not pass under the foreclosure of that mortgage.

That a mortgage may, as a general rule, cover and be a lien upon after-acquired real estate, is not only conceded by appellants, but fully supported by the authorities. *Pennock et al. v. Coe*, 23 How. 117, 16 L. Ed. 436; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014; *Tippett & Wood v. Barham*, 180 Fed. 76, 103 C. C. A. 430.

We fail to perceive how the statutory provisions relied upon by counsel for appellant in any way modify this general rule. The first provision of the statute is that no action shall be brought to charge any person upon any contract for the sale of lands, etc., unless the contract shall be in writing, signed by the party. The contract of mortgage was in writing, duly executed upon the part of the mortgagor, the Memphis & Little Rock Railroad Company, and expressly provided that it should cover after-acquired real estate. Hence it is clear that the contract covering the land in question, though after-acquired, met the requirements of the statute; the contract with respect to it being in writing and signed by the party to be charged therewith. The mortgage was recorded, and the provision in the statute that it should be a lien from the time it was filed cannot be construed to prohibit the validity of the provision providing for after-acquired property. As soon as the mortgagor thereafter acquired property such as mentioned in the mortgage, the mortgage attached to the same as a lien, notwithstanding it had been previously filed for record. We think it clear that the 89.63 acres of land in question, although acquired by the Memphis & Little Rock Railroad Company as reorganized after the execution and recording of its mortgage, was covered by it; that the title passed to the purchaser under the foreclosure of that mortgage; that the Memphis & Little Rock Railroad Company as reorganized was by such foreclosure divested of all title and interest in and to said land, and the same vested in the Little Rock & Memphis Railroad Company as of September 1, 1887, and was covered by its mortgage executed on that date to the Central Trust Company as trustee. The mortgage from the Little Rock & Memphis Railroad Company

to the Central Trust Company contained a like provision as the mortgage of Memphis & Little Rock Railroad Company as reorganized, of May 2, 1877, relative to after-acquired property. Such provision in that mortgage, however, is unimportant, as the mortgagor, the Little Rock & Memphis Railroad Company, had acquired the title to the property at the date of the giving of the mortgage to the Central Trust Company.

[2] Again, it is said that, notwithstanding the mortgage covered the land in question by virtue of the after-acquired property clause in the mortgage, it did not pass by the foreclosure, as the foreclosure did not specifically describe this land. In other words, to properly convey by foreclosure, it should, in the foreclosure proceeding, have described what land was after-acquired, so as to give certainty to the deed executed in the foreclosure proceedings; that oral testimony or testimony aliunde cannot be admitted for that purpose. While it is true that there must be a sufficient description in a conveyance to afford a basis for admitting parol evidence to identify the land, as a description cannot be made by parol evidence, yet the law is as stated in Jones on Real Property, § 348:

"A conveyance in general terms of all the lands of the grantor wherever situated, without further description, may be rendered certain as to the lands conveyed by proving what lands grantor owned at the time (citing a large number of authorities)."

Had the provision as to after-acquired real estate not been general, but confined to such after-acquired property as should be used in the operation of the railroad, or as appurtenant to what was then owned, there might be some force in the claim that, under such a provision, the proceedings in foreclosure should specify what after-acquired property came within the provision; but in the mortgage in question there was a general description, covering all after-acquired real estate, and parol evidence is admissible to point out the property covered by the description "may hereafter be acquired."

It follows from these views that such tract of land is not subject to execution upon the judgment of appellants against the Memphis & Little Rock Railroad Company as reorganized, and the judgment of the court below in that respect was clearly right.

[3] Are appellants entitled to a lien for the full amount of their judgment obtained against the Memphis & Little Rock Railroad Company as reorganized? Had appellees taken possession of and occupied all of the land of appellants, the value of which was the basis of their judgment, then the case would fall within the rule announced by this court in Zimmerman v. Kansas City Northwestern R. Co., 144 Fed. 622, 75 C. C. A. 424, and appellees, taking the entire land, would take it subject to the value as fixed by appellants' judgment; but such is not the case.

The evidence discloses the fact that portions of appellants' property taken and used by the Memphis & Little Rock Railroad Company each year caved into the river, and the tracks were moved back from the river from time to time as the land caved in; that appellees took possession and used but a small portion of the land

for which appellants obtained their judgment against them. This question was considered by the Supreme Court of Arkansas, when the case was before it, as reported in 51 Ark. 235, 11 S. W. 96, and the court said:

"Since the commencement of this action the bank of the Mississippi river in front of the land has caved to such an extent that not one of the railroad tracks, nor one of the buildings or structures of any kind, of appellee, remains now where they were then. But the locality on which every track and every building and structure on the land claimed by the appellants was then situated is now a part of the bed of the Mississippi river. As the banks caved and washed into the river, appellee, since the year 1881, has moved back its tracks and buildings, so as to keep them on the land adjacent to the river bank, but outside the caving. * * * The right to the property taken can only be acquired by the company by purchase, by adverse possession for the statutory period, or by statutory proceedings for the assessment of damages. The company can only acquire it through the right of eminent domain by making just compensation. Until then it remains in the original owner. The power to take and the obligation to indemnify for the taking are inseparable. But the owner may waive formal condemnation proceedings, and all formal modes of transfer, and elect to regard the action of the railroad company as taking the land under the right of eminent domain, and demand and recover just compensation (citing authorities). * * * When, therefore, he elects to demand compensation for land necessarily used in the construction of a railroad, he assumes a relation to the railroad company like unto that of a vendor who sells his land on time, and retains the title, and agrees to convey it when the purchase money is paid. He does not part with the title until the compensation is made. The amount to be paid for the land used as a right of way, though called 'damages' or 'compensation,' is in its nature the price of the land taken. If it had been sold to an individual on time, the vendor would have a lien on it for the unpaid purchase money. Equity in that case would treat the unpaid purchase money as a lien on the land sold, and enforce it, on the ground it would be unconscionable to allow the vendee to retain the property voluntarily sold to him and not pay its price. * * * If equity, contrary to its general rule, when property is being taken by a railroad corporation without making just compensation, will interfere to protect him, it certainly would and does not withhold its hand in the enforcement of his claim upon the property for the unpaid purchase price, when his right to pay for it as a constitutional condition precedent to its becoming the property of the corporation still exists in all its original vigor. It is obvious that a court of equity will, in a proper proceeding, so long as the original owner holds the title in the soil, enforce the claim of the owner against the property taken as it does a vendor's lien (citing authorities). * * * Since the commencement of this action the bank of the river has caved to such an extent that not one of the railroad tracks, or buildings, or structures of any kind of appellee on the land of appellants remain now where they were then. As the bank washed into the river, appellee moved them back on the land adjacent to the river. It is evident, therefore, that as to so much of appellants' land as has been washed into the river no action can be maintained to enforce a claim against it or to enjoin the use of it until compensation is made. But for the appropriation of such land to its use appellee is personally responsible, and upon that personal responsibility appellants can only rely for recovery."

When that case was again before the Supreme Court, as reported in 67 Ark. 84, 55 S. W. 952, the court said:

"The court below seems to have tried this case upon the theory that the plaintiffs were entitled to recover for rents for the use and occupation by the defendant of their lands, and the master's report is based on that theory. This was error. Plaintiffs, if entitled to recover, were entitled to recover against the defendant the value of the land of plaintiffs taken and appro-

priated at the time it was taken, and this recovery to be confined to the value of plaintiffs' land received by the defendant from its predecessor."

In adjudging the rights of appellants against the Memphis & Little Rock Railroad Company, we find, then, that the Supreme Court of the state determined that appellants could not have a lien for the lands which had become a part of the river by the caving in of the banks. As to such lands taken by the railroad company, appellants were entitled only to a personal judgment for its value. It was further adjudicated that the Memphis & Little Rock Railroad Company as reorganized was only liable for such of appellants' land as it received from its predecessors, and such is the general rule. As said in *Lewis on Eminent Domain* (3d Ed.) § 887:

"The first company has taken possession of private property for a public use, and is under an obligation to make just compensation to the owner. When its rights and franchises are transferred to a new company, by foreclosure or otherwise, the new company is under no obligation to use the property, nor is it liable for the debts of the old company. The new company may refuse to use the property at all, or it may condemn it anew. In such case it would lose the benefit of the improvements upon the property. But, if it elects to use the property for the purposes for which it was originally taken, and as the successor of the first company, knowing that the right to use it can be obtained only by the payment of just compensation, it in legal effect assents to the performance of this obligation, and an implied promise to pay the same to the owner arises, upon which an action may be maintained."

The law announced by the Supreme Court of the state in that action is the law of that case. Hence so much of appellants' judgment as represented the value of land taken by the railroad company, and which had subsequently, before the rendition of the judgment, been lost by caving into the river, could not be enforced as an equitable lien.

Applying the law as announced by the Supreme Court in that case, we think it clear that appellees in the present case are only liable for such of appellants' land as it took and received from its predecessor. The value of so much of the land as was taken by appellees was awarded appellants by the trial court, and we think, in this respect, the judgment was right.

[4] Again, plaintiff's action was one for damages only. No mention or suggestion of a lien was made until after it obtained its first judgment of \$13,868.80, when it commenced its action in the chancery court of Crittenden county to have such judgment declared a lien. That judgment being reversed, it continued its prosecution as one for damages in personam, without suggesting that they were entitled to a lien, and under the statute of Arkansas, and the decision of its Supreme Court, the statute of limitations had run at the time the claim for a lien was first made. The equitable claim of a lien, being a new and distinct cause of action, did not relate back to the commencement of the original action. *U. P. Ry. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; *Whalen v. Gordon et al.*, 95 Fed. 305, 37 C. C. A. 70.

For the foregoing reasons, the decree below was right, and is in all respects affirmed.

RITTERBUSCH, County Treasurer, et al. v. ATCHISON, T. & S. F. RY. CO.
 ATCHISON, T. & S. F. RY. CO. v. RITTERBUSCH, County Treasurer, et al.

(Circuit Court of Appeals. Eighth Circuit. July 15, 1912.)

Nos. 3,703, 3,704.

(Syllabus by the Court.)

1. TAXATION (§ 611*)—UNLAWFUL TAX—SUIT TO ENJOIN—TAXES JUSTLY DUE
 —AVERMENT OF PAYMENT OR TENDER.

An averment of payment or tender of the amount justly due is indispensable to the sufficiency of a bill to enjoin the collection of unjust taxes.

But where the allegations of the bill show that all the taxes assailed are void and inequitable, or that the void and inequitable part is so inextricably mingled with the part justly due that the two cannot be approximately separated, no such averment is necessary.

Averments upon this subject in a bill that the scheme of taxation is such that the complainant and other public service corporations are deprived of notice of and opportunity to be heard upon, and of appeals from, the assessment of their property, and of an equalization of the assessments of their property with those of others, while other taxpayers enjoy these advantages, that the taxing officers have assessed their property at its full value and that of other taxpayers at 63½ per cent. of its value, that the levy of taxes for 12 out of 19½ months is without authority, and the taxes for this period are so mingled with those of the other 7½ months that they cannot be separated, that the complainant has paid under protest more than half the taxes for the 19½ months, and is willing to give bond to secure, and that this amount so paid shall stand as security for, the payment of any taxes justly due, are ample to sustain the bill for an injunction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.*]

2. EQUITY (§ 340*)—ADMISSIONS—HEARING ON BILL—ANSWER AND REPLICATION.

Where a case is set down for hearing on bill, answer, and replication, only those averments of the answer which are responsive to the bill are taken as true. All allegations in avoidance or justification are denied by the replication and are taken as untrue.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 697-701; Dec. Dig. § 340.*]

3. TAXATION (§ 446½*)—OKLAHOMA STATE TAXES—STATUTES—TERRITORIAL LAWS—AUTHORITY TO LEVY.

The board of equalization of the state of Oklahoma was without authority on October 1, 1908, to fix the rate of taxation or to levy taxes for the expenses of the state for the year ending June 30, 1909.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 788; Dec. Dig. § 446½.*]

4. DEPOSITIONS (§ 110*)—OBJECTIONS.

Objections to the introduction of an entire deposition are untenable, if any part of it is admissible in evidence.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 323-328½; Dec. Dig. 110.*]

5. TAXATION (§ 840*)—PENALTY—DELINQUENT TAXES—INTEREST—DEMAND.

One who would enforce a penalty for a failure to pay a claim, such as 18 per cent. per annum interest on delinquent taxes, must demand

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 22, 1912.

the true amount of the claim. No penalty is incurred by a demand of a larger amount.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1656; Dec. Dig. § 840.*]

6. TAXATION (§ 611*)—PARTIAL INVALIDITY—INJUNCTION—TERMS.

Subject to the established principles and rules of equity jurisprudence, the terms on which a court of equity will grant its relief, such as the rate of interest on taxes justly owing to be paid by a complainant as a condition of an injunction against the collection of those that are void, is discretionary with the chancellor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.*]

(Additional Syllabus by Editorial Staff.)

7. EVIDENCE (§ 28*)—JUDICIAL NOTICE—FEDERAL COURTS.

The courts of the United States take judicial notice of the Constitutions and laws of the states.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 36, 43; Dec. Dig. § 28.*]

Appeals from the Circuit Court of the United States for the Western District of Oklahoma.

Suit by the Atchison, Topeka & Santa Fé Railway Company against F. W. Ritterbusch, as County Treasurer of Logan County, Okl., and others. From a decree enjoining the collection of state taxes, both parties prosecute cross-appeals. Appeal by the railway company dismissed, with costs, and judgment affirmed.

Charles West, Atty. Gen. (C. J. Davenport, on the briefs), for Ritterbusch and others.

S. T. Bledsoe (J. R. Cottingham, on the brief), for Atchison, T. & S. F. Ry. Co.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. The county treasurer and sheriff of Logan county, Okl., appeal from a decree which enjoins them from collecting the state taxes upon the property of the Atchison, Topeka & Santa Fé Railway Company in that county for the year ending June 30, 1909, which were fixed and levied by the state board of equalization on October 1, 1908. The railway company appeals from the same decree.

The railway company brought suit against the county treasurer and sheriff, who will hereafter be called the defendants, to enjoin the collection of the taxes on its property for the 19½ months between November 16, 1907, the date when Oklahoma became a state, and June 30, 1909, for school districts, townships, cities, counties, and the state, and after the railway company had paid more than one-half the taxes a temporary injunction was granted against the collection of the remainder of these taxes. Before the final decree was rendered, which is challenged by this appeal, a compromise and settlement of the controversy over all these taxes, except those levied for state purposes, was made, and upon the payment by the railway company of the agreed amount a perpetual injunction against the col-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lection of any of these taxes for the year 1908 was decreed. The case then proceeded to final hearing and decree on the merits of the issue whether or not the state taxes for the 19½ months were lawfully made and ought to be paid. The court below held that the levy was lawful for the period between November 16, 1907, and June 30, 1908, but unauthorized and void for the fiscal year ending June 30, 1909. The railway company paid the taxes for the former period, and the perpetual injunction was then granted against the collection of any more taxes for state purposes for the 19½ months. We turn to the consideration of the alleged errors assigned by the defendants.

[1] They first contend that the court erred in overruling the demurrer to the original bill and issuing the preliminary injunction, because the bill contained no averment that the railway company had paid that part of the taxes which it conceded to be due, or that part which could be seen to be due on the face of the bill, or could be shown by affidavits to be due, before the preliminary injunction was granted (*State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. Ed. 663), but the bill contained an allegation that the entire sum the defendants sought to collect was \$57,878.48, and that for the sole purpose of preventing the issue of a warrant and the seizure of its property the railway company had paid \$29,715.73 of this amount under a written protest and with a notice that it would bring this suit to recover it. And where a complainant claims and shows by the averments in his bill that the entire tax is void, or that a substantial part of it is inequitable, and it is impossible to determine what portion, if any, is valid, no tender or payment of any part of the taxes, and hence no averment of any such tender, is essential to sustain a bill to enjoin their collection. *Fargo v. Hart*, 193 U. S. 490, 502, 24 Sup. Ct. 498, 48 L. Ed. 761.

There were averments in this bill to the effect that the taxes for 12 of the 19½ months were levied without any legislative authority, that they were so commingled with those for the other 7½ months that it was impossible to separate them, that the scheme of taxation adopted by the state denied to the complainant and other public service corporations notice of and an opportunity for a hearing upon the assessment of their property, and an opportunity to have their property equalized with that of other taxpayers, opportunities which were accorded to other taxpayers, and that the taxing officers assessed their property at its full value and the property of other taxpayers at 63½ per cent. of its value, whereby they were deprived of the equal protection of the laws and their property was about to be taken without due process of law. The bill also contained an allegation that the complainant was willing to pay into court any amount justly owing, to secure the payment of that amount by a bond, and to let the \$29,715.73, which it had already paid, stand as security therefor. These allegations of the bill brought it far within the rule of equity requiring allegations of the tender, payment, or security for the payment of the part of taxes justly due, and there was no error in the overruling of the demurrer and the issue of the temporary injunction.

The state of Oklahoma came into existence on November 16, 1907. The Legislature of that state, evidently under the belief that there was no legislation under which taxes could be lawfully collected for state, county, and other public purposes, passed an act, approved April 17, 1908 (Laws 1907-08, c. 71), entitled "An act providing for the assessment for taxation for state, county, city, town, township and school purposes for the fiscal year ending July 1, 1908, and for the deficiency for the fiscal year ending July 1, 1903, providing for the levy of such tax and declaring an emergency," whereby it provided that (section 7) "there is hereby levied an ad valorem tax upon all property in this state which may be subject to taxation upon such basis, a tax sufficient, in addition to income from all other sources to pay the expenses of the state government for the fiscal year ending on the 30th day of June, 1908, and to pay the deficiency for the fiscal year ending on the 30th day of June, 1903: Provided, however, that the total amount of such levy shall not exceed one and one-half mills on the dollar of valuation," and that the state board of equalization should meet and compute the amount necessary to be levied for this period and these purposes, which should be certified to the county clerks of the respective counties to be entered on the tax rolls. Pursuant to this act the board on October 1, 1908, made the computation and adjudged that there should be a levy of $1\frac{1}{4}$ mills upon a dollar of the valuation of all the taxable property in the state to pay seven specific items of state expenses, one of which was \$1,140,000 expense of the state for the full fiscal year from July 1, 1908, to June 30, 1909.

It seems to be too plain for discussion that no authority was here granted to this board to compute and levy any tax to pay any of the expenses of the state for the year ending June 30, 1909. The power is expressly limited to fixing the rate and levying the taxes for the expenses and deficiency for the year ending June 30, 1908. Counsel for the state contended, however, that this levy for the year 1909 was authorized by the laws of the territory of Oklahoma on this subject, which he asserted were continued in operation in the state by virtue of section 2 of the Schedule to the Constitution of Oklahoma, which reads, "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation, or are altered or repealed by law," and it is assigned as error that the court below overruled this contention, and held (1) that, if the territorial laws on this subject were in force in the state, the levy was not made in accordance with them, and was made without authority from them; (2) that these laws were repugnant to the Constitution of the state and were never in force therein.

[2] Regarding the question whether or not the levy was made in disregard of, and hence without authority from, the laws of the territory, counsel first argues that this issue is not presented by the pleadings, because they concede that the levy for the fiscal year 1909 was made by the board, the legal presumption is that this levy was

valid, and hence according to the laws of the territory, and there is no averment in the bill that there was any failure so to make it. Let us examine the pleadings, and see if this is the condition in which this case stands. This issue was submitted and decided in the court below on bill, answer, and replication without evidence. When a case is set down for hearing on bill, answer, and replication, only those averments of the answer which are responsive to the bill are taken as true. All allegations in avoidance or justification are denied by the replication and are taken as untrue. *People's United States Bank v. Gilson*, 161 Fed. 286, 292, 88 C. C. A. 332; *Van Dyke v. Van Dyke*, 26 N. J. Eq. 180, 181; *Humes v. Scruggs*, 94 U. S. 22, 24, 24 L. Ed. 51; *Jacks v. Nichols*, 5 N. Y. 178; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280. The complainant alleged in its amended bill that the challenged taxes were raised under the act of April 17, 1908, and were therefore illegal and void. It set forth the resolution of the state board of equalization which fixed the rate and made the levy on October 1, 1908, and alleged that these were made as so set forth and were wholly void. The defendants answered that they admitted that the taxes in controversy were raised under authority of the act of April 17, 1908, and under other laws and the Constitution of the state, pursuant to section 3, art. 10, of the Constitution of the state and the laws of the territory of Oklahoma, and that the complainant had correctly set forth in its amended bill the resolution of the board which fixed the rate and made the levy. A replication was filed to this answer, and upon these pleadings the issue was determined. It will be noticed that the defendants admitted that the levy was made under the act of April 17, 1908, and that they admitted, but did not aver, that it was made under the section of the Constitution and the territorial laws cited. The admission raised no issue, and the concession was that the levy was made under the authority of the act of April 17, 1908. Nor would the result have been different if the defendants had averred that the levy was made under and pursuant to section 3, art. 10, of the Constitution and the laws of the territory, because this was matter in avoidance or justification of the allegation of the bill that it was made under the authority of the act of April 17, 1908, and was therefore void, and hence this averment of the answer would have been denied by the replication, and must have been taken as untrue on the hearing upon bill, answer, and replication. If, therefore, this issue is determinable by the rules of pleading and practice in equity, which defendants' counsel so earnestly invoke, there was no error in its decision by the court below.

[3, 7] But the courts of the United States take judicial notice of the Constitution and laws of the states, and this levy ought not to be stricken down in equity if it was authorized by any of the provisions of those laws and that Constitution. As has already been stated, it is clear that the board of equalization was not empowered by the terms of the act of April 17, 1908, to fix any rate or make any levy of taxes for the expenses of the state for the fiscal year ending June 30, 1909, because the power there granted to that board is expressly lim-

ited to the fixing of the rate and making of the levy "to pay the expenses of the state government for the fiscal year ending on the 30th day of June, 1908, and to pay the deficiency for the fiscal year ending on the 30th day of June, 1908." Defendants' counsel contend that this authority may be found in the territorial laws, and in section 3, art. 10, of the Constitution of Oklahoma, which reads:

"Whenever the expenses of any fiscal year shall exceed the income the Legislature may provide for levying a tax for the ensuing fiscal year, which, with other resources, shall be sufficient to pay for the deficiency as well as the estimated ordinary expenses of the state for the ensuing year."

But this section authorized the Legislature only, and by the terms of its grant impliedly prohibited the board, without express legislative authority, from making such a provision, and the Legislature by the act of 1908 made provision for levying a tax, and granted to the board authority to lay it for the expenses and deficiency of the year ending June 30, 1908, but withheld and thereby impliedly prohibited the board from exercising any authority to fix the rate or levy the tax for the expenses of the year ending June 30, 1909. There was, therefore, no power in the board, under section 3 of article 10 of the Constitution and the act of 1908, to make any levy of taxes for the expenses of the state for the year ending June 30, 1909.

The levy for 1909 was made on October 1, 1908, without authority in the board to make it under the act of 1908. Conceding, but not admitting, that the territorial laws on this subject continued in force in the state under section 2 of the schedule to the Constitution, was there error in the conclusion of the court below that this levy was beyond the powers of the board under those laws?

If those laws were applicable to this levy, they provided (section 5994, Wilson's Statutes of Oklahoma of 1903) that the board of equalization should hold a session commencing on the third Monday in June, 1908, and should decide on the rate of territorial tax to be levied for the current year; by section 5996 that on or before the fourth Monday in June, 1908, the territorial auditor should transmit to the county clerk of each county a statement of the rate of taxation for the general territorial tax as directed to be levied and collected by the territorial board of equalization, and that if the board failed to fix the rate the auditor should notify the clerk of each county of the rate; and by sections 5997 and 5998 that the county commissioners should meet the third Friday in July, 1908, to make levies for county purposes, that they might adjourn for not exceeding 10 days, and that if no statement of the rate of the levy for the territorial tax was received during their session they should, before adjourning, levy the general territorial tax at the rate of 2 mills on the dollar. The admitted fact that the rate in this case was fixed and the levy made by the board on October 1, 1908, renders it impossible that they could have been made under or in accordance with these territorial laws, because all the powers of the board and all the powers of the other officers under these territorial laws to make or certify the rate or levy the tax for the year ending June 30, 1909, had, by the terms of

these laws, entirely ceased long before the date on which this rate was fixed and this levy made.

The fact that section 8 of the act of April 17, 1908, authorizes the board of county commissioners to meet on the third Monday in September, 1908, to make a levy of taxes for county purposes for the year ending July 1, 1909, and to adjourn not exceeding 10 days, has not been overlooked. It is, however, immaterial, because it makes no provision for or in relation to a levy or a rate for that year for state purposes, and because the levy in hand was not made by the county commissioners. If it had been, it must have been 2 mills on the dollar for the year ending June 30, 1909, and this levy was $1\frac{1}{4}$ mills for $19\frac{1}{2}$ months, including the 12 months of the fiscal year ending June 30, 1909. The unavoidable conclusion is that, admitting that the territorial laws upon this subject were in force at the time of the levy by the state board of the taxes here in question, that board was then without power under the Constitution of Oklahoma and the territorial laws, and it was also without power under the act of April 17, 1908, to fix the rate for, or to levy any taxes for, the expenses of the state for the year ending June 30, 1909, and there was no error in the decision of the court below that to that extent the levy in question was *ultra vires* and void.

This result makes it unnecessary to discuss the question whether these territorial laws continued in force in the state of Oklahoma or were so repugnant to the state Constitution that they ceased to have effect after statehood. Suffice it to say that the majority of the court concurs in the opinion of the court below upon this issue also.

After the court had found that the levy for the taxes of the year ending June 30, 1909, was unauthorized, and that the amount of those taxes might be separated from the amount levied for the $7\frac{1}{2}$ months ending June 30, 1908, it set aside the submission of the case, permitted evidence to be taken, found the amount levied for each period, the railway company paid the amount levied for the $7\frac{1}{2}$ months, and the decree for the injunction was rendered. Defendants specify as error the admission of the deposition of R. C. Cain, chief of the accounting office of the State Auditor's office, over the objection that it was irrelevant, incompetent, immaterial, and not responsive to any questions in the pleadings in the cause. But some parts of the deposition, notably those which stated that the State Auditor was out of the state, and that the witness had charge of all the accounts in the Auditor's office, including the account of the revenues received by the state from other than direct taxation, were neither incompetent, irrelevant, nor immaterial, and they and the testimony the witness gave relative to the amount of revenue derived from sources other than direct taxation during the year ending June 30, 1908, were responsive to the issue made by the pleadings, whether the valid and the void taxes were inextricably mingled, and to the order of the court that the parties might take evidence to show what part of the taxes levied ought to be paid.

[4] Some of the testimony in this deposition was not the best evidence, because it was deduced from the account books, and they were

better evidence than the statement of their contents by the witness; but objection was not made on this specific ground, and there was no error in overruling the objections to the entire deposition because parts of it were admissible. Objections to the introduction of an entire deposition are untenable, if any part of it is admissible in evidence.

It is assigned as error that in the separation of the valid from the void taxes the court erred in attributing and crediting to the period from November 16, 1907, to June 30, 1908, any part of the \$845,000 which the state board estimated would be derived from sources other than ad valorem taxation. But this assignment is baseless, because the resolution by which the rate was fixed and the levy made itself establishes the fact that this \$845,000 was credited by the board to the entire period from November 16, 1907, to June 30, 1909, and there was plenary evidence that the state derived revenue from sources other than ad valorem taxation during the time between November 16, 1907, and June 30, 1908, and the board must have known that fact and taken it into consideration in its estimate.

[5] Finally, complaint is made because the court did not require the railway company to pay 18 per cent., but required it to pay only 6 per cent., per annum upon the portion of the taxes found to be justly due as a condition of the grant of the preliminary injunction. There was, however, no error here, because the state was demanding all these taxes, valid and void. No one could determine what part was valid or what part was void until the court adjudged the division. The 18 per cent. interest per annum upon taxes delinquent, imposed by section 6013 of Wilson's Statutes of Oklahoma of 1903, was in the nature of a penalty for the failure to pay the taxes when due. One who would enforce a penalty for the failure to pay a claim must demand the true amount. If he demands a larger amount no penalty is incurred.

[6] Moreover, subject to the established principles and rules of equity jurisprudence, the terms on which the chancellor below should grant relief to the complainant and issue his injunction were in his judicial discretion, and his action was not violative of any of those principles or rules, nor was it an abuse of his discretion. *Atchison, Topeka & Santa Fé Ry. Co. v. Sullivan*, 173 Fed. 456, 471, 97 C. C. A. 1.

The motion to dismiss the appeal in this case is not considered, because the conclusion reached upon the merits has the same effect as would a grant of that motion.

The railway company appealed from the decree, but at the argument waived its objections thereto. Let the appeal of the railway company be dismissed, with costs, and let the decree of the court below be affirmed, with costs, against the treasurer and the sheriff.

MOSIER v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. April 22, 1912.)

No. 3,627.

1. INDIANS (§ 34*)—SALE OF LIQUOR TO INDIANS—STATUS OF OSAGE ALLOTTEES—"GUARDIANSHIP."

Under Act June 28, 1906, c. 3572, 34 Stat. 539, relating to the Osage Indians, an allottee of that tribe who has not received a certificate of competency as therein provided is in charge of a superintendent, and an Indian over whom the Interior Department exercises guardianship within the meaning of Act Jan. 30, 1897, c. 109, 29 Stat. 506, which makes it a criminal offense to sell or give liquor to such an Indian.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 60; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 4, p. 3187.]

2. INDIANS (§ 6*)—GUARDIANSHIP OF UNITED STATES—EFFECT OF CITIZENSHIP.

The relationship of guardian and ward existing between the United States and an Indian of the Osage Tribe in Oklahoma is not affected by the mere fact that such Indian may be a citizen of the United States and of the state.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 12; Dec. Dig. § 6.*]

3. INDIANS (§ 34*)—SALE OF LIQUOR—STATUTE IN FORCE IN OKLAHOMA.

That the Oklahoma Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 269) § 3, required the Constitution of the state to prohibit the sale or furnishing of liquor in certain parts constituting Indian territory or reservations, and the Constitution and legislation of the state conform to such requirement, did not effect an abandonment by the United States of the right to exercise guardianship over the Indians in the state nor prevent Act Jan. 30, 1897, c. 109, 29 Stat. 506, making it a criminal offense to sell or furnish liquor to Indians, from being in force therein.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 60; Dec. Dig. § 34.*]

In Error to the District Court of the United States for the Western District of Oklahoma.

Criminal prosecution by the United States against Eugene Mosier. Judgment of conviction, and defendant brings error. Affirmed.

Milton Brown, for plaintiff in error.

John Embry, U. S. Atty., and Isaac D. Taylor, Asst. U. S. Atty.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Mosier was tried, convicted, and sentenced upon the first count of an indictment which was in the following language:

"That heretofore, to wit, on the 28th day of December, in the year of our Lord one thousand nine hundred and nine, Eugene Mosier, whose more full name is to the grand jurors unknown, then and there being in said district, did then and there, within said district, to wit, in the county of Osage, in said Western district of Oklahoma, and within the jurisdiction of said court, unlawfully, willfully, and feloniously sell, give away, dispose of, exchange, and barter certain intoxicating liquors, to wit, whisky, to a certain Indian, to wit, to Hazel Gray, said Indian being then and there a ward of the gov-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 18, 1912.

ernment under charge of an Indian superintendent, and an Indian over whom the government, through the Interior Department, then and there exercised guardianship, and an Indian who had not received a certificate of competency and whose restrictions had not been removed, and who was then and there a member of the Osage tribe of Indians, in Oklahoma, and then and there and continuously theretofore a resident and inhabitant of said district and of the former territory of Oklahoma."

After conviction Mosier moved in arrest of judgment on the ground that the first count did not state an offense against the laws of the United States. The motion being overruled and exception taken, the judgment entered on the verdict has been removed here by writ of error. While other errors are assigned, the ruling on the motion in arrest is the only one reviewable by us. Section 1, Act Jan. 30, 1897 (29 Stat. 506), the law under which the indictment was framed, reads as follows:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government or to any Indian a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, * * * shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter. * * *

[1] A comparison of the indictment with the statute easily demonstrates that an offense is stated therein unless there are other statutes which have repealed the law upon which the indictment is based as to Oklahoma, or have removed Hazel Gray from the class of persons to whom it is unlawful by the terms thereof to sell, give away, or dispose of spirituous or vinous liquors. It is alleged in the indictment that Hazel Gray on December 28, 1909, was a member of the Osage Tribe of Indians, in Oklahoma, who had not received a certificate of competency and whose restrictions had not been removed. To understand the force of this allegation, we must examine Act June 28, 1906, 34 Stat. 539. This act divided all lands belonging to the Osage Tribe of Indians in Oklahoma by giving to the members of such tribe his or her fair share thereof in acres, as provided in the act. Generally speaking, each member of the tribe was entitled to make three selections of land, of 160 acres each, and to designate which one of these should be his or her homestead. The act further provided that the homestead should be inalienable and nontaxable until otherwise provided by Congress, and that the other two selections, together with the remaining lands allotted to any member, should be known as surplus land and should be inalienable for 25 years. Subdivision 7 of section 2 and section 9 of the act, so far as material, read as follows:

"That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this act, except his homestead, which shall

remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

"Sec. 9. That there shall be a biennial election of officers for the Osage Tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined."

An examination of the act now under consideration shows beyond question that there is an Osage Indian agency in Oklahoma, in charge of an Indian superintendent, and that as to all Osage Indians who have not received a certificate of competency the Department of Interior exercises guardianship over them. Therefore Act June 28, 1906, 34 Stat. 539, is not only not inconsistent with the allegations of the indictment, but in connection with such allegations establishes the fact on motion in arrest that Hazel Gray was on December 28, 1909, an Indian under the charge of an Indian superintendent, and also an Indian over whom the government, through the Interior Department, exercised guardianship.

It is further contended, however, that, as the indictment alleges that Hazel Gray was on the date last mentioned a member of the Osage Tribe of Indians in Oklahoma, we must take judicial notice from this allegation that she was then and there a citizen of the United States and of Oklahoma, and therefore not subject to Act Jan. 30, 1897 (29 Stat. 506), upon which the indictment is founded. In support of this position, the case of *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, and certain provisions of the act of June 16, 1906 (chapter 3335, 34 Stat. 267), are cited. Just how Hazel Gray became a citizen of the United States and of Oklahoma is not specifically pointed out. Act June 28, 1906, 34 Stat. 539, under which the lands of the Osage Indians were allotted, unlike General Allotment Act Feb. 8, 1887, c. 119, 24 Stat. 388, did not provide that the Osage Indians, after the allotment, should be citizens of the United States and be subject to and entitled to all the benefits of all the laws, civil and criminal, of the state wherein they resided. The act under which Oklahoma was admitted to the Union did not in express terms make the Osage Indians citizens of the United States and of Oklahoma, but, as it seems to be conceded that Hazel Gray was on December 28,

1909, a citizen of the United States and of Oklahoma, we presume that her citizenship arose by reason of her being an inhabitant of the territory which was admitted to the Union as the state of Oklahoma on an equal footing with the other states of the Union.

[2] The question, then, to be decided on this branch of the case is: Does the mere fact of citizenship destroy the allegation of the indictment that Hazel Gray was on December 28, 1909, an Osage Indian under the charge of an Indian superintendent, and an Indian over whom the government, through the Interior Department, exercised guardianship? There is certainly nothing inconsistent in being an Indian and a citizen of the United States at the same time. The word "Indian" describes a person of Indian blood. The word "citizen" describes a political status. If as a matter of law and fact the government is exercising guardianship over an Indian who is also a citizen, it is not for the courts to say when the guardianship shall cease. As was said by the Supreme Court in *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532:

"These are considerations to be addressed to Congress. It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress."

In the *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, the same court, speaking upon the same subject, said:

"It (the government) is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how the relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress."

To the same effect are the cases of *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299; *Stephens v. Cherokee Nation*, 174 U. S. 484, 19 Sup. Ct. 722, 43 L. Ed. 1041; *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *Wallace v. Adams*, 204 U. S. 420, 27 Sup. Ct. 363, 51 L. Ed. 547. It is true that in the *Heff* Case the Supreme Court did decide that by the terms of the General Allotment Act of February 8, 1887, 24 Stat. 388, Congress had determined to abandon relationship of guardian toward the Indian, *Heff*. The decision, however, was based on the express language of said act, and in view of some recent decisions of the Supreme Court the reasoning of the court in the *Heff* Case may not be extended beyond the particular facts in that case.

The relationship of guardian and ward existing between the government and the Indian, Hazel Gray, is not affected by her citizenship, but, on the contrary, it is entirely consistent with it. *Smith v. Stephens*, 10 Wall. 321, 19 L. Ed. 933; *Wiggin v. Conolly*, 163 U. S. 60, 16 Sup. Ct. 914, 41 L. Ed. 69; *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C.

A. 525; *U. S. v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *U. S. v. Hall* (D. C.) 171 Fed. 218; *Rainbow v. Young*, 161 Fed. 836, 88 C. C. A. 653; *National Bank of Commerce v. Anderson*, 147 Fed. 87, 77 C. C. A. 259; *U. S. v. Thurston County*, 143 Fed. 287, 74 C. C. A. 425; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299; *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566; *Conley v. Ballinger*, 216 U. S. 84, 30 Sup. Ct. 224, 54 L. Ed. 393; *Beck v. Flournoy Live Stock Company*, 65 Fed. 30, 12 C. C. A. 497; *U. S. v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195; *Eells v. Ross*, 64 Fed. 417, 12 C. C. A. 205; *U. S. v. Sutton*, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200; *Tiger v. Western Investment Company*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *United States Express Company v. Friedman et al.* (C. C. A.) 191 Fed. 673; *Couture, Jr., v. U. S.*, 207 U. S. 581, 28 Sup. Ct. 259, 52 L. Ed. 350.

In *Hallowell v. United States*, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750, being the last expression of the Supreme Court bearing upon the question now under consideration, it was stated:

"It is a result of the recently decided cases in this court—*Couture, Jr., v. U. S.*, 207 U. S. 581 [28 Sup. Ct. 259, 52 L. Ed. 350]; *U. S. v. Celestine*, 215 U. S. 278 [30 Sup. Ct. 93, 54 L. Ed. 195]; *U. S. v. Sutton*, 215 U. S. 291 [30 Sup. Ct. 116, 54 L. Ed. 200]; and *Tiger v. Western Investment Company*, 221 U. S. 286 [31 Sup. Ct. 578, 55 L. Ed. 738]—that the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as dependent people."

In view of the decisions above cited, we are clearly of the opinion that, conceding Hazel Gray to have been a citizen of the United States and of the state of Oklahoma on December 28, 1909, that fact alone would not sever the relationship of guardian and ward existing between her and the government, or change the fact that she was then and there an Indian under the charge of an Indian superintendent.

[3] It is claimed, however, by counsel for Mosier that Act Jan. 30, 1897, 29 Stat. 506, being the law upon which the indictment is based, is not in force in the state of Oklahoma. This contention is sought to be maintained for the reason that Congress, by Act June 16, 1906, § 3, subd. 2, 34 Stat. 269, required the people of the proposed state of Oklahoma, as a condition precedent to the admission of said state into the Union, to provide in their Constitution that the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicating liquors within those parts of said state known as Indian Territory and the Osage Indian reservation, and within any other parts of said state which existed as Indian reservations on the 1st day of January, 1906, should be prohibited for a period of 21 years from the date of the admission of said state into the Union, and thereafter until the people of said state should otherwise provide by amendment to the state Constitution and proper state legislation. That the people of the proposed state of Oklahoma did in their Constitution provide for the prohibition of the manufacture, sale, barter, or giving away or otherwise furnishing of intoxicating liquors within the state as required by the act of Congress above mentioned enabling the people of

the said proposed state to form a constitution and be admitted into the Union on an equal footing with the other states of the Union. That the state of Oklahoma has enacted suitable legislation which is now in force punishing the sale, barter, exchange, or giving away of spirituous liquors within her territorial limits to Indians.

Briefly stated, the claim of counsel for Mosier is this: Congress having required the people of the proposed state of Oklahoma to provide in their Constitution as a condition to their admission into the Union that the sale, barter, exchange, or giving away of intoxicating liquors should be prohibited in all those portions of said state constituting the Indian Territory, the Osage Indian reservation or other Indian reservations which existed on a certain date, and the Constitution of Oklahoma having contained such provision and the Legislature of Oklahoma having passed laws punishing the sale, barter, exchange, or giving away of intoxicating liquors, it results from this legislation that the power to deal with the subject of the sale, barter, exchange, or giving away of intoxicating liquors within the state of Oklahoma to Indians under the circumstances described in the act under which the indictment in this case is drawn, has been fully delegated to the state of Oklahoma, and that the laws of the United States in regard thereto have no application. The enabling act for the admission of Oklahoma, in addition to the provisions in regard to the sale, barter, exchange, or giving away of intoxicating liquors to Indians, also contained the following provision (section 1):

"Nothing contained in the said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

While Congress might at any time abandon its relationship of guardian towards Hazel Gray, it could not delegate the power granted by the Constitution of the United States to exercise guardianship towards her to the state of Oklahoma, and we do not think that Congress intended to delegate or abandon its power to regulate the sale, barter, exchange, or giving away of intoxicating liquors to Indians within the state of Oklahoma to that state by the provision in regard to the sale, barter, exchange, or giving away of such liquors contained in the enabling act. We think the true interpretation of the provision in the enabling act is that Congress thereby sought to carry out its treaty obligations and to do all in its power to suppress the traffic in intoxicating liquors among the Indians within said state, and that it is no defense to a prosecution by the United States under the act of January 30, 1897, to say that the state of Oklahoma could also punish this same offense under its law.

It was held by this court in the recent case of *United States Express Co. v. Friedman et al.*, 191 Fed. 673, that the provision of Oklahoma Enabling Act June 16, 1906, § 3, 34 Stat. 269, did not operate to repeal by implication Act January 30, 1897, 29 Stat. 506. The con-

clusion, therefore, of the whole matter is that Congress has not clearly indicated that it has abandoned the power which it possesses to regulate the sale of intoxicating liquors among Indians within the state of Oklahoma, and that, therefore, the motion in arrest was correctly overruled, and the judgment below must be affirmed.

GAUNT v. RALSTON PURINA CO.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1912.)

No. 3,673.

1. SALES (§ 32*)—CONTRACT—OFFER AND ACCEPTANCE.

That letters containing an offer and acceptance of grain to be delivered in St. Louis referred in different terms to the inspection which should govern did not prevent them from constituting a contract of sale, where it appeared that there was but one official inspection at St. Louis which was accepted by both parties without question so far as deliveries were made and was clearly the one meant and understood by both.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 59; Dec. Dig. § 32.*]

2. SALES (§ 418*)—BREACH OF CONTRACT BY SELLER—MEASURE OF DAMAGES.

The measure of damages for breach by the seller of a contract for the sale of grain to be delivered at a certain place is the difference between the contract price and the market price of the same quality of grain at the place of delivery at the time of the breach, if there was a market price at such time and place, and, if not, the difference between the contract price and what it cost the buyer to procure the grain delivered there from the most accessible market, where it used reasonable diligence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

3. SALES (§ 416*)—ACTION FOR BREACH OF CONTRACT BY SELLER—EVIDENCE.

In an action for a breach by the seller of a contract for the sale and delivery of Kaffir corn, letters written by plaintiff, after the breach, inquiring the market price of such corn at different markets, were admissible to show the diligence used by plaintiff to obtain the corn as soon as possible after the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

In Error to the Circuit Court of the United States for the District of Kansas.

Action at law by the Ralston Purina Company against C. B. Gaunt. Judgment for plaintiff, and defendant brings error. Affirmed.

A. J. Adams and T. W. Sargent, for plaintiff in error.

J. D. Houston, C. H. Brooks, and Abbott, Edwards & Wilson, for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CARLAND, Circuit Judge. This is an action by the Ralston Purina Company to recover damages from C. B. Gaunt for breach of two contracts for the sale and delivery of Kaffir corn. The Purina Company recovered a judgment in the court below, and Gaunt has removed the case here by writ of error. The complaint of the Purina Company contained two counts based upon two alleged contracts for the sale of corn, dated November 13 and 17, 1906, respectively. The trial court charged the jury that the telegrams and letters introduced in evidence constituted valid contracts between the parties. This charge was excepted to and is assigned as error.

It appears that the Purina Company sometimes did business under the name of Robinson-Danforth Commission Company, and that Gaunt sometimes did business as C. B. Gaunt Grain Company. The correspondence out of which this case arises was conducted under the names last mentioned.

On November 13, 1906, Gaunt sent the Purina Company the following telegram:

"Wichita, Kansas, Nov. 13, 1906.

"Robinson-Danforth Commission Co., St. Louis, Mo. Offer ten thousand bushels Kaffir corn 75c cwt. St. Louis, December shipment.

"C. B. Gaunt Grain Co."

On the same day the Purina Company replied as follows, by wire:

"11/13/6.

"C. B. Gaunt Grain Co., Wichita, Kansas. Accept ten thousand bushels 3 or better Kaffir corn, 75c cwt. St. Louis, St. Louis weights and grades. December shipment.
Robinson-Danforth Commission Co."

Gaunt also the same day sent the Purina Company the following letter:

"Wichita, Kan., Nov. 13, 1906.

"Robinson-Danforth Com. Co., St. Louis, Mo.—Dear Sir: This confirms our sale to you to-day by wire of car about 10,000 bushels bulk, No. 3 or better white Kaffir corn at 75 per cwt. f. o. b. car, Del. St. Louis, Mo., subject to St. Louis official inspection St. Louis official weights, shipment within Dec. days, via any road. Ry. Off grades to apply on this contract as follows. Billed to St. Louis, Mo. Demand draft with B/L attached. Any exception to any part of the above must be reported at once, otherwise this confirmation to govern settlement.

"Yours very respectfully, The C. B. Gaunt Grain Co., by Gaunt."

To which the Purina Company immediately replied by letter as follows:

"The C. B. Gaunt Grain Co., Wichita, Kansas—Gentlemen: This confirms exchange of wires, resulting in our purchasing from you 10,000 bu. of No. 3 or better White Kaffir corn at 75c per cwt., f. o. b. St. Louis; December shipment. St. Louis Merchants' Exchange weights and grades to govern. We have arranged so that you can extend the time of shipment on these 10,000 bushels into January, if you see fit. Keep us posted on more offerings, and if we can make a trade for you will be only too glad to do so.

"Very truly yours,

Robinson-Danforth Com. Co.

"Dictated by W. H. D.-5."

On November 17, 1906, Gaunt sent the Purina Company the following telegram:

"Wichita, Kansas, Nov. 17, 1906.

"Robinson-Danforth Com. Co., St. Louis, Mo. Offer ten thousand bushels 3 White Kaffir 75 cwt. St. Louis Dec. Jan. shipment.

"C. B. Gaunt Grain Co."

To which the Purina Company immediately replied as follows:

"11/17/6.

"C. B. Gaunt Grain Co., Wichita, Kansas. Accept ten thousand bushels three or better Kaffir corn, 75c cwt. St. Louis. St. Louis weights and grades. December shipment.
Robinson-Danforth Com. Co."

On November 17th, Gaunt wrote the Purina Company the following letter:

"Wichita, Kansas, Nov. 1906.

"Robinson-Danforth Com. Co., St. Louis, Mo.—Dear Sir: This confirms our sale to you to-day by wire of cars 10,000 bu. bulk, 3 or better White Kaffir corn at 75c per cwt. f. o. b. cars, St. Louis, Mo., subject to St. Louis official inspection St. Louis official weights, shipment within Dec. Jan. days, via any Ry. Off grades to apply on this contract as follows: Billed to St. Louis, Mo. Demand draft with B/L attached. Any exception to any part of the above must be reported at once, otherwise this confirmation to govern settlement.

"Yours very respectfully,

C. B. Gaunt Grain Co., by Gaunt."

To which the Purina Company replied on November 17th, as follows:

"Nov. 17, 1906.

"The C. B. Gaunt Grain Co., Wichita, Kansas—Gentlemen: This confirms our wire, in answer to yours, resulting in our purchasing from you 10,000 bu. of No. 3 or better White Kaffir corn at 75c per cwt., delivered St. Louis. St. Louis Merchants' Exchange weights and grades. December-January shipment.

"Very truly yours,
Dictated W. H. D.-5."

Robinson-Danforth Com. Co.

[1] In support of the contention that the minds of the parties to the foregoing correspondence did not meet and agree upon the same thing, it is alleged that the acceptance of the offers of Gaunt by the Purina Company specified a grade of corn and referred to a different inspection from that named in the offers of Gaunt. This criticism is highly technical and without merit. Gaunt found no fault with the acceptance, and delivered corn according to the terms of the first contract, including grade and inspection. He claims that he had a right to refuse to deliver more corn for the reason that the Purina Company refused to receive a car of corn which it is claimed under official inspection graded No. 3 according to contract.

It appears in the evidence that there was but one official inspection at St. Louis, and the chief deputy inspector of grain in charge of the St. Louis office testified that there was but one inspection at St. Louis, and this inspection is spoken of as St. Louis Official, Merchants' Exchange, or Missouri State. We are satisfied that both parties understood the offer and acceptance in the same sense, and that the telegrams and letters constituted a valid contract.

[2] There was no error in the admission in evidence of the letter dated April 2, 1907, from the Purina Company to Gaunt. In the reply

thereto, dated April 10, 1907, Gaunt states that he never had expected to terminate the contracts, and he did not absolutely refuse to perform the same until he wrote the letter of April 16, 1907. It also appears from Gaunt's own letters that he gave the shortage of cars as an excuse for nondelivery of the corn. Upon the question of damages, the trial court charged the jury as follows:

"Now a question you may be called upon to determine in this case is the question as to what the plaintiff was damaged by the withdrawal of the defendant from its contracts in this case, or its repudiation of the contracts. And in that respect I charge you, as follows: The burden of proof is on the plaintiff in this case. These contracts when entered into between the parties were property rights. And as I have said to you, the plaintiff was entitled to receive there in St. Louis this amount of Kaffir corn contracted for. Now, upon the refusal of the defendant to perform its contracts (if you find the defendant did not have the right to repudiate its contract), the damages recoverable by the plaintiff would be the difference between what it was to pay for this Kaffir corn there in St. Louis, under the contract, and what it would cost it to go upon the market and purchase Kaffir corn in like amount and of like character when it received notice on the 18th day of April, 1907, that defendant declined to perform the contract. If it could then go upon the St. Louis market and purchase Kaffir corn to the amount contracted for, something over 16,000 bushels, I believe the evidence shows, that is to say, the plaintiff would in such case be entitled to recover what it was damaged, and its damage would be the difference between what it would have to pay for this Kaffir corn under these contracts and what it would have to pay to have these contracts fulfilled by going upon the market, if there was a market in St. Louis on the 18th day of April, 1907, and fill these contracts. However, if from all the evidence in this case you find that the plaintiff could not on that day go upon the market in St. Louis and buy sufficient to complete these contracts, then it was the duty of the plaintiff to proceed with all reasonable diligence to fill these contracts from whatever source it could fill them and at the most reasonable terms. And in case you find from all the evidence in the case that the contracts could not be filled upon the St. Louis market at that time, the damages for the breach of the contracts would be the difference between what it had agreed to pay for this Kaffir corn and what it would cost the plaintiff to proceed as a reasonably diligent person to buy enough Kaffir corn of the kind mentioned herein, delivered in St. Louis, to meet these contracts. If you find from the greater weight of all the testimony in the case that the plaintiff did proceed with reasonable dispatch and diligence to fill these contracts, and that it expended in so doing the amount of money that it claims to have expended here, if that was the reasonable time and manner in which it should, in your judgment, have fulfilled these contracts, then that would be the amount of the recovery; but the amount expended by the plaintiff in this case in purchasing Kaffir corn to meet these contracts, although you may find it could not fill these contracts on the market in St. Louis, is not necessarily what the plaintiff was damaged; but it is the amount it would have cost in the markets most accessible to this plaintiff to have filled these contracts with the kind of Kaffir corn purchased by it when purchased in a reasonable and diligent manner. That would be what the plaintiff would be entitled to recover in this case in the event you find defendant without cause breached these contracts and the plaintiff is entitled to recover."

In so charging the jury the court stated the law correctly. *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Belden v. Nicolay*, 4 E. D. Smith (N. Y.) 14; *Kountz v. Kirkpatrick*, 72 Pa. 376, 13 Am. Rep. 687; *Kingsbury v. Moses*, 45 N. H. 222; *Crounse v. Fitch*, 1 Abb. Dec. (N. Y.) 475; *Kerr v. McGuire*, 28 N. Y. 446; *Id.*, 28 How. Prac. (N. Y.) 27; *Gordon v.*

Bowers, 16 Pa. 226; Harris v. Panama R. R. Co., 58 N. Y. 660; Siegbert v. Stiles, 39 Wis. 533; Lawton v. Chase, 108 Mass. 238; Grand Tower Mining Company v. Phillips, 90 U. S. 471, 23 L. Ed. 71; Salmon v. Helena Box Co., 147 Fed. 408, 77 C. C. A. 586; Howard Supply Company v. Wells, 176 Fed. 512, 100 C. C. A. 70; Marsh et al. v. McPherson, 105 U. S. 709, 26 L. Ed. 1139; Vulcan Iron Works v. Roquemore, 175 Fed. 11, 99 C. C. A. 77; 2 Sedgwick on Measure of Damages (8th Ed.) par. 739; Lillard v. Kentucky Distilleries, 134 Fed. 168, 67 C. C. A. 74; McFadden v. Henderson, 128 Ala. 221, 29 South. 640.

[3] There was no error in admitting in evidence the letters which were in answer to inquiries of the Purina Company as to the market price at different places of Kaffir corn and the probability of obtaining the same. These letters were not admitted for the purpose of showing the market value of Kaffir corn, but upon the question of the diligence used by the Purina Company to obtain corn as soon as possible after the breach of the contract by Gaunt.

In this connection, it will be proper to refer to a clause in rule 11 (188 Fed. ix) of this court, which is as follows:

"When the error alleged is as to the admission or the rejection of evidence the assignment of error shall quote the full substance of the evidence admitted or rejected."

In many of the assignments of error appearing in the record the evidence is not quoted, nor is any reference made as to where it may be found, and the letters to which objection is made are not quoted and they do not seem to appear in the record at all.

Following assignment of error No. 41 as it appears in the record and also in brief of counsel for Gaunt, there appears a statement of the exceptions taken to the instructions of the court. In the record and also in the brief, the last sentence of this statement is as follows:

"The defense further objects and excepts to the refusal of the court to give each of the instructions asked by the defendant."

This last sentence nowhere appears in the bill of exceptions, and it does not appear in the record certified by the judge that any exceptions whatever were taken to the refusal of the court to charge as requested by counsel for Gaunt. Therefore we cannot consider any assignment of errors based thereon.

We have carefully considered the assignments of error which are based upon any proper exception and are not in direct violation of rule 11 hereinbefore mentioned. From this consideration we have found no error, and therefore the judgment of the trial court must be affirmed, and it is so ordered.

BRZEZINSKI v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 27, 1912.)

No. 249.

1. PERJURY (§ 32*)—TRIAL—EVIDENCE.

On the trial of a defendant charged with perjury in knowingly giving false testimony before a grand jury, the testimony of the stenographer who took down the testimony as given and of any other person who heard and remembers it is competent to prove what was testified to by defendant.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108-116; Dec. Dig. § 32.*]

2. PERJURY (§ 11*)—MATERIALITY OF FALSE TESTIMONY.

On the investigation by a grand jury of a charge of conspiracy to commit offenses against the United States by the underweighing of imported sugar, testimony that the accused attempted to bribe an employé of the government to conceal evidence of such false weighing discovered by him was material, and false testimony before the grand jury in respect to such attempt constituted perjury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

3. PERJURY (§ 32*)—TRIAL—EVIDENCE.

On the trial of a defendant for perjury in giving false testimony before a grand jury, which was directly contradictory of statements defendant had previously made under oath, testimony, as to a statement made by defendant between the times of such contradictory statements to another grand jury witness, that the latter could get a sum of money for going away somewhere, was competent as tending to show the motive which induced defendant to give the false testimony.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108-116; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the Southern District of New York.

Criminal prosecution by the United States against James O. Brzezinski. From a judgment of conviction, defendant brings error. Affirmed.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, convicting plaintiff in error under an indictment for perjury. The indictment charged that defendant was sworn as a witness before the grand jury, which was then engaged in an investigation into an alleged conspiracy to commit offenses against the United States, in connection with the underweighing of dutiable sugar and the participation of one Oliver Spitzer, among others, in said conspiracy; that in the course of such investigation it was a material matter of inquiry to determine whether or not Spitzer had on or about November 20, 1907, attempted to bribe defendant, who was at that time a special employé of the Treasury Department; that in response to questions put to him, the defendant on October, 1909, testified before the grand jury that Spitzer did not attempt to approach or bribe him and did not offer or promise to him any money or other thing of value. The indictment further charged that these statements were not true and that at the time of so swearing defendant did not believe them to be true.

B. H. Goldstein, for plaintiff in error.

G. H. Dorr, Asst. U. S. Atty. (John Boyle and S. Hershenstein, of counsel), for United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The points raised on this writ of error are wholly technical. The record makes out a very clear case; it is difficult to see how any intelligent person, reading it, could escape the conviction that defendant in testifying before the grand jury perjured himself, deliberately and willfully, and that he did so, taking his chance of this indictment and conviction, because he was bribed to do so, in order to help Spitzer to escape the consequences of his conduct. The evidence in the case is peculiarly strong because the bulk of it consists of statements to the effect that Spitzer had tried to bribe him, made by the defendant; two of such statements having been made under the sanction of an oath.

[1] The first fact for the government to prove was the giving of the testimony charged in the indictment. It called the stenographer who took the notes of the proceedings before the grand jury. He testified that he took down the questions and answers that were put to Brzezinski on that day; that he made a transcription in typewriting from the notes, made this transcription himself, did not dictate it. The absence of the notes was accounted for; they belonged to the witness' employer and with all his other "notes" were destroyed when he died. The witness identified the transcript he had made; defendant's counsel for some mysterious reason objected to his testifying that he "transcribed correctly," but he did testify that he made it from the notes, and that the notes contained all the questions and answers. An assistant United States attorney who was present in the grand jury room also testified to the substance of what Brzezinski said on that occasion. It is contended that the court erred in admitting this testimony on the ground that it was "not the best evidence." This is a frivolous objection. Any one who has heard an oral statement made and remembers it may testify to what was said. The objection now advanced that it was error to admit the transcript of the notes because it had not been shown to be accurate is also without merit, since defendant himself objected to proof that it was accurate.

The other points may be disposed in the order in which they are presented in the brief.

[2] It is contended that the perjurious testimony was not material to the investigation with which the grand jury was concerned, viz., a conspiracy by Spitzer and others to commit offenses against the United States. What happened was this: Parr and defendant, both special employes of the treasury department, were on the dock, of which Spitzer was superintendent. They detected several instances of underweighing and also found the device (a steel spring) by means of which the scales were tampered with. Information as to this device had already been communicated to the government by one Whalley, who had invented it and subsequently turned informer. Defendant at once

seated himself by the scales where he could guard the spring, while Parr went to telephone for a scale expert. While defendant was thus on guard, Spitzer came to him and said that he did not want this thing exposed, that, if defendant would get away with "that iron" (the spring) and make out that the scales broke, he might name his own price and Spitzer would pay it. We are at a loss to see why this occurrence was not material to the investigation which the grand jury had in hand, and find nothing persuasive to the contrary in the argument of the brief of the plaintiff in error.

It is quite apparent that defendant who had originally stated that Spitzer tried to bribe him and had twice sworn to that statement, had subsequently, when called as a witness on Spitzer's first trial in Brooklyn, failed to make good his assertions. The United States attorney, therefore, when he began to examine him before the grand jury cautioned him as to the situation in which he stood and told him distinctly that he need not testify at all unless he wished to. He chose to take the stand, but his voluntary act in so doing did not make the testimony which he gave extrajudicial, nor did the United States attorney's statement to Brzezinski that his conduct at the trial in Brooklyn was the knob of the investigation change the character of the proceeding which was an investigation of the conspiracy above set forth. The proposition that the oath could not be lawfully administered to defendant because the investigation before the grand jury was of a charge against himself finds no support in the record.

It is further contended that perjury cannot be assigned upon defendant's testimony "as it consisted entirely of conclusions." This point may be disposed of by a recital of what the witness' testimony was. He stated that he discovered no attempt, on the part of Spitzer, to bribe him on that day; that no attempt was made by Spitzer to approach or bribe him; that he made no promise to give money to him; that Spitzer never did offer or promise him money or anything on that day.

Error is assigned because of a refusal to charge that the jury "might consider whether or not the words alleged to have been addressed by Spitzer to the defendant did in fact constitute a bribe or an attempt to bribe." The words attributed to Spitzer were these:

"I do not want this thing exposed. Do not let it get out. Make out the scales are broke. Get away with that iron. Name your price; I will pay it."

How an intelligent mind could possibly "consider" these words did not constitute an attempt to bribe, it is difficult to understand. However that may be, the court had already instructed the jury, in the charge, that if they concluded that Brzezinski thought that Spitzer had not offered him money or attempted to bribe him, they would have to acquit. This was all—if not more—than defendant was entitled to.

[3] It is further contended that the court erred in allowing the witness Whalley, the informer, to testify to a conversation with defendant some months after the discovery of the steel spring in use on the dock. In this conversation as Whalley narrated it, Brzezinski suggested that some one would be willing to offer him \$7,500 if he

would get off to some little town, and in reply to Whalley's question, "Who is going to give me \$7,500?" "You can get it if you want it."

The objection advanced to this testimony is that it tended to show a distinct crime unconnected with the charge of perjury and was therefore incompetent and prejudicial. There was good ground for admitting this testimony. As we have seen, defendant immediately after the discovery of the steel spring asserted several times that Spitzer tried to bribe him. Such testimony, if given on Spitzer's trial, would have been most damaging to the latter. At that time defendant was a trusted and efficient government officer. Two years later, before the New York grand jury, he testified that Spitzer had never tried to bribe him and had not offered him anything. Why was this? Was it a mere lapse of memory, an honest forgetfulness of what had taken place? Or was his first statement false? An effort, perhaps, to magnify himself as an incorruptible public servant. What was the motive of these inconsistent statements? Whalley's testimony gave the clue, and that clue the jury were entitled to have in order to solve the problem. In November, 1907, defendant refuses an offered bribe, saying, "There is nothing doing." The next year Spitzer's first trial comes on and defendant fails to support the government. Why? The answer is found in Whalley's testimony, Whalley being also an important witness, that the defendant told him he could get \$7,500 for going off somewhere, the inference being that defendant had already made some arrangement in reference to his testimony. The circumstance, that this testimony of Whalley tends to show the commission of another crime (the government does not concede that it does, and we do not pass upon that point), does not make such an important piece of circumstantial evidence inadmissible. *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

It is not necessary to consider any of the other points submitted. The judgment is affirmed.

NATIONAL WASHBOARD CO. v. GOLDSTEIN.

(Circuit Court of Appeals, Second Circuit. July 17, 1912.)

No. 227.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION—INJUNCTION.

An order affirmed, which denied a preliminary injunction on affidavits to restrain defendant from using certain arbitrarily selected numbers on washboards manufactured and sold by him to indicate the size, style, and shape of the boards to which they are applied, because complainant had previously adopted the same numbers to serve a similar purpose, where it was not clearly shown that it used them to indicate origin, and the products of the respective parties were otherwise clearly distinguishable.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

Unfair competition in use of trade-marks or trade-names, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Lacombe, Circuit Judge, dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in equity by the National Washboard Company against Joseph Goldstein. From an order denying a preliminary injunction, complainant appeals. Affirmed.

Appeal from an order refusing to grant a preliminary injunction restraining the defendant from using certain arbitrary numbers in connection with the sale of washboards. This motion was made on the 23d of February, 1912, and was decided March 15, 1912, the court filing the following memorandum: "In view of the conflicting statements concerning the significance and use of arbitrary numbers on washboards I am not disposed to grant at this time and upon affidavits a further injunction based upon the use of numbers alone."

Prior to this and on November 11, 1911, the court had granted a preliminary injunction restraining the defendant from marking the washboards sold by him in imitation of the complainant's washboards and from simulating any of the complainant's trade brands or markings in connection with the sale of washboards. This order has been complied with so far as brands, names and markings are concerned. The present motion is designed to extend the injunction so as to prohibit the use of certain "identifying figures or numbers used by complainant" in the manufacture and sale of washboards.

The bill contains the following allegation: "That the washboards so manufactured and sold by your orator as aforesaid are of various styles, and that for the purposes of identifying said styles, and distinguishing them from each other your orator adopted and applied to said washboards of its manufacture certain arbitrarily selected numbers. That among the numbers so arbitrarily selected by your orator and applied to the washboards of its manufacture for said purpose were the numbers 500, 501, 604, 609, 808, 809, 831, 840, 841, 850 and 851." It is the use of these numbers for identifying the styles of washboards that the complainant seeks to enjoin.

Drury W. Cooper and Edward Rector, for appellant.

O. Ellery Edwards, Jr., and Benedict S. Wise, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). There is no question that before the injunction of November 11, 1911, was issued, the defendant had so dressed his goods in imitation of the complainant's trade-names and brands that the public might be deceived into taking his washboards for those of the complainant. All of these questions have, however, been eliminated by the changes made pursuant to the directions of the order.

We understood the complainant to concede at the argument that practically the only question now presented for consideration relates to the use of the arbitrarily selected numbers; but whether conceded or not this, in our judgment, is the only question to be considered. We are, therefore, confronted with the single proposition—should the court enjoin the use by the defendant of numbers designed to show the style of his washboards and to distinguish them one from the other, because the complainant had previously adopted similar numbers to serve a similar purpose and, perhaps, to indicate origin?

We do not deem it necessary to answer this question definitely at this time. It is sufficient to say that we think it too doubtful to be answered affirmatively upon a motion for a preliminary injunction.

It is undoubtedly true, where a manufacturer has selected an arbitrary combination of figures or letters to designate his goods, which combination in the minds of the purchasing public has become a substitute for the name of the manufacturer as indicating origin, that the courts have, in several instances, enjoined the use of such a combination by a rival manufacturer. But in many of these cases the figures were part of a general scheme of dressing up the goods for the market and were considered in connection with and as parts of other marks, brands and insignia. Here we are considering the numbers alone on goods, which in other respects, are now clearly distinguishable from the complainant's goods. In the cases referred to the courts have been convinced that the numbers or letters were designed to indicate origin.

In the case at bar this is seriously disputed and it is vigorously contended that the defendant adopted the numbers simply and solely to indicate the size, shape and style of the respective boards so that, in ordering, the purchaser can readily indicate the board he desires, in the same manner as a pair of shoes, a hat or a collar is ordered by number. Again, we are unable to find any proof that purchasers have actually been deceived since the injunction of November 11th, by the use of the numbers. Indeed it seems quite improbable that, in existing conditions, a purchaser having the ordinary mental equipment, can be so deceived. The complainant's boards are now plainly marked in red ink "National," the defendant's boards are plainly marked in black ink "Manhattan." If a purchaser has examined into the respective merits of the two boards and actually desires a National, it is impossible to believe that he can be induced to take a Manhattan because the same number appears on both. If he has no choice between them it is manifest that he cannot be defrauded. There is no substantive proof of fraud, or deception, or even of confusion, which can be attributed to the numbers alone. It is, of course, convenient to have the same number indicate the size and quality of the boards, no matter who may be the maker, and the proof should be clear that it was adopted with intent to injure and defraud the manufacturer first using it.

The questions in controversy are questions of fact; they have not been clearly established in favor of the complainant and should not be decided upon affidavits, but should await the final hearing after the witnesses have been tested by cross-examination.

The order is affirmed with costs.

LACOMBE, Circuit Judge (dissenting). I am unable to concur with my Associates and think this an especially vicious case of unfair competition. Defendant for several years subsequent to 1907 marked his washboards with various combinations of words, containing his business name and address and some arbitrary word, "Diamond," "Globe," or what not, indicating the size and style of washboard. During the same period complainant manufactured and marketed washboards, marking them with a combination in black of its own name, its business address, the word "National" in a contrasting color

(red), and certain arbitrary numbers designating size and style of washboard. In 1911 defendant, in place of the mark it had theretofore used on one side of its washboards, substituted a Chinese copy of complainant's mark, with the exception that the word in red was "Manhattan," instead of "National." No amount of testimony (and there was such testimony) by defendant, or his sons, all interested parties, could convince me that he did not intend by the substitution to mark his washboards in such a way that persons might mistake them for complainant's, and did not expect that thereby the sale of his own goods might be increased.

It must be assumed that the defendant equally with the purchasing consumer has "the ordinary mental equipment." If so, it follows that he changed from the old to the new style of marking his goods, not fortuitously, but with an intelligent purpose. That purpose is manifest. This was unfair trading, and in a former suit the court so held and ordered defendant to put a stop to it.

Defendant then modified his mark. The details need not be discussed, since the new mark seems to be sufficiently differentiated from complainant's, except only as to certain numbers, to restrain the use of which this suit is brought. These numbers, as has been said, were placed by complainant on its different sizes and styles of washboards, so that each size and style was marked with its assigned number. The numbers, in connection with the other indicia, are used by complainant to identify its product. These numbers are wholly arbitrary—such as 501, 608, 841, etc. They are not descriptive, as are the numbers stamped on collars, 15, 15½, 16, etc., to indicate the length of the article from buttonhole to buttonhole in inches; nor are they, like the numbers or the letters marked on shoes, 4, 4½, 5, a, b, c, etc., which indicate size; all the trade having for generations used "5a" to indicate a shoe of a certain length and width. Although arbitrary and originating with the plaintiff, they might, with its acquiescence, have been appropriated by the trade and generally used to designate goods of sizes and styles like those of complainant. But the testimony shows that nothing of this sort has occurred. Very many washboards are marked and sold with these numbers, the meaning of which the public is becoming accustomed to; but that is because complainant's business is a large one and it sells many goods. The significant fact is that complainant, and complainant only, since their adoption in 1907, has used these particular figures in connection with washboards, until defendant undertook to appropriate them in 1911, whereupon suit was promptly brought.

The combination of units, which may be used by any one who wishes through their use to identify some particular size or style of his goods, is practically unlimited. It was perfectly easy for defendant to select for his own use numbers which were not already associated in the mind of the public with complainant's. That he appropriated these numbers of the complainant with the expectation that their use might induce some persons to suppose that they were the same goods as those of the complainant, and that in that way the sale

of his own goods might be increased, seems to me manifest, and no amount of testimony by interested parties to the contrary is at all persuasive.

It seems to be a clear case of unfair trading, and I therefore dissent.

MUNSON v. McCLAUGHRY, Warden.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1912.)

No. 3,776.

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1216*)—CONVICTION—DIFFERENT OFFENSES—CONTEMPORANEOUS BURGLARY AND LARCENY—SENTENCE ON CONVICTION ON DIFFERENT COUNTS—VALIDITY.

The sentence of a defendant, convicted on two separate counts of an indictment, under sections 5478 and 5456, or 5475, Revised Statutes (U. S. Comp. St. 1901, pp. 3683, 3694, 3696), of burglary of a post office building with intent to commit larceny and of larceny committed at the same time and as a part of a continuous criminal act, to separate punishments for the burglary and the larceny, is ultra vires and void as to the sentence for the larceny, and after the defendant has satisfied the sentence for the burglary he is entitled to his release on habeas corpus.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.*]

2. HABEAS CORPUS (§ 28*)—VOID JUDGMENT—EXCESSIVE SENTENCE—JURISDICTION.

The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess is entitled to his release by writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 23; Dec. Dig. § 28.*]

Appeal from the District Court of the United States for the District of Kansas.

Habeas corpus on petition of Charles Munson against Robert W. McClaghry, Warden of the United States Penitentiary at Leavenworth, Kan. From an order denying the petition, petitioner appeals. Reversed and remanded, with instructions.

See, also, 196 Fed. 1007.

Turner William Bell, for appellant.

H. J. Bone, U. S. Atty., and McCabe Moore, Asst. U. S. Atty., for appellee.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

SANBORN, Circuit Judge. This is an appeal from an order which denied the petition of Charles Munson for a writ of habeas corpus and a release from the United States Penitentiary at Leavenworth, Kan. The petitioner was indicted, convicted, and sentenced under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one count of an indictment to a fine and imprisonment for five years under section 5478 of the Revised Statutes (U. S. Comp. St. 1901, p. 3696), for forcibly breaking into a building used in part as a post office, with intent to commit larceny in the part of the building so used, and under another count of the same indictment to imprisonment for one year under section 5456 or 5475, Revised Statutes (U. S. Comp. St. 1901, pp. 3683, 3694), to begin after the expiration of the sentence for five years, for stealing postage stamps and other property belonging to the Post Office Department of the United States from the same building at the same time that he committed the offense of breaking with intent to commit larceny charged in the first count of the indictment. He paid his fine and served his term of five years under the first count, and then presented this petition for a writ of habeas corpus and for his release from the penitentiary, on the ground that where one is convicted of burglary with intent to commit larceny and of larceny committed at the same time and place, the court is without jurisdiction, after sentencing for the former crime, to impose a farther and separate sentence for the latter.

[1] There is no doubt that the defendant might have been convicted and sentenced for the offense charged in the first count of this indictment without a conviction or sentence for the offense charged in the second count, or for the offense charged in the second count without a conviction or sentence for the offense charged in the first count; and section 1024 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), provides that where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, which may be properly joined, the whole may be joined in one indictment in separate counts. Counsel for the United States argue that the act of breaking, or attempting to break into, a building used as a post office with intent to commit larceny therein, and the act of stealing stamps or property of the United States, are separate offenses, as they undoubtedly are when they are not parts of the same act or transaction, and from this premise they deduce the conclusion that, although they are parts of the same act or transaction, they still remain separate offenses, for which the perpetrator may be separately indicted, convicted, and punished. In support of this position they call attention to these authorities: *Ex parte Peters* (C. C.) 12 Fed. 461; *United States v. Williams* (D. C.) 57 Fed. 201; *United States v. Yennie* (D. C.) 74 Fed. 221; *Sorenson v. United States*, 168 Fed. 785, 94 C. C. A. 181; *Rapalje on Larceny*, § 351, p. 412; *State v. Barker*, 64 Mo. 282; *State v. Ridley*, 48 Iowa, 370; *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340; *Speers v. Commonwealth*, 58 Va. 570; *Dodd v. Arkansas*, 33 Ark. 517; *State v. Warner*, 14 Ind. 572; *People v. Devlin*, 143 Cal. 128, 76 Pac. 900; *State v. Ingalls*, 98 Iowa, 728, 68 N. W. 445; *Gordon v. State*, 71 Ala. 315; *Territory v. Willard*, 8 Mont. 328, 21 Pac. 301; *State v. Martin*, 76 Mo. 337; *Howard v. State*, 8 Tex. App. 447; *Smith v. State*, 22 Tex. App. 350, 3 S. W. 238; *Rust v. State*, 31 Tex. Cr. R. 75, 19 S. W. 763.

A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act. It seems to be unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break with the criminal intent, and another for a larceny with the same intent, or such as one for the attempt to break, a second for the breaking, a third for the entering, a fourth for the taking of stamps, a fifth for the taking of other property, a sixth for the conversion of the property, and a seventh for carrying it away, all with the same single criminal intent. And there is evidently no limit to the number of offenses into which a single criminal transaction inspired by a single criminal intent may be divided, if this rule of division and punishment is once firmly established. The theory that such an act and intent could be punished as two separate offenses seems to have taken its rise in the federal courts in the decision of Circuit Judge McCrary in *Ex parte Peters* (C. C.) 12 Fed. 461. At that time the Supreme Court of Connecticut had held in *Wilson v. State*, 24 Conn. 57, that a conviction of larceny at the same time that a burglary was committed constituted no defense to a charge of the burglary. Chief Justice Waite, however, in an able opinion which has commended itself to the judgment of many courts, dissented from this conclusion and declared that:

"Whenever, in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations, founded upon the same intent, cannot be maintained."

Judge McCrary, in his opinion in the *Peters* Case, said that the reasoning of Chief Justice Waite was so strong that if it were a question of first impression he would be inclined to adopt his opinion, but that he found the law very well settled to the contrary, and he cited *Bishop's Criminal Law*, § 1062, *Josslyn v. Commonwealth*, 6 Metc. (Mass.) 236, *State v. Ridley*, 48 Iowa, 370, and *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340. A careful examination of these authorities discloses the fact that they fail to support his statement that they settle the question in favor of his decision.

In *Josslyn v. Commonwealth*, the Supreme Judicial Court of Massachusetts held only:

"That where the breaking and entering and actual stealing are charged in one count, there is but one offense charged, and there can be but one penalty adjudged. But where they are averred in distinct counts, as distinct substantive offenses, not alleged to have been committed at the same time and as one continued act, if in other respects they are such offenses as may be joined in the same indictment, the defendant may be convicted on both and a judgment rendered founded on both."

Bishop, at sections 1062, 1063, and 1064 of his work on Criminal Law, cites authorities on each side of this question and gives the opinion that:

"To make a burglary thus double and punish it twice, first as burglary and secondly as larceny, hardly accords with the humane policy of our law."

It will be noticed that the decision in Josslyn's Case was that the burglary and larceny might be pleaded as separate offenses, where they were "not alleged to have been committed at the same time and as one continued act," which was in effect to hold that, if they were pleaded or proved to have been "committed at the same time and as one continued act," they could not be punished as separable offenses. And that was, at the time Judge McCrary rendered his opinion, and ever since has been, the established rule in Massachusetts. In *Kite v. Commonwealth*, decided in 1846, subsequent to Josslyn's Case, and more than 30 years before the decision in *Peters Case*, 11 Metc. (Mass.) 581, at 583, the Supreme Judicial Court of Massachusetts held that:

"If the larceny charged in the second count appears, in proof, to have been committed at the time of the breaking and entering, then it is merged, and the conviction is properly for burglary, and the sentence must be accordingly."

Judge McCrary evidently overlooked the clear distinction that had been made by these Massachusetts decisions between the offenses of burglary and larceny when they were distinct and separate in time, place, and act, and burglary and larceny that were parts of the same continuous criminal act, and upon this mistake was founded the decision which he rendered against his own better judgment in *Ex parte Peters*.

The opinions in the other cases, *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340, and *State v. Ridley*, 48 Iowa, 370, which Judge McCrary cited in the *Peters Case*, did not treat or rule the question there and here at issue, and the fact was that the opinion of the courts of Massachusetts was contrary to that which Judge McCrary announced and in accord with his own good judgment.

Turning, now, to the other decisions in the courts of the United States, the question here under consideration was not presented or considered in *United States v. Williams* (D. C.) 57 Fed. 201. In *United States v. Yennie* (D. C.) 74 Fed. 221, the breaking into the building with intent to commit larceny and the larceny of the postage stamps were charged in the same count of the indictment, and the court held that, although they were separate offenses, the count was good. The question whether or not the defendants could be punished for both offenses, when they proved to be parts of a single continuing act inspired by a single criminal intent, was neither considered nor determined. This is also true of the decision in *Sorenson v. United States*, 168 Fed. 785, 94 C. C. A. 181, and the result is that, aside from the opinion under review, no authority in the federal courts, in support of the proposition of counsel for the government, except the opinion of Judge McCrary in the *Peters Case*, rendered against his

own better judgment and under an evident misapprehension of the state of the decisions, has been called to our attention.

The authorities cited by counsel for the government from the state courts, to the effect that burglary and larceny committed as parts of the same transaction are separate offenses and may be separately punished, have been carefully read. They are not, however, very persuasive, because some of them are founded on the Peters Case, some on special statutes of the states in which they were respectively rendered, and some on the argument that burglary and larceny committed as parts of a continuous act may be inspired by different criminal intents, the burglary by the intent to commit some felony other than larceny, such as rape, arson, or murder, so that the intent to commit larceny may not arise until after the breaking and entering with an intent to commit some other felony have been completed (*People v. Devlin*, 143 Cal. 128, 129, 76 Pac. 900); an argument which is idle in the case in hand, because the same single intent to commit larceny is an indispensable element of each of the offenses of which the petitioner was convicted in this case under sections 5478, 5456, and 5475, Revised Statutes.

On the other hand, it seems to be the established rule that where burglary with an intent to steal and stealing at the same time are charged in a single count, and there is a general verdict of guilty, the larceny is merged in the burglary and a sentence for the burglary only can be inflicted, although separate penalties are prescribed by the statutes for burglary and larceny. *State v. McClung*, 35 W. Va. 280, 284, 13 S. E. 654; *Commonwealth v. Hope*, 22 Pick. (Mass.) 1; *Kite v. Commonwealth*, 11 Metc. (Mass.) 581; *Roberts v. State*, 55 Miss. 421, 424.

The highest judicial tribunals of Massachusetts, Kentucky, Pennsylvania, and Georgia have decided that burglary with intent to commit larceny and larceny at the same time and as a part of the same transaction may not be lawfully punished as separate offenses, because they are parts of a single continuous act inspired by a single criminal intent. *Kite v. Commonwealth*, 11 Metc. (Mass.) 581, 583; *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. 84, 85; *Yarborough v. State*, 86 Ga. 396, 12 S. E. 650; *Commonwealth v. Birdsall*, 69 Pa. 482, 485, 8 Am. Rep. 283.

The United States Circuit Court of Appeals for the Ninth Circuit, after a thoughtful review of the authorities, has decided that, where one is indicted in separate counts and convicted of burglary of a post office with intent to commit a larceny under section 5478, and of larceny at the same time as a part of the same transaction under section 5456 or 5475, he can be lawfully punished for the burglary only. *Halligan v. Wayne*, 179 Fed. 112, 102 C. C. A. 410. And because in such a case the burglary and larceny are parts of a single continuous act, inspired by the same single criminal intent, provable by the same evidence, because the arbitrary subdivision of such a single criminal act, inspired by the same criminal intent, into numerous offenses, is unauthorized and oppressive, because, after conviction of such a burglary, the subsequent trial for such a larceny in reality puts the

defendant twice in jeopardy for the same criminal act and intent, and because this decision of the court of the Ninth Circuit is sustained by the eminent authority of its judgment and by the stronger and better reasons, its conclusion is followed and adopted by this court.

The result is that the power of the United States District Court to inflict punishment upon the petitioner was exhausted when it had sentenced him for the burglary with intent to commit the larceny, and its sentence for the larceny was in excess of its jurisdiction and therefore void.

[2] The excess of a sentence beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess alone is entitled to his release by writ of habeas corpus. *Ex parte Lange*, 18 Wall. 163, 176, 178, 21 L. Ed. 872; *Michigan Trust Co. v. Ferry*, 175 Fed. 667, 677, 99 C. C. A. 221, 231; *Mackey v. Miller*, 126 Fed. 161, 163, 62 C. C. A. 139, 141; *Ex parte Peeke* (D. C.) 144 Fed. 1016. As the petitioner had satisfied his sentence for the burglary with intent to commit the larceny, and was held only under a void sentence for the larceny committed at the same time and as a part of the same continuous criminal act inspired by the same criminal intent as was the burglary, he was entitled to his discharge.

The order denying his petition for a writ of habeas corpus and for his release from the penitentiary must therefore be reversed, and the case must be remanded to the court below, with instructions to release the petitioner.

CHESAPEAKE & O. RY. CO. v. STOJANOWSKI.

(Circuit Court of Appeals, Second Circuit. July 13, 1912.)

No. 248.

1. RAILROADS (§ 400*)—ACTION FOR INJURY TO PERSON—QUESTIONS FOR JURY.

Where the fact was undisputed that plaintiff lost his arm by being run over by a train on defendant's railroad, but the evidence was in direct conflict as to whether he was on the train and was thrown off by one of the trainmen, or was walking beside the track and caught hold of a car and attempted to get on, the question was properly submitted to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

2. RAILROADS (§ 282*)—LIABILITY FOR INJURIES—ACTS OF EMPLOYÉES.

Where a man riding on a freight train at night wore a plate on his cap and carried a lantern with which he gave signals for the movement of the train, the presumption is that he was the authorized agent of the railroad company and that his action in throwing plaintiff from the train was done in the due course of his employment, and the railroad company is responsible for such act whether authorized or not.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

In Error to the District Court of the United States for the Eastern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action at law by John Stojanowski against the Chesapeake & Ohio Railway Company. Judgment for plaintiff for \$4,080.20, and defendant brings error. Affirmed.

See, also, 191 Fed. 720, 112 C. C. A. 310.

Kenneth B. Halstead and Frederick J. Moses, for plaintiff in error.
Louis Boehm, for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The plaintiff brings this action to recover damages for the loss of his right arm occasioned, as he insists, by the negligence of the defendant in throwing him from a moving coal train near Eagle Mountain Station, Va.

The action has been tried twice. On the first trial the jury rendered a verdict of \$5,000 and on the second trial a verdict of \$4,000.

On writ of error to this court the judgment entered upon the first verdict was reversed because of error in excluding the train sheet showing the arrival and departure of trains at Eagle Mountain Station. The question of jurisdiction was directly decided against the defendant upon the authority of *Sleicher v. Pullman Co.* (C. C.) 170 Fed. 365.

[1] Our former decision is reported in 191 Fed. 720, 112 C. C. A. 310.

The questions involved were duly argued and were carefully considered by this court with the result that we found but one error of sufficient gravity to require reversal. We took pains, however, to call the attention of counsel to one piece of evidence, the admission of which we regarded as of doubtful propriety, in order that it might be avoided upon the new trial, viz., the plaintiff's testimony that he was married. It is highly improbable that we should have regarded the admission of this fact as sufficiently prejudicial to warrant a reversal. In short, it sufficiently appears from the opinion that, but for the exclusion of the train sheet, the judgment would have been affirmed. If the court had been of the opinion that the plaintiff had failed to prove a cause of action, it certainly would have so ruled and would not have subjected the parties to the useless expense of a new trial. Upon the main issue the record presents a clear cut question of fact. The plaintiff was born in Poland. At the time of the accident he had been in this country about three weeks and did not speak English. He testified, that on the day in question he boarded a loaded coal car on defendant's road, the train having stopped to take on water at Eagle Mountain Station, Va. He sat down on the car, which was about the eighth from the engine. He saw two men at the engine and a third man with a lantern, who gave a signal with the lantern, and thereafter the train started. This man was dressed in a dark blue or black suit with yellow buttons and wore a cap on which was a plate. After the plaintiff had been on the car between ten and fifteen minutes and the train had attained the usual speed of a coal train, the man who had swung the lantern came to the plaintiff and said "Get out of there." The plaintiff endeavored to hand his passport and workman's identification book to this man but he struck it

from plaintiff's hand. As the plaintiff stooped down to pick up the book the man "grabbed" him by the collar and threw him off the car, after which the plaintiff remembers nothing until he regained consciousness in a West Virginia hospital.

The defendant denies that any such occurrence as this took place. The testimony offered by it is to the effect that the plaintiff and another man were walking along the track when a long freight train, composed of box cars, and possibly a few coal cars also, came along. The plaintiff caught it and "it jerked him under." The witness Lyle says:

"He went to get on. He took his hand and caught hold of the ladder that goes under the car, and the thing jerked him under when he grabbed it; it jerked him under the car. It cut his arm off."

The defendant contends that plaintiff's testimony is so improbable and so contrary to the weight of evidence that the court should have directed a verdict for the defendant.

The plaintiff insists that the case presents a question of fact which was properly submitted to the jury.

In approaching this question we start with the uncontradicted fact that the plaintiff lost his right arm by being run over on the defendant's railroad. It may be conceded that there are many improbabilities in the plaintiff's theory of the accident; but is this not equally true of the defendant's theory?

Here was a train of freight cars with no facilities for boarding except ladders on the sides or ends of the cars, the bottom rung being several feet above the roadbed, running at the rate of ten or twelve miles an hour. Is it probable that a sane man would attempt to get onto such a train? It was clearly for the jury and not for the court to weigh the probabilities and decide between the two theories. The testimony is substantially the same as on the former appeal, and we see no reason to change the opinion then formed that the question was for the jury.

[2] It is argued that there is nothing to show that the trainmen were authorized, in any circumstances, to eject trespassers from the train. It will be observed that the plaintiff did not, indeed he could not, characterize the employment of the man who threw him off. He did not attempt to say whether he was conductor or brakeman. He did show that this man was apparently in a position of authority, directing the movements of the train. In such circumstances the presumption is that he was the duly authorized agent of the defendant and that what he did on the defendant's train was done in the due course of his employment. In the case of *Steamboat Co. v. Brackett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049, which arose in this circuit, a trespasser was assaulted and injured by the members of the defendant's crew on a Hudson river steamboat. The court said:

"It makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment."

See, also, *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Rounds v. D. L. & W. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Girvin v.*

N. Y. Central & Hudson River R. R. Co., 166 N. Y. 289, 59 N. E. 921.

We cannot assent to the proposition that the servant is within the scope of his authority so long as he acts with circumspection and prudence and outside of it the moment he acts improperly or negligently. Such a rule would put an end to all actions based upon the negligence of agents. It would enable a railroad company to say in substance: Our servants and agents represent us so long as they act with discretion, but the moment their negligence causes injury to others, they cease to be our representatives.

It is urged by the defendant that it was prejudicial error not to permit the withdrawal of a juror because of statements made by counsel in the opening address to the jury relating to the plaintiff's poverty and generally helpless condition immediately prior to the accident.

It frequently happens that counsel in opening draw a more vivid picture than is justified by the facts. Such exaggeration generally carries with it its own punishment. The jury notices the discrepancy between the opening and the proof and is quite likely to resent it. In the present case, however, all prejudicial statements of this kind made by plaintiff's counsel either in the opening or summing up were stricken out and the jury were instructed to disregard them. If the verdict had been for an exorbitant amount there might be some ground for the assertion that the jury were influenced by these remarks. The verdict was \$1,000 less than the previous verdict and it must be conceded that \$4,000 is a moderate sum to compensate a young workman, 25 years of age, for the loss of his right arm.

We have examined all of these exceptions as well as the exceptions taken to the refusal of the court to strike out testimony and find none of them well taken.

The judgment is affirmed

In re IMPERIAL FILM EXCHANGE.

(Circuit Court of Appeals, Second Circuit, May 16, 1912.)

No. 42.

1. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—"TRADING" OR "MERCANTILE PURSUIT."

A corporation engaged principally in the business of renting films for moving pictures is not engaged in trading or a mercantile pursuit which renders it subject to adjudication as an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1494).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4477-4478; vol. 8, p. 7053.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank of Mattoon, Ill., v. First Nat. Bank of Mattoon, Ill., 42 C. C. A. 4.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 81*)—CORPORATIONS—SUFFICIENCY OF PETITION.

It is not enough to give a court of bankruptcy jurisdiction to adjudicate a corporation an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1494), to allege that a part of its business is within the statute, but the petition must allege that to be its principal business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. § 81.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of the Imperial Film Exchange, alleged bankrupt. Appeal from an order dismissing an involuntary petition vacating an order appointing a receiver, approving a report of the master, etc. Affirmed.

Waldo & Ball (G. E. Waldo, of counsel), for appellants.

Luce & Davis (Seward Davis, of counsel), for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. [1] From what is shown in the record, outside the pleadings, concerning the business of the alleged bankrupt, it seems clear that its principal business was that of renting films for moving pictures and that it was not a corporation principally in trading or mercantile pursuits within the meaning of the provisions of the bankruptcy act as they existed when the petition was filed.

The Supreme Court has approved the definition of a "trader" as "one who makes it his business to buy merchandise of goods or chattels to sell again for the purpose of making a profit." And the Supreme Court has also said that a "mercantile pursuit" is trading in the larger sense. *Toxaway Hotel Co. v. Smathers*, 216 U. S. 439, 30 Sup. Ct. 263, 54 L. Ed. 558.

It seems too clear for argument that a corporation which leases moving picture films is not engaged in trading as above defined, and, indeed, in several recent decisions this court has held corporations outside the act whose business much more nearly approached trading than that of the alleged bankrupt. See *Re Wentworth Lunch Co.*, 159 Fed. 413, 86 C. C. A. 393, affirmed 217 U. S. 591, 30 Sup. Ct. 694, 54 L. Ed. 895; *Re Kingston Realty Co.*, 160 Fed. 445, 87 C. C. A. 406; *Re Altonwood Park Co.*, 160 Fed. 448, 87 C. C. A. 409.

[2] The only ground upon which the petitioners can possibly stand is that their petition alleged upon its face the necessary jurisdictional facts and that they were not controverted. And, if the petition were sufficient, there would be much foundation for this contention because it appears that the corporation did not deny in its answer the allegations concerning the nature of its business.

The relevant averments of the petition are these:

"That the said Imperial Film Exchange, for the greater portion of six months preceding the date of the filing of this petition, has been engaged in the business of selling and leasing moving pictures, films, machines, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—6

accessories for the exhibition of moving pictures, and has its principal place of business at No. 44 West Twenty-Eighth street, borough of Manhattan, city of New York. That the said Imperial Film Exchange is not a wage earner, nor person engaged chiefly in farming or the tillage of the soil, and is not a national bank or bank incorporated under the state or territorial laws, and your petitioners further allege that the said Imperial Film Exchange owes debts to the amount of \$1,000 and over."

Assuming that the business of selling moving picture films, machines, and accessories is within the act, the difficulty is that it is not alleged that the principal business of the corporation was such selling. It was not enough to allege that a part of the business of the corporation was within the statute. It was necessary to allege what its principal business was. As said by the Supreme Court in *Toxaway Hotel Co. v. Smathers*, supra:

"It may have been engaged in doing two distinct kinds of business. But unless this corporation was 'engaged principally' in mercantile pursuits it was not amenable to the act."

Taking the petition as it stands, there is nothing to negative what appears to have been the fact that the principal business of the corporation was leasing picture films, although occasional sales were made. As already stated, there is no allegation that the corporation was "engaged principally" in a business which brought it within the bankruptcy act.

For these reasons, it must be held that the corporation in question was not subject to be adjudicated a bankrupt, and that the District Court was without jurisdiction of the proceedings further than to determine whether the corporation came within the act. Additional jurisdiction could not be conferred upon it by any waiver or by any attempt of the parties to try immaterial issues.

The order of the District Court, in so far as it dismisses the petition and vacates the order appointing a receiver, is affirmed. But such order in so far as it approves and confirms the findings and report of the special master is reversed; the District Court having no jurisdiction to pass upon the subjects involved therein.

Costs of this court are awarded to the appellee corporation. The corporation should also recover costs in the District Court, but should not recover such costs as grew out of its failure to raise and litigate the jurisdictional question.

ASSETS COLLECTING CO., Inc., v. BARNES-KING DEVELOPMENT CO., Inc.

(Circuit Court of Appeals, Second Circuit, June 18, 1912.)

No. 245.

FRAUD (§ 36*)—FALSE REPRESENTATIONS—LIABILITY.

The complaint, in an action against a corporation to recover damages for false representations made by defendant's agent as to the value of its property, by which plaintiff was induced to buy stock of defendant and pay par therefor when it was in fact of little or no value, is not de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

demurrable on the ground that a recovery would enable plaintiff to acquire the stock for less than its full par value in violation of the rights of creditors of defendant and its other stockholders, where it does not appear from such complaint that plaintiff was an original subscriber for the stock, or that it had not been once fully paid for, or that there were any creditors or other stockholders.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 31, 32; Dec. Dig. § 36.*]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by the Assets Collecting Company, Incorporated, against the Barnes-King Development Company. Judgment for defendant, and plaintiff brings error. Reversed.

This cause comes here upon appeal from a judgment dismissing the complaint of the plaintiff in error who was plaintiff below.

Plaintiff is the assignee of Arthur P. Heinze, and the action is brought to recover for false representations as to the value of defendant's mining property. These statements it is averred were made by one Fischer, an agent of defendant, knowing them to be false; and in reliance upon them Heinze bought 25,000 shares of defendant's stock, paying to the agents of the defendant, for said defendant, the full par price of \$5 per share. It is further averred that the stock was then worthless and that at the time of bringing suit it was worth \$97,000 less than Heinze paid for it. For this sum judgment is asked against defendant.

Richard S. Harvey (Ferdinand E. M. Bullowa and Emilie M. Bullowa, of counsel), for plaintiff in error.

Chadbourne & Shores (A. J. Shores, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Issue was joined, the cause came on for trial before a jury, and some testimony was put in by plaintiff. Defendant's counsel then contended that the complaint was demurrable and asked the court to hear him on that proposition. To this the court agreed and, after hearing argument, sustained the demurrer and dismissed the complaint. In consequence the record in this court contains none of the testimony. The answer is printed, but, since the cause was disposed of on demurrer to the complaint, its averments are not to be considered.

The theory upon which the complaint was dismissed is apparently this: A subscriber to the stock of a corporation assumes certain obligations. One of these is that full value shall be paid for the stock so subscribed for, either at the outset or from time to time, as called for. The creditors of the company are entitled to have full payment made for all stock subscribed, if it be necessary to secure their claims. The other stockholders are entitled to have all stockholders treated alike, so that full payment shall not be required from some and part payment only from others. It is further contended that, when a subscriber shall have paid for his stock in full, he may not thereafter, on some theory that he was deceived as to its value by false reports of the company, recover back part of what he has paid and still retain the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stock. To do so would be in effect to give him his stock as full paid, when in reality he had only paid for it in part.

The difficulty in this case arises from uncertainty as to the facts to which it is sought to apply this theory. It is to be regretted that the plaintiff was not allowed to complete his proof, so that it could be seen whether the situation was as indicated above, or was materially different.

It not infrequently happens that the whole or a large part of the stock of a corporation is issued for property. When this is done, honestly, in good faith and on a fair valuation, the stock thus issued is full-paid stock, thereafter nonassessable, except in states where there is some provision for additional assessments to pay debts. It also often happens that the persons who have thus subscribed for stock and have paid for the same by giving property for it, instead of cash, will donate to the corporation part of their full-paid stock, for it to sell and thus raise funds to conduct its business, hoping that thereby the value of what stock they do not thus contribute to the treasury will be enhanced. The stock which the corporation has thus received it may of course sell for what price it chooses, since full payment for it has once been made. If it can be shown that, in selling such stock, the corporation through its agents knowingly made false representations of material facts, we know of no reason why the deceived purchaser may not maintain an action against the corporation to recover for the fraud practiced on him. The authorities on the briefs deal not with the purchaser at a sale of such stock, once lawfully issued, but with subscribers to an original issue of stock.

Turning now to the complaint, which is the only record before us, we find nothing to show whether or not there are any creditors; for aught that appears defendant, save possibly for plaintiff's claim, may not owe a dollar to any one. For aught that appears, Heinze or his assignee and Fischer the individual who, it is alleged, made the false representations as defendant's agent, may be the only stockholders. As to the purchase the complaint alleges that, relying upon the false statements and induced thereby, Heinze did in December, 1906, *purchase* 25,000 shares of the capital stock and *pay therefor to the agents, promoters, and syndicate managers of the company, for the defendant* above named, \$125,000. This averment is entirely consistent with a sale by the company of stock once fully paid for and afterwards donated it to sell on the open market. We cannot, upon such a complaint, find that Heinze was subscriber for an original issue of stock, when there is no testimony to show it, and plaintiff's counsel in his brief insists that such is not the fact. The complaint is not demurrable upon the ground that it does not set up facts sufficient to constitute a cause of action.

Judgment reversed.

NGON KAY et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 20, 1912.)

No. 223.

ALIENS (§ 32*)—PROCEEDINGS FOR DEPORTATION OF CHINESE—EVIDENCE CONSIDERED.

The finding of a commissioner and District Court that evidence was insufficient to sustain the claim of Chinese persons that they were born in the United States affirmed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.*

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Northern District of New York.

Proceedings for deportation of Ngon Kay, alias King Kee, and Yik Jin, alias Yik Chung. From an order affirming the decision of the United States Commissioner deporting defendants, they appeal. Affirmed.

R. M. Moore (B. W. Berry, on the brief), for appellants.

George B. Curtiss, U. S. Atty. (Harry E. Owen, Asst. U. S. Atty., of counsel).

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The contention of the appellants was that they were born in San Francisco in 1884 and 1886, respectively, and had ever since lived in this country—in California, Connecticut, and New York. One witness only was called, Wong Gett, who testified that he was their uncle; that he lived in San Francisco when they were born and for some years afterwards; that he came to New York bringing the boys with him, their father having died and their mother having returned to China. He stated in detail the various places where they had lived, giving dates, etc., and identified the defendants as being his nephews. Although the defendants were, as it is asserted, intelligent and able to speak English, they were not called to corroborate their uncle's statements as to their places of residence after they were sufficiently mature to preserve some memory of them. Nevertheless the testimony of the uncle given at the first hearing made out a prima facie case. At an adjourned hearing, however, he was confronted with a sworn statement which he had made some years before and which materially contradicted his testimony as to his own movements. In this earlier deposition he stated that he first came to the United States March 14, 1880, landing at San Francisco where he remained only six weeks, then going to Boston and ever since living in Massachusetts, Rhode Island, Connecticut, and New York. In explanation of these discrepancies he testified that during some clan warfare in San Francisco there had been a murder committed, with which he had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nothing to do; that he was apprehensive he might get in trouble with members of some hostile clan if it were known that he was living in San Francisco at the time of the murder; and that for that reason he stated in his earlier affidavit that he remained in San Francisco only 6 weeks after arrival, instead of 10 years. He thus admitted his willingness to make a false statement under oath, if strong personal interest prompted him so to do.

The commissioner who saw him and heard his testimony reached the conclusion upon such testimony, wholly uncorroborated, that the defendants' birth in San Francisco was not proved, and there is nothing which would warrant this court in overruling the finding of the commissioner and the District Court on that vital issue in the case.

Appellants further contend that the commissioner erred in not granting an application to allow them to put in further testimony, which application was made before any decision by the commissioner. The record is perhaps not as full as it might be, but as we understand it the narrative of events is as follows:

The first hearing was had on November 5, 1910. It then appeared that one Wong Lon, uncle of the witness and great-uncle of defendants, with whom they at one time resided, was living at Hartford, Conn.

The hearing was then adjourned to December 16, 1910, when the witness was confronted with the earlier statement above referred to. At the close of this hearing the case was submitted. Immediately thereafter—apparently within a day or so—it occurred to counsel that this great-uncle Wong Lon could probably corroborate the claim of the defendants that they were born within the United States. Thereupon counsel telegraphed to the commissioner to withhold decision in order to allow him to submit further evidence. Subsequently on January 7, 1911, counsel made an affidavit that Wong Lon was a material witness who would testify that he had known the defendants since their birth and was well acquainted with the place of their birth. He served a copy of this affidavit on the United States attorney with notice of a motion, to be made before the commissioner on January 11, 1911, at 2 p. m., for leave to submit the evidence of Wong Lon. Manifestly the commissioner gave abundant time for defendants to make this application, because as the record shows the case was not decided until January 13, 1911.

Exactly what took place on January 11th the record does not disclose. Whether counsel appeared in support of his motion, or whether he submitted it upon the notice and his own affidavit of what he had been told the witness would swear to does not appear. It may be assumed, since no such affidavit is found in the record, that the application was not fortified by any sworn statement of the proposed witness, although he lived in Hartford and presumably was easily accessible during the three weeks which had elapsed after counsel concluded that he wished to call him as a witness. All that we find is that on January 13th, "on reading and filing the affidavit (of counsel) and notice of motion for an order reopening the case," the motion was denied.

The inference is that counsel had been given full opportunity to present whatever he could offer in support of the motion.

Assuming the facts to be as set forth above, we are not satisfied that the commissioner erred in denying the motion,

The judgment is affirmed.

A. B. DICK CO. v. HENRY et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1912. On Rehearing,
May 20, 1912.)

No. 155.

COURTS (§ 384*)—CIRCUIT COURT OF APPEALS—DETERMINATION OF CAUSE.

Where facts have been stated by the Circuit Court of Appeals to the Supreme Court as a basis for a question of law certified for decision, it is to be implied that the court has found such facts, and, after the instruction of the Supreme Court has been received, they will not be re-examined on the same record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1021; Dec. Dig. § 384.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the A. B. Dick Company against Sidney Henry and Margaret Henry. On motion by defendant, appellant, for rehearing. Denied.

See, also, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645.

Hans v. Briesen, for Margaret Henry.

Before COXE, WARD and NOYES, Circuit Judges.

PER CURIAM. The mandate from the Supreme Court has not yet been received by the clerk of this court. Until it is filed in this court, we cannot make any order affecting the merits of the case.

A motion for an additional hearing has been submitted informally but without stating with sufficient definiteness what the new points are upon which a hearing is desired.

If the surviving defendant desires to do so, in advance of receiving the mandate, she may submit a printed brief stating definitely what the new points are upon which she desires to be heard further and a short statement of the argument thereon; the brief to be filed with the clerk of this court on or before May 15, 1912.

On Rehearing.

COXE, Circuit Judge. We have carefully considered the brief presented May 15th in support of the motion for a rehearing and have re-examined the record and the briefs filed at the original hearing. If the court had any doubt as to the other questions involved in the suit, it would not have certified the question of infringement to the Supreme Court. This would be implied in any case, but the certificate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sent to the Supreme Court expressly states that after hearing the arguments, "this court agreed as to all the questions except one only, upon which it desires the instruction of the Supreme Court for the proper decision."

The question being answered to the effect that the selling of the ink to Miss Skon constituted an infringement, there is nothing for this court to do but to affirm the decree in favor of the complainant. The death of the defendant, Sidney Henry, does not in any way affect the question now before the court. There is no doubt as to the liability of the defendant, Margaret Henry. The bill alleges that the "defendants, Sidney Henry and Margaret Henry, individually and as co-partners, trading as the Lineograph Company," sold ink in violation of the complainant's rights. The allegation that they were in partnership is not denied in the answer. Indeed, the defendant, Sidney Henry, testified as follows:

"X-Q. Who is associated with you in the business which you are doing now, and have been doing for some years past? A. My wife.

"X-Q. Any one else have any interest in that business? A. No one.

"X-Q. Are you and your wife in partnership? A. I am her manager.

"X-Q. You mean that she is the proprietor of the business and that you work for her? A. She owns it."

There was no doubt in the mind of the court at the time of the certification, and there is no doubt to-day, that the defendants were acting together as partners, and that the selling of ink was in the line of their business. The defendants have had the advantage, not usually accorded to litigants in patent causes, of a hearing upon the principal question involved, not only in the Circuit Court and in this court, but also in the Supreme Court of the United States.

In the case of *The Folmina*, 173 Fed. 615, 97 C. C. A. 557, this court said:

"That which we do now hold is that where facts have been found and stated to the Supreme Court as the basis for asking its instructions, this court will not, after those instructions have been obtained, re-examine upon the identical evidence already considered, controverted questions of fact which have been advisedly determined and, applying this rule to the present case, this court must decline to accede to the contention of the appellee that it reconsider the question."

We see no reason for subjecting the parties to the expense of a rehearing when, in our opinion, every question involved has been fully presented and decided in favor of the complainant.

The motion for a rehearing is denied.

SHELLEY v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 21, 1912.)

No. 246.

INTERNAL REVENUE (§ 11*)—"MANUFACTURE OF SMOKING OPIUM."

The mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same, is not a "manufacture of opium for smoking purposes" within the meaning of Internal Revenue Act Oct.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1, 1890, c. 1244, §§ 36, 37, 26 Stat. 620 (U. S. Comp. St. 1901, p. 2226), imposing a tax on smoking opium and regulating the business of its manufacture.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 29, 36-38; Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. 5, pp. 4344-4346; vol. 8, p. 7716.]

Noyes, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Criminal prosecution by the United States against Alfred Shelley. From a judgment of conviction, defendant brings error. Reversed.

This cause comes here upon appeal from a judgment of conviction of plaintiff in error upon two indictments (which were consolidated) charging him with unlawfully manufacturing opium for smoking purposes, contrary to the provisions of sections 36 and 37 of the Act of October 1, 1890, c. 1244, 26 Stat. 620, 621 (U. S. Comp. St. 1901, pp. 2226, 2227).

R. M. Moore, for plaintiff in error.

Henry A. Wise, U. S. Atty. (John Neville Boyle, Asst. U. S. Atty., on the brief), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Smoking opium is produced from crude opium by a process which we held in *Marks v. United States*, 196 Fed. 476 (decided April 8, 1912), constituted a manufacture within the meaning of the statute. It appears that, when smoking opium has been produced, it may be smoked more than once. That is to say, the residuum left after a first smoking may be simply heated and smoked again. If to this residuum (known as *yen shee*) some additional smoking opium is added, each time it is reheated the process of resmoking may be continued longer. We are of the opinion that the mere mixing of smoking opium with the residue of opium that has been smoked and heating the same is not a "manufacture of opium for smoking purposes" within the meaning of the statute. The manufacture which the statute contemplates is complete when from the crude opium there has been produced the smoking opium, with which alone, as defendant contended, he operated, in its unsmoked and smoked condition.

From an examination of the record it would seem that defendant was correct in contending that he used no crude opium, although occasionally a witness in answering some question uses the word "opium," without qualifying it as "crude" or "smoking." But if there was so much doubt on this point that it should have been sent to the jury to decide the question, then we think there was error in the refusal to charge that, if the jury found that defendant only mixed smoking opium with the residue which remains after smoking, his act was not a manufacture of opium for smoking purposes within the meaning of the statute.

The judgment is reversed.

NOYES, Circuit Judge, dissents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MOORE CARVING MACH. CO. v. CLEMONS MACH. CO.

(Circuit Court of Appeals, Second Circuit. July 2, 1912.)

No. 247.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—POLISHING MACHINE.

The Gale patent, No. 685,328, for a rubbing and polishing machine having a polishing belt and a reciprocating head pressing the belt to its work, was not anticipated and discloses patentable invention. Claims 1 and 3 also *held* infringed by a machine differing only in the means used for reciprocating the head.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—POLISHING MACHINE.

The Yarnell patent, No. 743,608, for a polishing machine, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Western District of New York.

Suit in equity by the Moore Carving Machine Company against the Clemons Machine Company for infringement of two patents. Decree for complainant on one patent and for defendant on the other, and both parties appeal. Reversed on complainant's appeal, and affirmed on defendant's.

For opinion below, see 192 Fed. 122.

This cause comes here upon cross-appeals from a decree of the District Court, Western District of New York. Complainant filed the usual bill in equity for infringement, declaring upon two patents. The first is No. 685,328 for a rubbing and polishing machine, issued October 29, 1901, to H. P. Gale and subsequently assigned to complainant. The second is No. 743,608 for a rubbing and polishing machine, issued November 10, 1903, to C. T. Yarnell, assignor to complainant. The district judge held the first patent valid, but found that defendants did not infringe the claims declared upon (1 and 3). He further found that the second patent was valid and that defendant's device infringed its seventh claim, which is the only one in controversy. Each side appealed from so much of the decree as was adverse.

Paul & Paul (A. C. Paul, of counsel), for complainant.

J. William Ellis, for defendant.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] The Gale patent relates to polishing machines in which the work is done by a polishing belt, whereby the belt can be readily adapted to work on the surface of the material which it is desired to polish or abrade. Some of the objects of the improvement are stated to be to provide a head to press a running polishing belt upon the surface to be polished; to balance the head on the machine so that its pressure can be instantly controlled by lever; to provide means whereby the head may be given a reciprocating motion lengthwise of the belt. Other stated objects of improvement are unimportant in the case at bar and need not be enumerated. The complainant's machine is arranged as follows: Wheels are arranged at opposite ends of the frame over which runs the polishing belt, usually a strong web carry-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the polishing or abrading material on its outer surface. One of these wheels is power driven, so that the lower stretch of the polishing belt is carried continuously in the same direction, and the wheels are so far apart that the upper and lower stretches of the belt would normally run horizontally. The article to be polished is placed upon a carriage which is adjustable so as to bring the surface to be polished into contact with the polishing belt; when once the surface is brought to a proper position, the carriage ceases to move, and the article remains where it has been placed until it is moved laterally by hand so as to bring another segment of its surface into contact with the belt. In order to press the belt into contact with the article to be polished, a so-called "head" is located within the space between the upper and lower stretches of the belt. It is connected to a guide bar on which it slides, so as to have a reciprocating motion, in the direction of the running belt or reverse thereto. The patentee states that, by having a curved guide bar, a curved reciprocating motion may be imparted to the head if desired. This head is also (through the guide bar) connected with a rod, which is so arranged that by means of a lever the rod, bar, and head may be depressed thus forcing so much of the belt as the head contacts with below its normal running line. This increases the friction between the surface and the belt; the amount of pressure may be regulated by the operating lever. Apparently this is a desirable feature which is accomplished by the extent to which the belt is pinched between the top of the work piece supported on the carriage and the reciprocating head on the other side of the belt. The claims in controversy are:

"1. In a rubbing and polishing machine, a rubbing or abrading belt suitably mounted for running the same, a reciprocative head having means for pressing said belt to its work."

"3. In a rubbing and sandpapering machine, an abrading or polishing belt having suitably-mounted pulleys for running the same, a head reciprocatively mounted within said belt to work from the center out each way pressing said belt to its work."

As thus stated the combination of old parts is seen to be a simple one, but it is novel, so far as the record discloses. A careful examination of the prior art shows that complainant's counsel is justified in making the statement, found in his brief, that:

"The Gale patent is absolutely the first in the art to provide a sanding and polishing machine having a rubbing or abrading belt with a reciprocating head arranged within the belt, and means pressing the head against the back side of the belt and thereby pressing the belt to the work."

Reciprocation of the head seems to be a desirable feature; irrespective of the expert's comments upon it, the Patent Office found in it sufficient to induce the issue of the patent, and defendant employs this feature, although the use of a nonreciprocating head would at once put his device outside of the scope of the claims.

In defendant's machine we find the polishing belt running over pulleys one power driven, always in the same direction; the pulleys are so far apart that normally the lower stretch of the belt would run on a horizontal plane. Located within the belt is a head, which

operates to press down that portion of the lower stretch with which it contacts so as to bring it into close frictional contact with the surface to be polished. This head reciprocates by sliding on a guidebar, working outward from the center each way pressing the belt to its work. The guidebar of defendant is not connected with a rod arranged to be operated vertically by means of a lever. The guidebar is fixed having no vertical motion. In order, however, to secure the relative motion of head and carriage by means of which the belt is pinched between head and working surface, the carriage is arranged so that it may, by means of a lever, be raised or lowered, thus increasing or decreasing pressure at the working surface, precisely as it is increased or decreased in the device of the patent. This reversal of motion between two parts, one of which remains fixed while the other advances or recedes, is a well-recognized form of equivalency and will not avoid infringement unless there is something in the record which requires the claims to be so narrowly construed that even this slight change will be sufficient to take a device, in other respects identical, out of the scope of the claim.

We do not find anything in the record which constrains to so narrow a construction. As originally filed, claims 1 and 3 called merely for "a head" to press the belt to its work. They were rejected and three prior patents were cited: Huseby, No. 637,121, November 14, 1899; Totman, No. 348,177, August 24, 1886; Morris, No. 29,293, July 24, 1860. In each of these there is a head located within the belt. In Huseby this head is spring-pressed downward; the pressure of the springs may be varied by turning nuts, and when once so regulated remains constant until the nuts are again turned; there is no regulation of pressure while the machine is working by means of a head movable vertically by means of a lever. In Totman there is a head within the belt, which has such a vertical movement as will adjust it to variations in the position of the surface being operated upon, such as may be caused by differences in the thickness of panel, but has no means of regulating pressure of the head at the will of the operator while the machine is running. In Morris an elastic roller is located within the polishing belt and is provided with means for raising and lowering it from or towards the lower stretch of the belt. But neither in Morris nor in the other two patents is there any reciprocating head. In consequence, as soon as Gale modified his claims by limiting them to a reciprocating head, his patent was issued.

Two other patents are relied upon by defendant. In Hess No. 412,616 the patentee provides a hand implement, entirely disconnected from any machine which is operated by hand. The operator takes this implement and places it within the loop of a belt, and then by grasping the two handles he uses it as a means for holding the abrasive surface of the belt against the work piece. There is nothing in this which calls for any modification of the claims of the patent in suit. The only remaining patent to be considered is Clark No. 570,866. The machine shown in this patent provides a pair of tongs in which a tube, such as a portion of a bicycle frame, may be gripped and held without being rotated. A polishing belt is wrapped partially around the tube

thus held by the tongs, and as said belt is driven the guide pulleys, by which the belt is held against the tube, are moved by oscillating the plate upon which they are mounted, so that the position of the belt is changed and it is caused to come in contact with every portion of the stationary tube which is being polished. The guide pulleys operate against the inner side of the polishing belt, and by thus pulling against it they cause another part of the belt to press against the work. But we cannot concur with the District Judge in the conclusion that the Clark patent requires a construction of the patent in suit which would confine it to a device where there is a "guide bar on which the head travels vertically to press the belt to the material operated upon." The Clark patent has no head which presses the belt to its work, pinching the belt between the head and the work; nor is there any reciprocation of the head. The belt no doubt yields somewhat when the work-piece is pressed against it as did the spring-pressed head in Huseby; but there is no relative movement between the holder for the work-piece and the oscillating plate which carries the guide pulleys. Certainly if Clark's was a junior patent, it could on no reasonable theory be held to infringe the Gale device or that of defendant. Clark's device may very well necessitate a construction of claims 1 and 3 which will restrict them to a machine which operates by pinching the polishing belt between the head and the working face, but it is in precisely that way that defendant's device operates. We are of the opinion that such device infringes claims 1 and 3.

[2] In the Gale patent the reciprocating head may be set to have a predetermined length of throw, but that length cannot be varied during operation; to do so the machine must be stopped and readjustment effected. It is desirable to have the head adjustable during operation. Thus, if a round table-top is being polished, a short throw only is required when work begins at the side of the table-top; a longer throw is required as the polishing belt reaches the center, and thereafter the length of throw may be again reduced. Yarnell improved the Gale machine by so arranging the head and connected parts that the throw, or stroke, of the head could be regulated by the workman while the machine was running and doing work. The seventh claim of his patent reads as follows:

"7. The combination in a rubbing and polishing machine, with a polishing belt, of a reciprocating head arranged to engage said belt and press it to its work, suitable mechanism for reciprocating said head and means for regulating the throw of the head without stopping the machine substantially as described."

Yarnell was the first to adopt such means in machines of the type under consideration. We concur with Judge Hazel in the conclusion that this claim is valid and is infringed by the device of defendant. It seems unnecessary to add anything to his discussion of the question.

The decree is reversed, with costs of this appeal to complainant, and cause remanded, with instructions to decree for complainant in conformity with the views expressed in this opinion, with costs.

SUNDH ELECTRIC CO. v. INTERBOROUGH RAPID TRANSIT CO.

(Circuit Court of Appeals, Second Circuit. July 8, 1912.)

No. 201.

1. PATENTS (§ 127*)—VALIDITY—PRIOR PATENT OR PUBLICATION—PRIOR INVENTION.

A later patent was not in the prior art, so as to invalidate a patent in suit as a prior patent or publication, although it was granted on an earlier application; but it may be proved by competent evidence that the later patentee was the original and first inventor by being the first to both conceive the invention and reduce it to practice, and such prior invention may be shown by his prior application, where there is no evidence to carry the invention of either patentee back of the date of his application, provided the invention of the patent in suit and of such application is the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 179, 180; Dec. Dig. § 127.*]

2. PATENTS (§ 328*)—VALIDITY—PRIOR INVENTION—ELECTRIC CONTROLLER.

The Sundh patent, No. 733,564, for an electric controller, *held* void on the ground that the patentee was not the original and first inventor of the device patented.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Sundh Electric Company against the Interborough Rapid Transit Company. Decree for complainant, and defendant appeals. Reversed.

This cause comes here upon appeal from a decree granting injunction and accounting in a suit in equity for infringement of a patent. The patent is No. 733,564 granted July 14, 1903, to August Sundh, complainant's assignor, for an electric controller. The claims with which this appeal is concerned are:

"1. An electro magnet, an armature therefor, a shaft, means for rotating said shaft controlled by said armature, a circuit-closing lever, a contact-terminal in the path of said lever, and a cam on said shaft constructed to move said lever to close circuit at said terminal.

"2. An electro magnet, an armature therefor, a shaft, means for rotating said shaft controlled by said armature, a circuit-closing lever, a contact-terminal in the path of said lever, and a cam on said shaft constructed to move said lever to close circuit at said terminal and to retain said lever in said closed position when the rotation of said shaft is arrested.

"3. An electro magnet, an armature therefor, a shaft, means for rotating said shaft controlled by said armature, a plurality of circuit-closing levers, a plurality of contact-terminals in the path of said levers, and cams on said shaft constructed to move said levers to close circuit at said terminals; the aforesaid parts being timed and constructed to operate said levers to close said circuits successively.

"17. The combination with the solenoid 13, and its movable core, of the rotary shaft 30, gearing between said core and shaft for causing rotation of said shaft by said core, pivoted circuit-closing levers 48, 49, 50 and cams 54, 55, 56 on said shaft; the said cams being constructed successively to operate said circuit-closing levers 48, 49, 50.

"18. The combination with the solenoid and its movable core, of the rotary shaft 30, gearing between said core and shaft for causing rotation of said shaft by said core pivoted levers 48, 49, 50 and 62, circuit terminals in the path of said levers and cams 54, 55, 56 and 74 on said shaft; the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said levers and cams being constructed and timed so that said levers 54, 55, and 56 are successively actuated by said cams to close circuit and the lever 62 to open circuit."

Arthur B. Seibold and W. Clyde Jones, for appellant.
William B. Whitney, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). An electric controller is a device for regulating the amount of current delivered to a machine which such current operates. When, by closing a circuit the current is turned on, it is desirable that its entire force should not become operative at once at the working point. Therefore in the circuit there are placed one or more resistance coils, which reduce such force until they are cut out by the closing or opening of other circuits, usually in succession. A familiar instance is the hand-operated controller on a trolley car where the driver moves a lever over successive contact-points, thereby gradually increasing or reducing current. It is often desirable to have the controller automatic. Thus in the case of a water-tank on the roof of a building which is fed by an electrically operated pump, there will be a device which will close circuit and set the pump going when the water sinks to a determined level, and which will open circuit and stop the pump when the water reaches another determined level. The current thus automatically turned on or off is regulated by a controller, also automatically operated at the proper times. The various parts which are combined to produce these results, independent circuits, solenoids, contact-terminals, shafts, gearing, cams, levers and what not are old and well known in the art.

Judge Hazel quoted from a description of the patented device a sufficiently full specification of its parts and their operation, which reads as follows:

"Briefly stated, the throw of a hand switch closes the circuit through the upper winding of a double solenoid, which, when energized, draws up its core and closes the main switch in the motor circuit and thereby starts the motor, with all the resistance in the circuit. At the same time the lower winding of the solenoid is energized, and, drawing up its core against the retarding action of a sash-pot, by means of a rack cut along the back of the core and meshing with a pinion on a cam-shaft, causes the rotation of the shaft, whose cams act successively on the arms of a series of pivoted lever switches, making 'butt' contact with a series of fixed contact-terminals, to close these switches one after another, and thereby short-circuits and cuts out step by step the sections of resistance (and with the last section the series field winding of the motor), and gradually brings the motor from rest up to a condition of full speed. Finally, the last cam on the shaft to operate throws open a normally closed lever switch in the circuit of the lower solenoid winding and cuts out that winding; but its core is held in its elevated position, at the top of its upward movement, by the upper solenoid winding, and in turn holds the camshaft so that its cam will maintain the switches in position, the resistance switches closed and the solenoid circuit switch is open. When it is desired to stop the motor the hand-switch is opened; whereupon the core of the lower solenoid winding drops by gravity, rotating the cam-shaft back to its initial position and allowing a spring to close the solenoid circuit switch and the resistance switches to fall back to

open position by gravity, and then the core of the upper solenoid winding drops."

The conclusion we have reached upon the whole case makes it unnecessary for us to discuss the details of the structure. We may state, however, that besides the particular combination or combinations covered by the claims above cited, the patentee also showed the same combined with a "magnetic snap action," so-called in the briefs, which prevented sparking between levers and circuit-terminals, which snap-action is not covered by these claims, is not employed by defendant and need not be discussed. It is unnecessary also to review the prior art. Judge Hazel's opinion may be consulted for a sufficiently full résumé of its disclosures. He held that none of the prior patents were anticipatory, in which conclusion we concur. He stated the crucial question in the case as follows:

"Did it involve invention at the date of the Sundh application to gear the electro magnetic engine in the form of a solenoid, having a core and dash-pot, to the cam shaft of the lever to make butt contacts with the co-operating fixed contact (circuit) terminals in such a way as to start the motor and move the levers successively?"

In his conclusion that this question should be answered in the affirmative and in the reasoning by which he reached such conclusion we also concur.

[1] Among the patents introduced by defendant was one to Ihlder, No. 742,031, which, as was said by the Circuit Court, "so closely resembles the Sundh patent in suit that the supposition arises that both Ihlder and Sundh were engaged at the same time in solving the problem and each invention performs substantially the same function." If either of these devices were in the prior art, there would certainly be no invention in devising the other. It was held, however, that this patent was not in the prior art. Such holding was correct. The chronological sequence of events is as follows:

June 10, 1902, Ihlder application filed.

March 16, 1903, Sundh application filed.

July 14, 1903, Sundh patent issued.

October 20, 1903, Ihlder patent issued.

No testimony carried the date of either invention back of the date of filing application. The nature of the defense of prior art is succinctly expressed in section 4920, U. S. Revised Statutes, subdivision third:

"That it [the device of the patent] has been patented or described in some printed publication prior to his [the patentee's] invention or discovery thereof, or more than two years prior to his application for a patent therefor."

Ihlder's device was certainly not patented before Sundh's invention, which was completed by reduction to practice on the day the latter filed his application. Nor was Ihlder's application, although it completed his invention by reducing it to practice on the day such application was filed, a "publication" within the meaning of the statute, because it remained unpublished in the secret records of the Patent Office until after Sundh's application had been filed. The Ihlder patent, therefore, was no part of the prior art.

It is contended, however, that the court erred in not sustaining a separate defense based upon the Ihlder patent, viz., the defense enumerated in the fourth subdivision of section 4920, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 3395):

"That [the patentee] was not the original and first inventor or discoverer of any material and substantial part of the thing invented."

This is a separate and distinct defense from the third one, and while evidence is not admissible to carry back the date of a later patent, by showing that application for it was filed earlier, the fact that the person who took out such later patent was himself the original and first inventor of the invention in controversy earlier than the plaintiff may be proved, as any other fact is, by competent proof. *Barnes Automatic Sprinkler Company v. Walworth Mfg. Company*, 60 Fed. 605, 9 C. C. A. 154; *Diamond Drill Machine Company v. Kelly Brothers (C. C.)* 120 Fed. 295. The various authorities cited in Judge Hazel's opinion and on the brief of appellee are concerned wholly with the other defense, prior patenting or publication.

[2] That Ihlder invented the device of his patent as early as June 10, 1902, the date when his application was filed, is established by the record. Invention involves two things—the mental conception and the application of that conception to the production of a practical result. So long as there is merely the mental conception and such memoranda of it as are intelligible merely to the inventor, his invention is not complete. When, however, he actually constructs the device he has planned, either full size or in model, and the structure is found to work as expected, he has reduced the invention to practice. It is then complete. It is further settled by authority that, even though he may not build a machine or a model, he reduces his invention to practice when he files with the Patent Office an application containing specifications so careful, exact, and complete that a man skilled in the art can, by following their instructions, produce a machine which will meet the description and produce the results which the application asserts it will. *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Porter v. Loudon*, 23 Wash. Law Rep. 689.

In order to maintain this fourth defense it must, of course, appear that the invention of the patent in suit and the invention of the prior application are the same. Thus in *Diamond Drill Company v. Kelly*, supra, the patent in suit dealt with a beltfastener, the prior application with a bed-spring. That court held that even though it should be found that these were analogous arts, and that the presence of either in a prior field of art left no room for invention in the production of the other, it could not be said that both had invented the same thing. But it does not follow that the two devices must be Chinese copies of each other to warrant the application of this particular defense.

It must be remembered that the specifications include a magnetic snap-action which is not present in defendant's structure. In order to maintain this suit complainant must establish the proposition that besides disclosing the invention of the controller described, with the snap-action, he also disclosed the invention of the controller without

the snap-action. This contention we think he has made out, and in determining whether he or Ihlder was the original and first inventor the invention to be considered is the one without the snap-action. Ihlder has no snap-action.

Moreover, minuter details, which are susceptible of variation without affecting the novel combination of Sundh, are not to be considered as essential (in the particular form shown in the specifications and drawings) to his invention. If they were, there would be no infringement, because defendant's device is not a Chinese copy of the device shown in the specifications and drawings of the Sundh patent.

Comparing the devices of Sundh and Ihlder we find in both a solenoid engine with its core and dash-pot combined with a switching mechanism comprising a cam plate having cams which co-operate with butt contact switch levers. The cams are moved in Ihlder by reason of the circumstance that they project from a cam-plate which is itself connected to a continuation of the core of the solenoid; in Sundh the cams are moved because they are attached to a rotating shaft which itself gears in a ratchet on the core and rotates as the core ascends. The cams of both are so arranged as to their bearing surfaces as to produce successive movements of the switch levers. In Ihlder this successive movement is of pairs; in Sundh it is of single parts—an immaterial difference. It is not necessary to go into details of the mechanism. The substantial invention of each patent is the invention set forth in the claims when such claims are construed in the light of the specifications. We may best compare the third claims of both patents.

Sundh.

"3. An electro magnet, an armature therefor, a shaft, means for rotating said shaft controlled by said armature, a plurality of circuit-closing levers, a plurality of contact-terminals in the path of said levers, and cams on said shaft constructed to move said levers to close circuit at said terminals; the aforesaid parts being timed and constructed to operate said levers to close said circuits successively."

Ihlder.

"3. In a switch, the combination of a plurality of contacts, a plurality of contact arms provided with contacts co-operating therewith, and means for successively actuating said contact-arms, said means consisting of a movable member provided with bearing-surfaces of varying length upon which the contact-arms are adapted to bear, and electro magnetic means for actuating said member, for substantially the purposes set forth."

Each of these claims reads with great precision upon the devices of both patents. Since both were pending in the Patent Office at the same time, interference should have been declared. Complainant urges the nonaction of the Patent Office as an argument in favor of the proposition that it must have been held by the officials that there were patentable differences between the two structures which made interference unnecessary. There seems to us to be such identity that we can account for the failure to declare interference only on the theory of oversight. If the claims of the Sundh patent are to be construed as covering an invention so broad as to include defendant's device—and we think, in view of the prior act, that they may be so construed—then the invention they cover was reduced to practice by Ihlder's application of June 10, 1902, and complainant cannot maintain

this suit, because it has been shown that he was not the original and first inventor of that invention.

The decree is reversed, with costs, and cause remanded, with instructions to dismiss the bill, with costs.

AMERICAN STREET FLUSHING CO. et al. v. D. CONNOLLY
BOILER CO.

(Circuit Court of Appeals, Second Circuit. June 27, 1912.)

No. 243.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STREET FLUSHING MACHINE.

The Ottogy patent No. 795,059, for a street flushing machine, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the American Street Flushing Company and others against the D. Connolly Boiler Company, impleaded. Decree for complainants, and defendant appeals. Affirmed.

E. L. Thurston and C. P. Byrnes, for appellant.

J. S. Wooster and C. V. Edwards, for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This patent was first examined and prior art exhaustively discussed by the Court of Appeals for the Eighth Circuit, which sustained its validity and construed its claims giving full weight to the proceedings by way of amendment in the Patent Office. *St. Louis Street F. M. Co. v. American Street F. M. Co.*, 156 Fed. 574, 84 C. C. A. 340. In the cause at bar (*F. R.*), Judge Hazel followed this earlier decision, but himself discussed the various issues and found that the machines of defendant infringed the claims as so construed. We fully concur in his reasoning and conclusions. The additional patent, Beckwith 554,168, adds nothing material to the showing of the prior art. The nozzles of defendant's machine may be so adjusted that a considerable part of the stream will strike the pavement at an angle so sharp as to dig out the filling material from between the blocks or bricks, if used on a pavement thus constructed; but it is not so arranged that it can act only in that way. It is readily adjustable so that much the greater part of the stream—75 per cent. or more—will operate just as it does in the patented structure. We do not think infringement is avoided by applying some small fraction of the stream discharged somewhat differently. It seems unnecessary to add anything to Judge Hazel's discussion of the case.

Decree is affirmed, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LORAINÉ DEVELOPMENT CO. v. GENERAL ELECTRIC CO.

(District Court, N. D. New York, July 22, 1912.)

1. PATENTS (§ 165*)—CONSTRUCTION AND VALIDITY—SUFFICIENCY OF CLAIMS.

However valuable, new, and novel the actual discovery and invention of a patentee, and however accurate the disclosure and description thereof in the specification of his patent, he must claim it, or it is deemed abandoned to the public. While that construction should be given to a claim which will uphold it, if it can be done without doing violence to the language used, it is not sufficient to uphold a claim that the court can see that the patentee intended to cover his real invention by the language used, when in fact he did not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 246*)—INFRINGEMENT—COMBINATIONS.

If a patentee introduces an unnecessary element into his claim for his invention, another, who discovers that such element is unnecessary or superfluous, and therefore does not use it, is not an infringer, although he makes a structure otherwise identical with that of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. § 246.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ARC LAMP.

The Carbone patent, No. 975,935, for an arc-lamp globe, specially adapted to the use of impregnated carbons, claims 1 and 3, which cover a globe "divided into a plurality of superposed chambers by suitable configuration of the walls," the middle or lighting chamber having a transparent wall, which surrounds the arc closely, so that the heat will prevent the condensation of the gases therein and their deposit on the globe to obscure the light, an upper or condensation chamber for such gases, and a lower or settling chamber, contemplates a physical separation of the chambers by the configuration or contraction of the globe, and, while not anticipated and valid, such claims are not infringed by a globe of conical shape with straight walls, without contractions or other configuration to divide it into chambers.

In Equity. Suit by the Lorainé Development Company against the General Electric Company. On final hearing. Decree for defendant.

C. P. Goepel, of New York City, Wm. G. Van Loon, of Albany, N. Y., and Theodore Swift, of Albany, N. Y., for complainant.

Albert G. Davis, of Schenectady, N. Y., and A. D. Salinger, of Boston, Mass., for defendant.

RAY, District Judge. This is a patent for new and useful improvements in arc-lamps and was granted November 15, 1910, to Tito Levio Carbone. The patent says that:

"The present invention relates to arc-lamps for long lighting hours, and has the object of keeping clean the part of the globe from which the light mainly issues, especially in case of the employment of impregnated carbons."

The patent then asserts:

"The use of the flaming arc is connected with the disadvantage of requiring a globe or inclosure for the arc, and the vapors invariably given off by the flaming arc of impregnated or other carbons yield deposits which cloud the transparent walls and tend to obscure the arc. Attempts have been made to overcome this difficulty by utilizing the heat of the arc to set up

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a vigorous circulation of the gases at the interior of the globe by providing a more or less highly organized exterior circulatory system for the purpose of returning the gases which have been forced out at the top to the bottom of the globe. These gases carry the vapors away from the arc and deposit the condensation products in the cooler parts of the circulatory system arranged to receive them outside of the arc-inclosing globe itself. In such attempts as have been made to carry out this arrangement, a number of difficulties have been encountered. For instance, some definite construction must be employed for the purpose of returning the gases downwardly from the arc to the lower end of the globe. These channels necessarily obstruct the arc more or less and prevent it from delivering its full illuminating effect, cutting down its efficiency and in some instances casting large shadows. These difficulties are independent of the complexity and elaborate structures that become necessary. The object of the present invention is to eliminate these difficulties and attain the desired result in a more direct manner and by simpler and less expensive means."

The patent then declares that, as a result of much testing, means were devised whereby the desired result could be accomplished, and the circulatory system much simplified at the same time; that—"the necessity of any outside duct or ducts for the return of the gases to the lower portion of the arc-space is dispensed with and the whole structure simplified by reducing the same to a single globe or inclosure which is provided with a plurality of chambers suitably connected."

It then states that one embodiment of the invention, which has given excellent results, has three such chambers arranged one above the other, the middle chamber being transparent and containing the arc, which chamber, for the best light-emitting and distributing qualities, may be conical in shape with the walls brought preferably into more or less proximity to the arc, so as to better subserve the efforts of maintaining its surface free from deposits; also, that it is thought the gases arising around the upper electrode are cooled in the upper chamber and fumes deposited therein, and that the cooled gases flow along the outer part of the globe adjacent to the wall of the globe; also, that the heat adjacent the arc would be sufficient to prevent the deposit of the fumes, at that part of the globe, meaning, but around the lower electrode the flow of gas would be slow enough to permit suspended particles to fall in the lower chamber. The patent also states that excellent results have been obtained when a space has been provided both above and below the arc, and that when either space was omitted the deposit would encroach on and partially obscure the light-emitting wall of the globe surrounding the arc. The patent then states that as a means of securing a clear line of demarcation of the deposits and preventing their encroachment upon the transparent wall immediately surrounding the arc *a change of angle or inclination of the wall of the globe with respect to the arc or general alignment of electrodes is found effective and an inner ridge or contraction will accomplish this result.* This, of course, means a break or change in the general line of the wall of the globe at the point or points where it is supposed the deposit will end. I doubt not that an actual contraction of the glass forming the wall of the globe was contemplated. The patent says, however, that—

"a clear line of demarcation is not in all cases necessary, and *any means* of confining to a greater or less extent the deposits will fulfil the conditions;

the necessary feature being an organization whereby the phenomenon of diffusion operates to carry the vapors produced at the arc away from the light-emitting wall before they are condensed and the oxides or other solids deposited."

The patent then explicitly states:

"The present invention consists in providing a *separate* chamber for the arc by forming a *series of circular contractions in the globe*, so that it is divided into several superposed chambers."

The office and function of this is thus described:

"By this device the heat of the arc is concentrated in the middle member, but at the same time the walls of the middle chambers are protected by their conical shape against decomposition, and can therefore be arranged closer to the arc than was possible hitherto. The advantage of this arrangement is that no gases are condensed on the walls of the middle chamber inclosing the arc."

The patentee shows several forms of globes according to his invention, but says:

"It will be understood that the globe may take a great many different forms without departing from the spirit of the invention."

The claims in issue read as follows:

"1. An arc-lamp globe specially adapted to the use of impregnated carbons, and divided into a plurality of superposed chambers by suitable configuration of the walls, the middle chamber having a transparent wall surrounding the arc closely for preventing the gases produced by the arc from condensing on said walls. * * *

"3. An arc-lamp globe specially adapted to the use of impregnated carbons, and divided into a plurality of superposed chambers by suitable configuration of the walls, the walls of the middle chamber surrounding the arc as closely as possible, the said walls consisting partly of glass and partly of metal."

It is evident that claim 1 calls for (1) an arc-lamp globe, which (2) is divided into a plurality of superposed chambers by suitable configuration (shaping) of the walls; the *middle* chamber having a transparent wall which surrounds the arc *closely*. The function of this particular chamber is not only to allow the light to shine through, but to prevent the gases produced by the arc from condensing on the walls of such chamber. We understand from the specifications that the walls of this middle chamber surround the arc *closely*, so that such walls may be heated and thereby prevent the condensation of the gases in that chamber. We also understand from the specifications that the globe is divided into so-called chambers by a suitable configuration of the walls thereof, to the end that there may be a clear line of demarcation between the lighting chamber and the one above and the one below, which we may properly name condensing and settling chambers. By this construction or shaping of the globe and this location of the walls of the middle chamber the object of the invention is accomplished, viz., "keeping clean the part of the globe from which the light mainly issues."

First, the wall of this lighting chamber from which the light mainly issues closely surrounds the arc and is kept heated, so there is no condensation and settling of gases therein; and, second, by the "suitable

configuration of the walls of such globe" we have the clear line of demarcation of the deposits, and the encroachment of such deposits upon the transparent wall immediately surrounding the arc is prevented. By this configuration of the walls of this chamber we have "a change of angle or inclination of the wall with respect to the arc or general alignment of electrodes," and such a configuration is all that the first claim of the patent demands. It is not at all necessary that the configuration correspond to any one of the figures of the drawings of the patent as those are illustrative only. While claim 1 describes the wall of the middle chamber, and locates it, and states the purpose of such location, claim 2 locates the wall of the middle chamber; and then describes the walls of the globe (all three chambers), and says they are partly of glass and partly of metal, meaning, not a mixture of glass and metal, but that the walls of the upper chamber and probably of the lower chamber may be of metal.

The complainant insists that the words "providing a separate chamber for the arc by forming a series of circular contractions in the globe, so that it is divided into several superposed chambers," provide or describe a structure which is conical in shape, and that this is done by building an infinitesimal number of circular contractions upon each other, each succeeding contraction of glass being slightly smaller than the one above, and that in this way the conical shape of the wall of the middle chamber is produced. The complainant insists that this is the structure referred to in the claim, viz., "a plurality of superposed chambers by suitable configuration of the walls," and that no reference is had to the circular contractions in the globe plainly shown in the drawings of the patent, and which divide Figs. 1, 2, and 4 into four chambers and Fig. 3 into three chambers.

Defendant's Structure.

The defendant uses a globe quite similar and for all practical purposes the same as complainant's (that of the Carbone patent), except in one particular. By looking at complainant's globe, Fig. 3, and leaving off the upper chamber, which we have referred to as the condensing chamber, it is noted that the remaining part is shaped like a somewhat flaring mouthed beer glass, with a contraction about halfway down, which divides it into two parts. The upper part of this surrounds the arc, and when united to the upper part or condensing chamber we have the condensing chamber at the top, then the lighting chamber in the middle, and at the bottom the settling chamber. The complainant's expert speaks of these as zones—the condensing zone, the lighting zone, and the settling zone, containing the refuse powder not retained in the upper or condensing chamber. The defendant dispenses with the contraction in the globe walls, followed by an expansion thereof, and has a structure or globe (leaving off the condensing chamber or apartment) shaped like a beer glass with a wide or flaring mouth. The walls of this globe, or this part of the globe which includes the part devoted to lighting and the part devoted to the settling particles, have such shaping or configuration with respect to the arc or general alignment of the electrodes, the alignment of the electrodes

being perpendicular, and the arc, of course, between them, that they slope away from the electrodes as we go towards the condensing or upper chamber and towards the prolonged line of the electrodes as we go downward. In short, the two chambers (if there are two within the meaning of the patent) are cone-shaped, and the axis of such cone is the line of the electrodes. But there is no change of angle or inclination of the walls of these two chambers with respect to the arc or general alignment of electrodes from base to top, as such walls rise in a straight, but not perpendicular, line; but the distance of such walls from the axis of the cone or center line of the chambers gradually increases. It follows that as the lighting chamber widens at all points, is funnel-shaped, above the arc there is no obstruction to the process or "phenomenon" of diffusion of the gases, or vapors, generated at the arc, and as diffusion proceeds, and as the heat at the zone of the arc (lighting chamber) prevents condensation or deposit of soot or smoke or gaseous products on the walls there, they gradually rise or are diffused into the upper space or condensing chamber, if lighter than the heated zone, or fall, if heavier. The heavier oxides or solids, if not carried to the condensing chamber, can fall a certain distance before coming in contact with the walls of the globe; but those carried or moving upward meet no obstruction whatever until they reach the condensing chamber and come in contact with its walls.

Theory of Carbone.

It is plain, although not explained at length, that Carbone's idea was that the gases, vapors, etc., generated or produced at the arc, and the solids contained therein, are dissipated in the spaces above and below the arc, and on each side thereof, for that matter, by the "phenomenon" of diffusion, and that heat prevents their condensation and deposit, while cold hastens and produces such condensation and a settling thereof. His idea seems to be that by keeping the wall of the lighting chamber heated, on account of its proximity to the arc itself, there would be no condensation in or settling on the walls of such chamber, and that diffusion would take such gases, etc., away to the cooler zones or chambers, where they would be condensed and deposited, except as to the heavier products, which would descend to the lowest chamber. To repeat, Carbone says:

"Of course, a clear line of demarcation is not in all cases necessary, and any means of confining to a greater or less extent the deposits will fulfill the conditions; *the necessary feature being* an organization whereby the phenomenon of diffusion operates to carry the vapors produced at the arc away from the light-emitting wall before they are condensed and the oxides or other solids deposited."

Figs. 1 and 2 of his drawings show a constriction of the wall of the lighting chamber where it joins the condensing chamber, while Figs. 3 and 4 show none, but an enlargement or expansion into the enlarged condensing chamber. Carbone, after making the above statement, proceeds to say:

"The present invention consists in providing a separate chamber for the arc by forming a *series of circular contractions* in the globe"

—not lighting chamber, so that it (the globe) is divided into several superposed chambers. By *this* device the heat of the arc is concentrated in the middle member (meaning chamber), and the concentration is effected by the “circular contractions” shown and described.

While Carbone describes his present invention by the use of the words “a series of circular contractions in the globe, so that it is divided into several superposed chambers,” when we come to the several claims of the patent we find a change of language in some of them. While claims 1 and 3 (in suit and alleged to be infringed) say “divided into a plurality of superposed chambers by suitable *configuration* of the walls,” and speak of the “middle chamber,” that is, the heating chamber, the other claims of the patent use the words “divided into three superposed chambers by suitable *contractions* in the wall.” Hence it is argued with force that there is an essential difference between claims 1 and 3 and the remaining claims, and that, while claims 2, 4, 5, and 6 call for the contractions in the walls, the claims in suit, 1 and 3, do not, and include and cover any structure having such a configuration of the walls of the globe that there is in fact a heated chamber or zone, a condensing chamber or zone, and a deposit chamber or zone, although there is nothing to indicate, prior to actual use, where the one chamber or zone begins or the other ends. The contention is that a globe so shaped, even if nothing more than a cone (inverted), that when the arc-lamp is in operation there is a space so near the arc that the gases and vapors will not condense there, leaving a lighting space, zone, or chamber, and another space above where, on account of the cold, the gases and vapors are condensed, thus forming a condensing space, zone, or chamber, and another space below the heated space where the heavy residuum may fall and remain in its condensed form, even though there is nothing to indicate, prior to use, where the one space or chamber begins and the other ends, nothing to differentiate the one chamber from the other, is a structure within and covered by claims 1 and 3 of the patent in suit. This contention is supported by the difference in the language of the claims to which attention has been invited, and the following language of the specifications:

“Of course, a clear line of demarcation is not in all cases necessary, and any *means* of confining to a greater or less extent the deposits will fulfill the conditions; the necessary feature being an organization [of the globe] where the phenomenon of diffusion operates to carry the vapors produced at the arc away from the light-emitting wall before they are condensed and the oxides or other solids deposited.”

If this contention be correct, then any globe so formed or configured that the wall thereof about and for a space near to the arc is kept so heated that the gases and vapors will not condense there, and so formed or configured as to provide a space above for condensation and a space below for the settlement and deposit of the heavier material or gases generated at the lower electrode, is within and covered by claims 1 and 3, and the defendant infringes.

It is, of course, a somewhat complex or unusual use of words to speak of “a single globe or inclosure,” without any physical separa-

tion or division of any kind, as being divided into "a plurality of superposed chambers by suitable configuration of the walls," for the reason that gases and vapors given off by the arc inclosed by such globe will rise and condense and deposit to some extent in the upper part of such globe, and the heavier residuum fall to and rest in the lower portion of such globe, while the central part contains none of such deposit, provided the shape of the globe is such that the part of the wall surrounding the arc and near it is so closely located thereto that the gases will not condense or deposit there on account of the heat, and when in fact the globe is shaped like a perfect cone with the upper part somewhat expanded. It is like saying of a single room, without partition or physical division of any kind, that it has two chambers, an upper and a lower chamber, for the reason the foul air sinks to and occupies the lower part, while the pure air rises to and occupies the upper portion of such room.

True Construction.

[1] However valuable, new, and novel the actual discovery and invention of a patentee, and however accurate the disclosure and description thereof in the specifications of his patent, he must claim it, or it is deemed abandoned to the public. No court can legally rewrite a claim, so as to cover what is described and constitutes the real invention, if not embraced in or covered by the claim as written and allowed. However, no just court will give a technical or narrow construction to the language of a claim, if by doing so the claim is defeated. That construction should be given which will uphold the claim, if it can be done without doing violence to the language used. But it is not sufficient to uphold a claim that the court can see that the patentee *intended* to cover his real invention by the language of the claim, when in fact he did not. Nothing has been more frequently declared in patent law than that a meritorious inventor may disclose a valuable invention, but fail to claim it by appropriate language.

The Defense.

The defendant here says that while complainant may have a perfectly good patent and valid claims for what is in fact claimed, embraced within and covered by the language of the claims, still it does not infringe those claims, as it is not using the structure described, but something entirely different and disclosed by the prior art; and which, therefore, it has the right to use, at least so far as the complainant is concerned. The defendant insists that the complainant has claimed a specific device, which it does not use, and that, even if the complainant is entitled to the doctrine of equivalents, the defendant is not using a well-known equivalent for complainant's structure, at least that it was not a well-known equivalent at the time complainant applied for and obtained his patent in suit.

The complainant, by the Carbone patent, has done away with and discarded the circulatory system of the prior art; that is, it has discarded all conduits for creating a circulation within the globe, whereby the gases and vapors generated at the arc are forced upward into the

condensing chamber and in part downward to the deposit or lower chamber. It relies largely on the law of diffusion, or, as Carbone termed it, "the phenomenon of diffusion," which is the gradual and spontaneous molecular mixing of two fluids, or gases, which are placed in contact one with the other. It takes place without the application of external force, and even when opposed by the action of gravity, as when a heavier gas is placed below a lighter one there will result a mixture of the two by spontaneous molecular action. The molecules of the two fluids have motion and mutual attraction, and a tendency to commingle without exterior aid. Carbone knew, of course, that the heated gases, etc., would rise within the globe. Carbone also discarded the idea that it was necessary to force the gases and vapors away from the neighborhood of the arc, and relied on the discovery that they would not condense and attach themselves to the wall of the light-giving chamber so long as that space and wall was sufficiently heated. He therefore drew the walls of the light-emitting chamber as closely as possible to the arc, instead of curving it away from the arc, so that the middle chamber has "a transparent wall surrounding the arc closely for preventing the gases produced by the arc from condensing on said walls." I think it plain that one of Carbone's ideas was that the configuration of the walls must be such as to come as near as possible to the arc, and at the same time not interfere with the upward tendency of the gases and vapors and molecular attraction or diffusion. But he had another idea, which he expressed at every opportunity, both in the specifications and in the claims, viz., that he must divide his globe into a plurality of superposed chambers by suitable configuration (shaping) of the walls, or by contractions of the walls.

The defendant urges that, giving the broad construction to Carbone's claims 1 and 3 contended for, he was anticipated, so far as his globe is concerned, by several prior patents, notably the English patent to Fairweather, No. 28,409, granted February 23, 1905, for electric arc lamp, and which in the drawings, Figs. 1 and 2, shows an elongated egg-shaped globe, with smooth, unbroken walls and an upper condensing chamber or section, and is supplied with means for a circulatory system whereby the gases and vapors formed at the arc are carried or forced upward, outward, downward, and then inward, and then down to the bottom of the globe, etc. The walls of this globe opposite the arc are furthest therefrom, and this was an intentional construction, so as to have the sides or walls as cool as possible at this point, so as not to interfere with the downward circulation as the vapors passed downward from the condensing chamber. The Fairweather idea was that the heat emanating from the arc should be dissipated as rapidly as possible, and as low a temperature as possible maintained in the globe, so as to (it is declared) prevent the formation of the coat of soot, etc. The patent says:

"The invention further and particularly relates to that variety of arc-lamps wherein the arc is formed within a substantially air-tight inclosure; one object of my invention being to provide simple and efficient means for at once stoppering or closing the arc-inclosing globe, and insuring the rapid, continuous dissipation of the heat from the electric arc, with a view to main-

taining a low temperature within the inclosing globe and preventing the formation of the coat of soot which markedly cuts down the light efficiency of other lamps after a few hours' use. A further and distinct purpose of dissipating the arc heat is to prevent the cracking or melting of the globes, and thereby greatly reduce the cost of maintaining the lamp in service. * * * The arc-inclosing means comprises the usual deep, slender, glass globe, *G*, and the stoppering device or closure, *D*, which latter differs from all others in form and function. It is generally conceded and stated that fully one-half the cost of maintaining inclosed-arc lamps lies in the expense of cleaning the globes and replacing those which are cracked or melted or warped by the great heat of the electric arc. It is also well known that the effective candle power of an arc-lamp of the inclosed-arc type is greatly reduced by the deposition of carbon and other residual products upon the inner walls of the globe. In the ordinary arc-lamp, this coating, which obscures the light, becomes apparent within a few hours after the lamp is placed in service, and, by the time a set of carbons has been consumed, becomes so thick and heavy as to seriously cut down the efficiency of the lamp. The residue deposited on the glass is commonly called 'soot,' and is difficult to remove except by a chemical process. I conceive that the deposition of soot within inclosing globes is a direct consequence of the high temperature attained by the confined gases, and that it may be prevented by any means that will operate to markedly reduce that temperature. * * * The effect of this device is to reduce the temperature within the globe to the extent of several hundred degrees, and the baking on or deposition of soot upon the glass globe is positively prevented. The soot is for the most part deposited upon the under surface of the insulator, *3*, and upon the walls of the radiator, and that which returns to the globe is so far cooled and condensed as to be precipitated, and accumulates as a fine, loose powder in the bottom of the globe. In addition to the cooling effects of the novel globe closure, it should be noted that the dividing device employed therein has the effect of causing the gases to circulate rapidly within the globe, resulting in the exposure of the coolest gases upon the inner walls of the glass globe. The downward moving currents of gas tend to scour or free the surface of the globe from particles that may be precipitated thereon, and furthermore, by being caused to descend to the bottom of the globe, undoubtedly part with a certain proportion of their heat by radiation through the coolest portions of the globe."

In short, the Fairweather patent proceeds upon a theory the very opposite of Carbone's, except in that he provides a "radiator" or condensing chamber. Fairweather had no conception that heat would prevent the condensation of these gases, and that it was desirable to maintain a high degree of heat in the light-emitting zone. On the other hand, he curved the wall of this part of the globe away from the arc, while Carbone brought such walls as closely as possible to the arc. In short, Fairweather's globe is further from being truly cone-shaped than are Figs. 1, 2, 3, and 4 of Carbone, although, if we give to claims 1 and 2 of Carbone the construction asked for by complainant, we would have Fairweather's globe an arc-lamp globe "divided into a plurality of superposed chambers by suitable configuration of the walls," as we would have an infinitesimal number of circular contractions going upward from the arc, and the same going downward therefrom, and we would also have "a change of angle or inclination of the wall" of the light-emitting part of the globe "with respect to the arc or general alignment of electrodes." I am satisfied that Fairweather's globe does not anticipate Carbone's globe, and equally well satisfied that the defendant does not use the Fairweather globe, or its substantial equivalent.

I have examined the Blondel patent of May 16, 1911, No. 992,479, application filed January 15, 1906; the Ross patent of June 6, 1911, No. 994,427, application filed February 9, 1903; the Jones patent, No. 935,518, of September 28, 1909, application filed September 16, 1907; the Steinmetz patent, No. 892,768, issued July 7, 1908; and the Carbone British patent, No. 17,448, of October 14, 1909, and also the Thompson British patent of March 11, 1903, No. 5,952.

Thompson clearly had the idea of the diffusion of the fumes, gases, etc., generated at the arc, for he says:

"A further improvement relates to means for preventing the diffusion of fumes from the poles of an electric arc lamp."

He also says these fumes, if not collected, will condense in the upper part of the lamp and eventually interfere with the proper operation of the regulating mechanism. He provides a cooling or condensing chamber. I do not see that he dealt at all with the problem of keeping the light-emitting part of the globe clean and free of deposits. He was well acquainted with the fact that a cooler temperature facilitated or produced condensation of the fumes.

Steinmetz used an outer and an inner globe (as does defendant), and while he was dealing with the problem of preventing the deposit of the condensed gases on the light-emitting part of the globe he provided an elaborate circulatory system, viz., an opening at the bottom of the inner globe inclosing the arc, openings into a chamber above, and openings thence into the outer globe. He also provided wire screens in his upper or condensing chamber for catching and retaining the condensed gases, etc. The heat of the arc started the circulation, and the opening at the bottom of the inner globe permitted the ingress of air. The gases passed up into the screening chamber, and what was not deposited and retained passed on with the current down into the outer globe, and thence into the inner globe, and up past the arc into the screening chamber, and so a constant circulation was kept up. His theory was that by means of this system no condensation would take place in either globe, and hence no deposit there. Both globes curved furthest away at the arc. Neither complainant nor defendant uses any such system.

Jones has an inner or arc-inclosing globe and a complete circulatory system, and provides passages from a chamber above the arc to a chamber below the arc, and says:

"The heat of arc in chamber A causes a strong upward draft of the heated gases therein, the gases being then carried over into the chamber B, and from thence being returned to chamber A by way of the way of the passages d and e, and the chamber C. As the temperature of the passages d and e is much lower than that of the chamber A (the arc chamber), a large portion of the fumes will be condensed in these passages, while, the uncondensed portions being returned to the chamber A, their temperature is again raised by the heat of the arc, so that deposit on the transparent envelop of the chamber A is practically prevented below or in the region of the arc."

Jones also says:

"I have found that, for successful working of inclosed-arc lamps using carbons carrying chemicals, it is necessary that the chemicals added should give off vapors having a high vapor density and thus forming a compara-

tively small arc, and therefore a small region within which the electrical energy is dissipated; the effect of this being to raise the vapors in the arc to a high degree of incandescence, giving a high light efficiency. I have also found that it is desirable to add salts having a high melting point, and for this reason it is desirable to add a steadying salt, which acts as a flux in melting the chemicals to form a uniform liquid before vaporization. I find that with such mixtures no liquid slags are formed, and therefore the troubles caused in other lamps in which chemicals are used are completely avoided. My invention consists in an inclosed-arc lamp, in which the electrodes are disposed in a substantially air-tight chamber of small capacity, formed of a transparent or translucent arc-inclosing part, and one or more short passages connecting the ends of said part, whereby the gases are circulated in such a manner as to substantially prevent the formation of eddies and deposit on the arc-inclosing walls; the hot ascending gases sweeping the walls in a rapid current."

Jones fully understood that sufficient heat would prevent the condensation and deposit of these gases or fumes; but he did not understand that a single globe, without appliances for producing a circulation, is all-sufficient, provided there is sufficient space for deposits at a distance above the arc and a similar space below, and he did not seem to appreciate that by bringing the wall of that part of the globe which is to give out the light as closely as possible to the arc, and so shaping his globe as to leave the upward rise of the fumes or gases unobstructed, he would solve the problem of keeping the light-emitting part of the globe clean and clear of condensed gases. His arc-inclosing globe is substantially a sphere. As I have stated, Carbone, on the other hand, brought the light-emitting part of his globe as closely as possible to the arc, and left space above and below for the condensation and deposits, trusting to heat at the so-called lighting chamber to prevent a clouding of the globe, and to the lower temperature above and below for the condensation and deposit of the gases or fumes at those points.

The Ross patent, while pointing out the evils of these deposits, made no attempt to remedy them, except by providing a cover with a frame and a bowl-shaped globe with walls removed as far as possible from the arc. After pointing out the evils of these deposits he says:

"The small size of the common arc-inclosing globe, and the consequent close proximity of the arc to the glass, aggravate these difficulties. A special object of my invention is to simplify the lamp, by using but one inclosing glass, substantially hemispherical in shape and of such size that proper diffusion of the rays of the arc will be obtained, *while all parts of the glass are so far removed from the arc that the objections common to other types will be eliminated.*"

Instead of bringing the lighting chamber *close* to the arc, he removes it therefrom as far as possible.

I am of the opinion that the correct disposition of this case depends on the construction of the claims in issue of the Carbone patent and the limitations therein contained. If claims 1 and 3 demand a two-chambered globe in the literal sense of having some physical dividing line or partition line between them, one chamber for the lighting zone, and the other or lower one for deposits (not including or referring to the upper or condensing chamber), it is

very clear that defendant uses no such structure. Can we, in view of the specifications, eliminate and disregard the words "and divided into a plurality of superposed chambers by suitable configuration of the walls, the middle chamber having," etc.? Can we say that "divided" means the division made by the deposit and nondeposit of condensed gases, and that the words "suitable configuration of the walls" mean walls disposed at such an angle and without change of angle with reference to the alignment of the electrodes that the diffusion of the gases is not interfered with? May we not properly inquire why Carbone did not describe or show in his drawings a globe having no contraction in the walls or drawing-in thereof at the point of division between the chambers? I can but suspect that Carbone had in mind that he would devise some means, some structure or form of globe, which had no clear line of demarcation between the chambers, for he says:

"Of course, a *clear* line of demarcation is not *in all cases* necessary, and any means of *confining*, to a greater or less extent, the deposits, will fulfill the conditions," etc.

But he immediately adds:

"The *present invention* consists in providing a separate chamber for the arc by forming a series of *circular contractions* in the globe, so that it is divided into several superposed chambers."

In Figs. 1, 2, 3, and 4, he shows actual, visible contractions in the walls of the globe. Did he refer to what he thus showed, or did he refer to a cone-shaped globe without such actual contractions, but built up, as complainant's brief says, by—

"a plurality of circles adjacent each other, each of which would be contracted in respect to the largest diameter of the upper chamber. Similarly, if this member be molded to the conical shape resulting from Fig. 3, it would be contracted in respect to the upper chamber, but in addition thereto it would be sectionally contracted in respect to itself, since it is composed of a plurality of sectional contractions, one adjacent to the other and each smaller than the other; the largest cross-section being at the base, or at the largest diameter of the cone, and the smallest one at the apex or blunted end of the cone."

Giving claims 1 and 3 this meaning, we have thousands or millions of superposed chambers, depending on the size of the succeeding sectional contractions, and we would have a heating or arc chamber made up of thousands of smaller chambers, with no boundary line until the arc-light was put in operation, and then such boundary line of the middle or arc chamber would be determined, not by any configuration of the walls, but by the point where deposits on the wall of the globe ended. This refinement may have been in the mind of the patentee, but it seems to me that it is not expressed or suggested in the language of claims 1 and 3, or that of either of them, as aided by the specifications. However much a court would like to eliminate a limitation found in the claim of a patent, or however much it would like to write into it something not found there, it cannot justly or legally do so, although it may be done by a few strokes of the pen and an arbitrary decision.

The complainant says:

"The patent itself uses the word 'chamber' quite frequently, but says, 'I have found that excellent results are obtained when a depositing space is provided both above and below,' but immediately, 'it was soon found that, when one or both chambers were omitted,' etc. Thus the word 'chamber' is rightly used in the sense of surrounding a 'space.' It is with the understanding of the word 'chamber' in this light that the patent calls the co-operating parts 'chambers.'"

The complainant's brief also says:

"It needs no evidence to show that a cone is a sectional contraction of a cylinder, and that the conically shaped glass portion of defendant's lamp consists of a plurality of contractions in the globe or in respect to the cylinder tangential to the periphery of the upper depositing chamber. But, however many contractions there may be, none concern us, excepting that one, or those, if more than one, which perform the function of the contractions in the patent. It is that contraction consonant with the imaginary line of intersection distant from the arc equal to the critical distance, and it is that contraction which differs from the contraction immediately adjacent by operating in a different manner. It is that contraction which separates a light-emitting space-chamber from the depositing space-chamber. It is that contraction which divides the globe into superposed space-chambers communicating with each other. Finally, it is that contraction of the patent specification referred to in: 'The present invention consists in providing a separate chamber for the arc by forming a series of circular contractions in the globe, so that it is divided into several superposed chambers.'"

I am not at all content with this reasoning. If we leave out the contractions in the walls of the globe, we have surrounded the entire space inclosed within the globe, and have but one chamber. If each and every part of the interior of the globe surrounded by the straight lined wall only is a chamber, we have thousands of chambers, and the middle chamber will be ascertained by measurement on the perpendicular line, and not by the location of the arc or the limits of the deposit.

I am reluctantly brought to the conclusion that, while the defendant's structure is within the spirit of Carbone's invention and within the terms of that which he described in the specifications, it is not within or covered by the claims in suit, which have self-imposed limitations that cannot be changed or disregarded. The complainant is entitled to the doctrine of equivalents, but there is no evidence in this case that defendant's structure was the known equivalent of complainant's at the time the patent was applied for or granted. As a mechanical structure, the one is not the equivalent of the other. I think that defendant's structure operates on the same principle as does the complainant's, and that generally speaking the one produces the same results as does the other. I also think that contractions in the walls of the globe are unnecessary and useless, and that the division of an arc-lamp globe into more than two chambers is unnecessary. There must be a condensing chamber to take care of the deposits, and an arc chamber for emitting the light, and the walls of this chamber must be kept clean, or free from deposits. Even if some of the heavier condensed particles fall to the bottom of the lighting chamber, no serious consequence results, and in any event a contraction in the wall of the globe is unnecessary.

[2] It is a question, therefore, whether the introduction of a limitation into the claim of a patent which has no effect on the operation and utility of the device makes an infringer of one who discards the limiting element, but uses the construction of the patent with such element eliminated. In other words, if a patentee introduces an unnecessary element into his claim for his invention, and another discovers that such element is unnecessary, or superfluous, and therefore does not use it, but makes a structure otherwise identical with that of the patent, is he an infringer? This point has been passed upon many times. In *Dunbar v. Meyers*, 94 U. S. 187, at page 202, 24 L. Ed. 34, the court said:

"It is settled law that, when the respondent in constructing his machine omits one of the ingredients of the complainant's combination, he does not infringe the complainant's patent"—citing *Gould v. Rees*, 15 Wall. 194, 21 L. Ed. 39; *Prouty v. Ruggles*, 16 Pet. 341, 10 L. Ed. 985; *Vance v. Campbell*, 1 Black, 427, 17 L. Ed. 168; *Gill v. Wells*, 22 Wall. 28, 22 L. Ed. 699.

And in *Wright v. Yuengling*, 155 U. S. 47, 52, 15 Sup. Ct. 1, 3 (39 L. Ed. 64), the court said:

"Now, while this semicircular connecting piece may be an immaterial feature of the Wright invention, and the purpose for which it is employed accomplished, though less perfectly, by the extension of the guiding cylinder in the manner indicated in defendant's device, yet the patentee, having described it in the specification and declared it to be an essential feature of his invention, and having made it an element of these two claims, is not now at liberty to say that it is immaterial, or that a device which dispenses with it is an infringement, though it accomplish the same purpose in perhaps an equally effective manner. *Vance v. Campbell*, 1 Black, 427 [17 L. Ed. 168]; *Water Meter Co. v. Desper*, 101 U. S. 332 [25 L. Ed. 1024]; *Gage v. Herring*, 107 U. S. 640, 648 [2 Sup. Ct. 819, 27 L. Ed. 601]; *Gould v. Rees*, 15 Wall. 187 [21 L. Ed. 39]; *Brown v. Davis*, 116 U. S. 237, 249 [6 Sup. Ct. 379, 29 L. Ed. 659]."

But this rule is not carried to the ridiculous extent of allowing an infringer to escape by merely changing the form or shape or size of an element specified in the claim of a patent, especially when shape, size, or form is not of the essence of the invention claimed. *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717. But change of form is one thing, and an omission of an element is quite another. Suppose we rewrite claim 1 of the patent in suit so as to read, "An arc-lamp globe specially adapted to the use of impregnated carbons, having a plurality of superposed spaces surrounded by the walls of such globe but in no way divided from each other, the middle space having a transparent wall surrounding the arc closely for preventing the gases produced by the arc from condensing on such transparent walls," would we have the same claim found in the Carbone patent? Clearly not, for we have eliminated the *division* of the spaces and the *configuration* or shaping of the walls of the globe to effect such division.

[3] Turning to the file wrapper of the Carbone patent in suit, we find strong evidence that in framing claims 1 and 3 he had in mind, and intended and deemed essential, a physical division of his globe, the glass part, into two chambers or spaces, by means of contractions, or other shaping or configuration, of the walls, so that the

one should be distinguished and distinguishable from the other, not only when in operation, but when not in operation. It is quite true that the language of a claim as allowed and the plain import of same is not to be cut down, limited, or changed by what the patentee may have said while the application was pending and under consideration in the Patent Office; but, when it is sought to give to the language of the claim some unusual or extraordinary significance or meaning, we may properly look to the declarations and statements made by the applicant to the Patent Office examiners in support of the claims and to induce their allowance. Turning, then, to the "Remarks" accompanying and forming a part of Carbone's communication to the Commissioner of Patents, dated August 31, 1909, we find the following:

"In the further prosecution of this test the inventor found out that the limit between the part having a deposit and the part which is free of the same can be clearly defined, when between *B* and *C* a sufficient strong contraction is formed. Then the construction shown in Figure 3 is obtained. * * * But, whatever will be the theory of the process, the fact, according to the observation of the inventor, cannot be denied that it is sufficient when the space surrounding the arc is divided into three chambers, which are separated from each other by means of contraction, so that the precipitate is formed exclusively in the upper and lower chambers, and that the middle chamber remains clear."

As claim 1 stood December 21, 1909, instead of "a plurality of" it contained the words "three or more," and instead of "configuration of" the words "contractions in," and the words "more or less" preceded the word "closely." On that day the examiner said:

"Claim 1 is rejected as being for subject-matter not disclosed. There are not more than three chambers shown. The claim is rejected as being rendered indefinite by the expression 'more or less.'"

Thereupon, and March 11, 1910, Carbone amended claim 1 by canceling the words "three or more" and substituting "a plurality," but protested and said:

"The applicant does not admit that he had not the right to claim the feature 'three or more,' since Figure 2 shows the chambers *A* and *C*, and the part *B*, comprises also two chambers, making four in all."

May 9th, in response, the examiner said claim 1 was allowed, but June 23, 1910, said:

"Upon reconsideration it appears that lines 21 to 30, page 2, require revision, as will be apparent upon inspection. It also appears that claims 1 and 3 are inconsistent. A plurality is more than one, but obviously the globe could not be divided into two chambers by more than one concentration. Furthermore, Fairweather shows a globe with two (a plurality of) superposed chambers, and these claims must therefore be rejected."

Thereupon Carbone again amended claim 1 and also claim 3 to meet this new objection, by changing the words "contractions in," claim 1, to "configuration of" and, in claim 3, "contractions formed in" to "configuration of." It seems to me perfectly clear that Carbone and his attorneys and the Patent Office always had in mind "chambers" or divisions of the space within the globe, formed by some physical contraction of the globe wall, or some other phys-

ical change in the wall lines, and that a partial actual physical division of the entire space to form distinct chambers is demanded by claims 1 and 3. I am not unmindful of what is said in *Wright v. Yuengling*, supra, 155 U. S. page 52, 15 Sup. Ct. 3, 39 L. Ed. 64, "If the guiding cylinder of this patent had been a pioneer invention, it is possible the patentee might have been entitled to a construction of this claim broad enough to include the defendant's device, notwithstanding the absence of the semi-circular connecting space," although the court had just used the language already quoted, and "a literal construction is not to be adopted where it would be repugnant to the manifest sense and reason of the instrument" (*Brown v. Guild*, 90 U. S. 181, 23 L. Ed. 161), and "the reasonable presumption is that, having a just right to cover and protect his whole invention, he intended to do so" (*Winans v. Denmead*, supra); but "the claim of a patent is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms" (*Howe v. National, etc.*, 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963). I am unable to see that these claims are susceptible of two constructions, one of which constructions will embrace the defendant's structure; but, on the other hand, they show clearly what the patentee desired to secure as a monopoly, and hence nothing can be held to be an infringement which does not fall within the terms the patentee himself has chosen to express his invention. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

It is quite true that the language of a patent is addressed to those skilled in the art especially, and the claims and specifications may be expressed in the language of the art to which the patent relates, however technical. If even common words have a special, extended, or restricted meaning when used in that art, courts are bound to give them that meaning. But I fail to find in this record anything which indicates that in this art of electrical lighting, or arc-lamp or arc-lamp globe making, the word "divided" has any special meaning other than separated, or that "plurality" means less than two, or that "superposed" does not mean one above another, or that "chamber" signifies other than a space wholly or partially inclosed or having boundaries indicated by some physical sign, especially when it is stated that the division is to be made by a suitable configuration of the walls of a glass globe.

I have endeavored to bring this case within the decision of the Supreme Court in *Ives et al. v. Hamilton*, 92 U. S. 426, 430, 23 L. Ed. 494, but am unable to do so. The patentee, Carbone, whatever his actual inventive idea or conception, and however broad and meritorious, was bound to provide and describe *means* for making it effective and useful. Ideas and conceptions and functions are not patentable. Carbone, in claims 1 and 3, described and claimed means; but this did not exclude others from devising and obtaining a patent for means to accomplish the same result, keeping the light-emitting part of an arc-lamp globe clean and clear of deposits,

provided they devised different means, however much simplified, means not within the range of equivalents for those described and claimed by Carbone. If Carbone has described, but failed to claim, the means used by this defendant, probably he may apply to the Patent Office and claim them yet. But that is not the question here, which is: Has Carbone claimed a globe with three chambers, an upper or condensing chamber, an arc or lighting chamber, where the heat is more or less confined and the wall is brought as closely as practicable to the arc, and a lower and we may say depository chamber, and distinguished and distinguishable from each other by either a contraction in the walls of the globe, or by some change of angle in the walls of the globe; that is, some actual configuration of the globe walls which will distinguish the one chamber from the other? This is the "means" specified and claimed in the claims in issue here, and the cone-shaped globe (leaving out of consideration the upper or condensing chamber common to both and well known in the prior art) used by defendant, and which has no contraction of its walls and no change of configuration of its walls at all to divide the one chamber from another, was not a well-known equivalent therefor when Carbone applied for or obtained his patent; hence there is no identity or equivalency of means, although the operation of the two globes is similar, and the result obtained substantially the same. See *Westinghouse v. Boyden, etc.*, 170 U. S. 569, 18 Sup. Ct. 707, 42 L. Ed. 1136, and *Henry Huber Co. v. J. L. Mott, etc.* (C. C.) 113 Fed. 599, 604. As the words of these claims have to do with the essentials of the means described and claimed, and are not merely descriptive of their form or shape, I am compelled to hold that, while the Carbone patent is valid and not anticipated, the defendant does not infringe the claims in issue.

The bill must be dismissed, with costs.

SUNDH ELECTRIC CO. v. GENERAL ELECTRIC CO.

(District Court, N. D. New York. July 29, 1912.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ALTERNATING CURRENT ELECTROMAGNET.

The Lindquist patents, No. 744,773 and No. 764,608, each for an alternating current electromagnet, and the second being for an improvement on the first by simplifying and lessening the cost of construction, construed, and held infringed.

2. PATENTS (§ 241*)—INFRINGEMENT—INFERIORITY OF INFRINGING DEVICE.

If an alleged infringing device has substantially the same elements as that of the patent, with the same functions, all working on the same principle and in obedience to the same law, and in the same manner and producing the same result, it infringes, although it does not do the work as well or perfectly.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 380; Dec. Dig. § 241.*]

*For other cases see same top c & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Sundh Electric Company against the General Electric Company. On final hearing. Decree for complainant.

Park Benjamin and Alfred Wilkinson, both of New York City, for complainant.

Charles Neave and William G. McNight, both of New York City, for defendant.

RAY, District Judge. These patents to Lindquist are marked as the Senior patent and the Junior patent, and will be referred to as such or under that name. The complainant is the owner of both patents. The manufacture and sale by defendant of the alleged infringing device is admitted.

[1] The defendant denies infringement, and alleges that the patents are invalid in view of the prior art, and for the added reason that Lindquist was not the original inventor, if any invention is shown. The main question is that of infringement, as I am satisfied that the patents are valid and that Lindquist was the original inventor.

The claims in issue of the Senior patent read as follows:

"1. An electromagnet having a plurality of coils symmetrically disposed around a central axis, the individual axis of each of said coils being parallel to said central axis, and means for producing currents of different phase in said coils.

"2. An electromagnet having a cylindrical core and a plurality of symmetrically disposed coils thereon, the said coils having their individual axes parallel to the axis of said core, and means for producing currents of different phase in said coils.

"3. An electromagnet having a cylindrical core, with symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means for producing currents of different phase in said coils.

"4. An electromagnet having a cylindrical laminated core with integral symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means for producing currents of different phase in said coils."

The claims in issue of the Junior patent read as follows:

"1. An electromagnet having a polygonal core and a plurality of symmetrically disposed coils thereon, the said coils having their individual axes parallel to the axis of said core and means for producing currents of different phase in said coils.

"2. An electromagnet having a polygonal core with symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means for producing currents of different phase in said coils.

"3. An electromagnet having a polygonal laminated core with integral symmetrically disposed pole-pieces at one end thereof, coils on said pole-pieces and means for producing currents of different phase in said coils."

It may be said here that the second Lindquist patent is an improvement on the first and simplifies and lessens the cost of construction.

There seems to be three essentials in this electromagnet, viz., the coil, the core, and the armature. To the coil the energizing current is supplied; the core, an iron body, becomes magnetic when the current passes and the armature is attracted. It is established that traction electromagnets energized by a direct current have been known and in use for many years, and as the direct current flows in one direction, and constantly and with substantial uniformity, there has been a constant, direct, and unvarying magnetic pull and holding of the arma-

ture. It is a matter of common knowledge that an alternating current, which flows alternately in opposite directions, would not and could not operate in this way, as with an alternating current the armature is attracted and then released in rapid succession, and the result is a constant hammering and chattering—a destruction of parts and unendurable noise. It was therefore a problem to devise an electromagnet which could be efficiently worked with the alternating current. I am satisfied that Lindquist did this, and that his invention went into immediate use and was successful. It is evident that if a unitary magnet core is subjected to the energizing effect of a number of coils, in each of which the reversal of the current occurs at different times, there will be a pull on the armature at all times, a constant pull, and that hammering and chattering will cease. However, it is also evident that the net pull of all the coils must be constant, and in one and the same straight line, and that this line must be coincident with the axis of symmetry of the core. In other words, if the support of or pull on the armature should shift from place to place, there would be more or less hammering and chattering. There must be a constant and uniform pull on all points of the armature in the same and in the proper direction. The patent, therefore, provided the central core with a definite longitudinal axis of symmetry passing through its center, which fixed the line of pull, and the magnet coils were arranged symmetrically around this axis and with special reference to their magnetic effects on the core.

This last, magnetic effect on the core, is of the utmost importance. The currents are of a different phase; when one is pulling and another is not. Kennelly, complainant's expert, describes the Senior patent in suit in detail, but sums up the mode of organization of the same as follows:

"A central axis, or axis of symmetry, and around this axis are placed a plurality of coils. The coils are to be disposed symmetrically with respect to this axis, and the symmetry is to be such that each of said coils has an axis and each axis is parallel to the said central axis or axis of symmetry of the whole; that is, I understand that, of all the possible types of symmetrical arrangement about an axis which may theoretically exist in such a structure, that particular disposition is to be employed which involves the parallelism of the axis of each of the plurality of the coils with the axis of symmetry of the whole."

I do not think the geometrical arrangement of the magnet coils about the axis of much importance. The claims call for a symmetrical disposition of the coils around a central axis. That degree of symmetry and geometric arrangement was necessary which would secure a substantial degree of uniformity in the direction and magnitude of electromagnetic attraction upon the armature under the conjoint action of out of phase electric currents. Constant and uniform pull on the armature was the main and controlling idea.

Claims 2, 3, and 4 of the Senior patent call for an electromagnet having a "cylindrical core," but claim 4 says "cylindrical laminated core," and claim 1 has a central axis around which the coils are disposed. Means for producing currents of *different* phase in the coils, and coils are essential elements of each claim; but no specific method

of winding and connections are claimed or essential, and any method may be adopted which will produce different phases. We have as the main feature a single solid laminated mass, with pole-pieces so formed therein that a substantially uniform distribution of symmetrically balanced magnetic forces results. These magnetic forces, as I have said result, in a mechanical pull constant in strength, direction, and point of application. The patent involved a proper conception of the relation of things and their utilization when brought into proper relation.

The defendant's switch, the alleged infringing device or structure, has the alternating current traction electromagnet to control the opening and closing of switch contacts disposed in circuit. The defendant's electromagnet structure has a large fixed coil, an armature in elongated or plunger form, and, when this fixed coil is energized, the armature is drawn into that coil, which is composed of a number of flat plates or laminations laid face to face. Two flattened copper rings, which defendant's expert, Mr. Hawkins, speaks of as shading coils, and each of which is a closed coil of one turn, respectively inclose pole-pieces which are formed by cutting grooves in the end of the armature and these grooves receive the rings. The switch mechanism to be operated by the movement of the armature is attached to the end thereof opposite the end which carries the two copper ring coils. In this structure three coils are operating on the plunger, one of which is fixed axially with respect to the plunger, but is not rigidly attached thereto, and the others are connected with the plunger both axially and rigidly. It cannot well be denied that these three coils are symmetrically disposed around the longitudinal axis of the fixed core, and that this is the axis of symmetry of the system. Complainant states it this way:

"These three coils are 'symmetrically disposed around the longitudinal axis of the fixed coil, which is also the axis of symmetry of the system.' The fixed coil is symmetrical to that axis, because that axis passes through its center, and the single ring coils on the plunger are symmetrically disposed around that axis, 'because they are disposed at equal distances from the central axis of the plunger, which plunger is placed symmetrically inside the fixed coil.'"

It is evident, from the very brief references made, that there are structural differences between the defendant's structure and that of the Lindquist Senior patent. But change of construction does not avoid infringement in a patent as broad as this. The two coils on defendant's armature are copper rings of one turn, and not spirals of several turns; but the one is the equivalent of the other in mode of operation and results, if the electrical current is of sufficient strength. In the structure of the Senior patent the coils are all supported on pole-pieces which project from the stationary coil. Defendant's structure has its large fixed coil stationary, and the two copper ring coils on pole-pieces on the armature—plunger. The complainant's expert, Prof. Kennelly says this is purely structural, and will not affect the principle or mode of operation of the apparatus as described. I fail to find proof to the contrary. In defendant's structure the copper ring coils are disposed opposite each other and equidistant from

the axis, but the fixed coil surrounds the axis. It seems to me that this plurality of coils have their axes parallel to each other and to the central axis of the device. On this subject the complainant's expert says:

"I consider that the circular symmetry called for is such as corresponds to an initial clock face arrangement of poles disposed at equal angular distances around the dial, but with any length of diameter permitted to any diametral opposite pair, including the limiting case when such a pair has vanishing separation, or resolves itself into a single pole at the center. If, therefore, in the arrangement of Fig. 6 of the senior Lindquist patent, one pair of opposite poles is pushed nearer and nearer together, until they meet as a single pole in the center, I consider this would be retaining the circular symmetry called for in the patent as a limiting case, and it would disclose three poles in a straight line, all forming part of a unitary core structure, each parallel to the axis of symmetry, and each pair—regarding the central pole as the equivalent of a pair—being symmetrically disposed with respect to the axis. Such an arrangement would act, in the manner described in the patent, to produce substantially constant pull without chattering, by reason of a substantial uniformity of the resulting magnetic attraction in strength, direction, and point of application."

He also says:

"'In the defendants' switch,' says Professor Kennelly, 'it is my opinion, unquestionably, that the fixed coil is located on the plunger core in the sense that it is not off or away from the plunger core. It is "on" in the sense of surrounding the plunger core and operating upon it. It is not on the plunger core in the sense of being rigidly attached to that core. It is "on" the plunger core as that term is used in describing electromagnetic mechanism.'"

It seems to me that defendant's structure shows (1) an electro-magnet having a fixed and a movable element; (2) that in such magnet we have a plurality of coils; (3) that these coils form a symmetrically disposed system with respect to the central axis of the apparatus. Each of the three coils has an axis of its own, and then there is the central axis, and all are parallel to each other. Alternating currents flow in these coils, and these currents are of different phase; that is, the alternating current in the fixed coil is of a different phase from that in the single-turn coils which are, as I understand, of the same phase. So far as I can see or understand, the whole operates to produce a steady, uniform pull in one and the same direction, and hold the armature, and so prevent the pounding and chattering before referred to. Claim 2 of the Senior patent calls for (1) a cylindrical core with a plurality of symmetrically disposed coils thereon, the individual axis of which must be parallel to the axis of such core. There must be, also, means for producing currents of different phase in said coils. The core of the Lindquist Senior patent has or carries pole-pieces which carry the coils. In defendant's device the plunger carries the two copper ring coils.

Mr. Hawkins, for the defendant, points out some 21 different propositions, or differences between Lindquist and defendant's device, which he claims show noninfringement. The most of them go to mere differences in structure, and have no bearing on design and operation. There seem to be three known equivalent methods of producing currents of different phase in magnet coils. If we have two generators,

and from each supply a current, the one differing in phase from the other, and carry each of such currents over a different circuit to a different coil to energize same, we necessarily have a current of different phase in each coil. If we have a single generator, and produce therefrom a single alternating current in one circuit, and then split the circuit into two branches, each branch having a coil, but place resistance to the current in one branch, and not in the other, we necessarily have a different phase, as it takes time for the current to pass the obstruction. If, now, we have a single generator, delivering a current to a coil in a single circuit, but we place a second coil, closed on itself, close to the coil in the circuit, the current will induce another current in the second coil, and this will be out of phase with the coil in the circuit. These are the direct, split-phase, and split-phase inductive methods respectively. The use by defendant of a different method from those shown by Lindquist in his drawings does not avoid infringement. Lindquist did not limit himself to any method of producing the currents of different phase in the coils. I think, therefore, that these differences are of no essential moment. This applies to propositions 1, 2, 5, 6, 7, 9, 10, 12, 15.

Defendant contends that "means" for producing currents of different phase in the coils are not found in the defendant's alleged infringing device. On this subject Mr. Kennelly testified that he did find such means, and detailed them, referring to the drawings of defendant's device, as the alternating current mains supplying the fixed electromagnet coil, the fixed coil cross-sectioned in black and white, the two single ring coils on the plunger, the arrangement of the magnetic circuit of the apparatus, and the location and arrangement of the three coils, whereby, he says:

"Not only are their axes parallel to each other and to the axis of symmetry of the whole, but also whereby means are produced for setting up electric currents and magnetic fluxes differing in phase for the purposes described in the patent in suit."

If means for producing currents of different phase in the coils are wanting, I am unable to understand why defendant has currents of different phase in the fixed coil and the ring coils, and the results that follow from their presence. The court is, of course, bound to follow the credible evidence in the case, and on a subject like this, when experts disagree, to an extent, at least, is liable to go wrong, as are the experts themselves. Hawkins seems to think that the Senior patent in suit is limited to a source of supply of out of phase current external to the magnet, but connected to the windings through leads to the coil terminals. If defendant's device has the three coils arranged according to the patent in suit, and one, the large one, is directly connected with the generator and surrounds the plunger, which carries the smaller coils, and these are actuated by induction, or the split-phase inductive method, can it make any difference so long as the large fixed coil is of a different phase from that of the copper ring coils? If Lindquist's claims had called for *the* "means for producing currents of different phase in said coils" shown and described in his drawings, there would be a limitation in the claims themselves which is not now

found there, and which I do not think should be read into them, and which would probably avoid infringement. Even if the Lindquist patents are valid as an advance on the prior art, and even if defendant's device infringes the Lindquist claims, broadly construed, still, if the defendant's device is strictly in accordance with the prior art (it being conceded that it differs from Lindquist considerably in construction and somewhat in its mode of being operated and operation), there is no infringement; that is, defendant does not infringe the Lindquist claims properly construed in the light of the prior art.

Considerable has been said as to the Ihlder patent for alternating-current magnet, dated May 30, 1905, No. 791,423, application filed July 31, 1903, divided and application for the particular patent filed December 2, 1904, and also as to the Ihlder patent of January 17, 1905, No. 780,104, application filed July 31, 1903, for electro-controlling apparatus. Lindquist filed his application for the Senior patent in suit July 14, 1903, and I find no satisfactory evidence that Ihlder can be carried back of Lindquist in knowledge even. The Schuckert and Imray patents are in this art. The Schuckert patent (German) of May 1, 1902, No. 130,293, shows a two-phase and a three-phase tractive magnet of which he says:

"The subject of the present invention consists in an arrangement of tractive magnets for multiphase currents which eliminates the disturbing noise which occurs in the magnets heretofore known."

After stating that in any case the armature of such a magnet must be guided parallel, he says:

"The present invention offers a method permitting the avoidance of the appearance of such disturbing couple of forces; i. e., the construction of multiple magnets operating noiselessly. This purpose is substantially obtained in that the tractive force generated by each single phase passes through the point of application of the load. In consequence thereof, the resultant of all tractive forces generated by the collective phases will always pass through the point of application of the load, and disturbing couples of forces cannot occur."

He then describes an arrangement whereby these alternating-current magnets—with two-phase current only two alternating-current magnets are firmly placed vertically one above the other, and three corresponding armatures directly under such magnets, respectively, are rigidly connected together by a rod. He says:

"If the three alternating-current magnets are fed in star or triangular connection, with triphase current, a variable tractive force will be exercised on each of the three armatures. The resultant of the three forces is, however, almost constant, and it always passes through the point of application *h* of the load, a fact which is especially to be emphasized."

It is evident that, aside from the idea of a parallel guidance of the armature and that the "resultant" of the three forces must pass through the "point of application of the load," this is not complainant's patent or invention.

The patent referred to also says:

"Instead of placing the magnets one over the other, the pole surfaces of same may be arranged in a plane, as in Figs. 2 to 7, in which case a common magnetic yoke may be advantageously arranged for the magnets as well

as for the armature. It is a characteristic feature of this arrangement that the poles produced by each phase are always arranged in pairs about the point of application of the load, and are excited in the same manner as an ordinary continuous current horseshoe magnet. However, the magnets according to Figs. 5 and 7 form an exception, a single pole being arranged for one of the three phases. As, however, this pole lies vertically over the point of application of the load, no couple of forces can be formed by the tractive force thereof.

"Figs. 2 and 3 show such a magnet for triphase current. It possesses six polar projections, of which two always are placed diametrically opposite each other (*I-I*, *II-II*, *III-III*) and are fed by one phase. Fig. 4 shows the same arrangement for a two-phase magnet. Fig. 5 illustrates a five-pole magnet for triphase current. In this arrangement the poles *II-II*, *III-III* are again arranged in pairs, and their coils are connected in series. The first phase, however, feeds only one, viz., the middle pole, which lies vertically under the point of application of the load, and possesses advantageously a double cross-section, so that the central tractive forces of the poles, *I*, *II-II*, and *III-III* are of the same amount.

"In order to facilitate the construction in the arrangement according to Fig. 6, two triple-pole magnets are firmly connected together. The excitation of the three-pole pairs results in such a way that the resulting tractive forces of the poles *I-I*, and also of the rest of the pole pairs, passes through the point of application *h* of the load."

The drawings indicate a center around which the coils, whether four or six, are symmetrically arranged, and the armature has four or six (as the case may be) corresponding projections or poles, which, as illustrated, meet corresponding projections of the magnets on which the coils are placed. The laminations of the pole-pieces are at right angles to those of the core. The claim reads:

"Tractive magnets for multiphase currents, characterized by a central or pair arrangement of their poles, in such a way that the tractive forces generated by each phase pass through the point of application of the load for the purpose of avoiding the disturbing couples of forces which might occur through the action of force and load on the armature and for obtaining a noiseless action of the magnet."

Without going into detail, I am satisfied that Schuckert differs very materially from Lindquist, and that from the German patent and drawings it would be practically impossible to make an operative device in accordance therewith. It suggests, but does not teach or instruct one how to do what is suggested. I have no doubt, and the prior art demonstrates, that it was understood that an electromagnet operated by alternating currents would draw and hold its load without vibration or chattering, if means could be devised by which all parts of the armature should be pulled or lifted and held by the same force or equally at all times in one and the same direction, and we may say the point of application of the load. Any electromagnet which failed in this was defective in arrangement and operation. The Lindquist patent says:

"The invention relates to an electromagnet constructed to be energized by an alternating current, and when so energized to attract its armature and hold the same in position by substantially constant pull and without chattering. The invention consists in an electromagnet having a plurality of coils symmetrically disposed around a central axis, the individual axis of each of said coils being parallel to said central axis; also in the construction more particularly hereinafter set forth."

And later the patent says:

"In all cases it will be noted that the axes of the coils are always parallel to and symmetrically disposed around the axis of the cylindrical magnet core."

Claim 1 says nothing of a "cylindrical core," claims 2 and 3 call for a "cylindrical core," and claim 4 calls for a cylindrical laminated core with integral symmetrically-disposed pole-pieces at one end thereof, coils on said pole-pieces, and "means," etc. I fail to see that defendant does not infringe each and all of these claims. Clearly there is an electromagnet, and clearly it has a plurality of coils symmetrically disposed around a central axis, and as clearly the individual axis of each of said coils is parallel to the central axis. And I can, I think, understand the necessity or great value of the parallelism of the axes of the coils. It means much more than merely mechanical parallelism, for it involves an equal distribution of the magnetism. As I understand, if the core is not laminated, there is danger and imminent danger of so-called parasitic or Eddy currents. If we would have a symmetrical distribution and operation or effect of the magnetism, we must have a symmetrical and like construction and quality of the elements through which it is to operate or be distributed. When defendant surrounded its laminated armature (surrounded when drawn in) with the large fixed coil, and energized it, the consequence was that the copper ring coils were energized and the armature drawn into the large fixed coil. When the core, armature, with its two symmetrically-disposed laminated pole-pieces carrying the two single-turn copper coils, is energized, the large fixed coil inducing current in the ring coils, we have the structural and magnetic equality and symmetry required. The lamination of the pole-pieces on the end of the armature which carry the copper ring coils are integral with the armature, a part thereof, and consequently parallel with the central axis. I cannot see why every condition of the patent in suit is not fully met by the defendant's structure. It is said that the movable plunger is not cylindrical geometrically. This is true. But functionally it is cylindrical. To all intents and purposes it is cylindrical. For all the mechanical and magnetic purposes of defendant's device it is cylindrical. It moves up and down in the cylindrical space within the large fixed coil. There are several cases which hold that such a change of shape, the function being the same, does not avoid infringement.

Hawkins contends that the "core" of Lindquist is the body *A* from which the pole-pieces extend and which in turn support the coils. This is true enough. He then says:

"The portion of defendant's structure which corresponds in function to this core *A* is the rectangular box-like iron member which is stationary and surrounds the main coil. This member obviously is not cylindrical."

If this box-like structure referred to by Mr. Hawkins does perform the functions, and all the essential functions, of the core of the Lindquist patent, then it is so far from cylindrical that, if "cylindrical" is of any importance at all, defendant does not infringe. But

in my judgment this box-like structure serves as a mere support for the real core of the defendant's structure. He says:

"Dr. Kennelly, in reading this claim on defendant's structure, calls the plunger of defendant's structure the 'core.' It does not seem to me that this is a proper interpretation, because defendant's plunger corresponds more nearly to the armature pole-pieces 24 of Lindquist, which move up and down inside the coils just as defendant's plunger moves up and down inside the main coil, and these pole-pieces in Lindquist's structure are not cylindrical, and are not the parts referred to by the term 'cylindrical core' in the claim. Even if defendant's plunger could properly be called the 'core,' as this word is used in the claim, it could not be called a cylindrical core without further interpreting 'cylindrical,' as Dr. Kennelly does, as 'functionally cylindrical.' As I have explained heretofore, the shape of the core has nothing to do with its function, so that interpreting cylindrical as 'functionally cylindrical' is simply reading the word out of the claim."

I cannot agree with this when we consider the function of the Lindquist core as described in his specifications. He also says:

"I do not agree with Dr. Kennelly that defendant's coils—the large one with its axis coincident with the axis of the magnet, and the two small coils being on opposite sides of the central axis and inclosed by the large coil—are properly described as 'symmetrically disposed around a central axis,' when that clause is read in the light of the specifications and drawings of the Lindquist patent."

[2] It is true that Lindquist's *drawings* do not show such an arrangement of the coils, but all he had to do was to show one mode of arrangement. The claim embraces all arrangements of the coils which will symmetrically dispose them about the central axis. Mr. Hawkins also contends that defendant's device will not do the work of complainant's device as well or as perfectly. This is immaterial. If substantially it has the same elements with the same functions, all working on the same principle and in obedience to the same law, and in the same manner and producing the same result, although imperfectly, defendant infringes.

The defendant infringes, and there will be a decree accordingly for an injunction and for an accounting, with costs. Defendant is amply responsible, and pending an appeal, if taken within 30 days from the entry of the interlocutory decree, the issue and operation of the injunction will be suspended, on condition that defendant shall keep an account of all infringing devices made and sold or made or sold, open to inspection once each three months.

DE LASKI & THROPP CIRCULAR WOVEN TIRE CO. et al. v. FISK RUBBER CO.

(District Court, D. Massachusetts. July 16, 1912.)

No. 121 (No. 593, C. C.).

PATENTS (§ 328*)—ANTICIPATION—APPARATUS FOR MAKING PNEUMATIC TIRES.

The Thropp patent, No. 822,561, for apparatus for manufacturing wheel tires for automobiles, claims 1 and 2, *held* void for anticipation.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the De Laski & Thropp Circular Woven Tire Company and others against the Fisk Rubber Company. On final hearing. Decree for defendant.

Emery & Booth, John P. Bartlett, and E. Clarkson Seward, for complainants.

William Quinby, for defendant.

BROWN, District Judge. The bill alleges infringement of claims 1 and 2 of letters patent No. 822,561 to P. D. Thropp for apparatus for manufacturing wheel tires. Application was filed November 1, 1905; the patent is dated June 5, 1906.

The invention relates especially to apparatus for holding a clencher tire in position during the vulcanizing process.

1. Tire-forming apparatus comprising an annular core or mandrel, annular pressure-rings arranged to engage the clencher edges of the tire leaving the outer body portion of the tire exposed and means for forcing the pressure-rings into a predetermined position with respect to the core or mandrel.

2. Tire-forming apparatus comprising an annular core or mandrel provided with an inwardly-extending rib, pressure-rings arranged to engage the clencher edges of the tire on opposite sides of the said rib leaving the outer body portion of the tire exposed and means for forcing the pressure-rings against the opposite sides of the rib.

Complainants say the invention lies in the apparatus for molding and giving pressure to the tire casing during the vulcanization; that the apparatus is adapted for use in producing automobile tire casings by what is called the "one cure, wrapped tread method," in which the inner casing, including the tread, is built up on a core or mandrel at one time, of green or unvulcanized stock. The side pressure-rings are then applied, which inclose the inner or clencher part of the tire, leaving the outer body portion uninclosed. The whole is then spirally wrapped with a porous tape, and so wrapped is submitted to a vulcanizing heat, after which the wrapping, pressure-rings, and mandrel or core are removed and the casing is entirely completed.

Complainants state that many advantages result from the use of this apparatus, both in the quality of the product through the avoidance of pinching or of buckling, which is said to attend the use of the full or closed mold of the prior art, by reason of the difficulty in estimating accurately the amount of rubber necessary for the proper filling of the closed mold, and in the ease, speed, and lessened cost of manufacture.

It is claimed that the patent in suit is basic, being the first apparatus adapted for the manufacture of one-cure open-cure, wrapped tread tire casings in which substantially the inner half of the casing (that is, the clencher part) is molded, and the outer half open cured.

The utility of the apparatus is shown by testimony to the effect that by July of the year 1910 19 manufacturers of automobile tire casings used this device and paid royalties therefor to the complainants. The most important defense is that of invalidity of the patent in view of prior patents and of the prior unpatented art.

The defendant states that the Thropp patent shows an open mold

as distinguished from a closed mold and that an open mold is in all respects like a closed mold, except that the outer edges of the mold sections are cut away to expose a part of the sheath. In both forms the mold sections must inclose and engage the clencher part of the sheath.

The defendant has introduced a large amount of testimony as to devices of the prior art preceding Thropp's date of invention. Thropp claims as his date of conception February 1, 1905. In interference proceedings the patentee, Thropp, on March 12, 1907, filed a sworn preliminary statement in the Patent Office to the effect that he conceived the invention and first made a drawing or sketch of it about February 1, 1905; that the invention was first disclosed to others on or about March 1, 1905; that a full size working model of the invention was made on or about July 15, 1905; and that he first reduced the invention to practice on or about July 20, 1905.

The defendant has produced voluminous evidence, called the Akron evidence, as to the making of designs for molds by the B. F. Goodrich Company; the manufacture of molds; and the use of these molds in January, 1905, for the manufacture of single open-cure wrapped tread automobile tires. It has also proved that the first four of these tires were delivered to the Baker Electric Vehicle Company, of Cleveland, Ohio, January 10, 1905. Drawings for an open heat mold, dated December 22, 1904, are produced, which show a mold comprising a mandrel and annular pressure rings arranged to engage the clencher edges of the tire, leaving the outer body portion of the tire exposed; also open heat molds for a fillet to be used in connection with the pressure rings.

In the patent in suit it is said:

"The outer edges of the pressure-rings are made quite thick, as shown at 11 and 12, in order to make them firm. * * *

Also the following:

"In operation, the several elements of the tire having been placed in position on the core and the pressure-rings forced into position by the bolts 8, filling-rings 17 18 of wedge shape in cross-section are placed against the sides of the tire above the thick edges 11 and 12 of the pressure-rings, and the whole is wound with a wrapping of tape 19, the filling-pieces 17 18 serving to impart the pressure of the winding tape to the sides of the tire to hold the latter in position during the vulcanizing process."

The fillet molds shown in the Akron evidence are for producing filling pieces corresponding to those shown in the patent in suit. The filling-rings are elements of claim 3, but are not elements of claims 1 and 2. The omission of these wedge-shaped filling-pieces from the apparatus of the patent in suit would leave a portion of the outer tread at a considerable distance from the winding tape, so that the winding tape would not exert its pressure upon parts of the outer portion of the tire. Nevertheless, the defendant has shown a device which in all substantial particulars is an anticipation of what is shown in the drawings of the patent in suit, and which is doubtless apparatus for holding a clencher tire in position during the vulcanizing process, in connection with a winding tape. If the claims in suit can be distin-

guished by the omission of the fillets, and cover apparatus in which the outer edges of the pressure-rings are made sharper and longer so as to dispense with the use of fillets, this must be regarded as merely a difference in form which does not meet the defense that the prior art shows rigid mold sections for the clencher or inner part of the tire adapted to be used with a cross wrapper for the curing of tire casings in open heat.

The complainants contend that this device is not proved by competent evidence to have existed or to have been used. Upon a reading of the entire testimony and of the full discussion of this matter upon the defendant's brief, I am of the opinion that the device is proved not only by the direct and positive testimony of competent witnesses, but that the corroborative testimony, consisting of drawings, mold cards, invoices, and entries, establishes beyond a reasonable doubt the facts upon which this defense rests. This testimony comes not only from the Goodrich Company itself but from the Baker Motor Vehicle Company and from the Williams Foundry & Machine Company, manufacturers of molds.

The complainants say further that the apparatus shown is part of a two cure apparatus, and is not adapted to perform the functions of the patent in suit. The materiality of this objection is doubtful. The patent in suit says nothing as to a one cure process or a two cure process. In the two cure process the carcass of the tire casing, exclusive of the tread portion, is built on a mandrel and semicured in a closed mold, the tread is built up on a separate mandrel wrapped spirally with a fabric wrapper and also semicured, and the two semicured parts are united by cement and the whole spirally wrapped and subjected to a second cure in open heat. The patent in suit is broad enough to cover the use of the apparatus with either a wholly uncured carcass or a semicured carcass. The patent in suit upon the present record and upon the briefs can hardly be regarded as for a new method of curing. The open heat wrapped tread single cure process was old. The use of the spiral winding of tape instead of a closed mold, and the open wrapped tread single cure process for the purpose of obviating pinching is shown in the patent to Cowen 565,834, August 11, 1896. Claim 1 of said patent is as follows:

"The herein-described method of manufacturing pneumatic tires, which consists in building up an endless tube of or containing unvulcanized rubber; temporarily covering the tread surface of the inflated unvulcanized tube with a fabric adapted to make fine indentations therein; securing the said tread covering fabric temporarily in position pressing upon the said tube; vulcanizing the tube while so covered, and then removing the temporary covering to leave the completed vulcanized tube ready for use, substantially as described."

Defendant has properly suggested that the form of clencher cavity shown in the Thropp patent is not new with Thropp and that various forms of open molds in the prior art had means for holding the inner portion of a tire during an open cure. The contention that the Goodrich Company's apparatus was for a two cure process, though of doubtful materiality, is not satisfactorily established. Thropp the patentee,

testifies upon examination of the drawings that they represent a two cure apparatus and not a single cure apparatus. This is based upon the contention that the drawings of the Baker device include not only defendant's Exhibits 14 and 11 of open molds, but also Exhibit 12 of a closed mold. On the other hand, is the testimony that Exhibit 12 of a closed mold, though marked "Baker special" was not a part of the device in use and it may be observed that the closed mold Exhibit 12, marked "C 613," is about a month earlier in date than Exhibits 11, marked "C 627," and 14, marked "C 626," and of other exhibits consecutively numbered and dated at about the same date in December.

Any inference to be drawn from Exhibit 12, however, is insufficient to meet the positive testimony of a number of witnesses that the process used with the apparatus of Exhibits 14 and 11 was a one cure process.

The defendant also introduces testimony, called the Detroit evidence, of witnesses connected with the Morgan & Wright Rubber Works. This establishes the conception of making a tire sheath by the single open cure wrapped tread process prior to September, 1904; the construction of apparatus and the making of a single sheath, and subsequent developments of open mold construction which led to the production of apparatus substantially like that of the patent in suit. There is also further evidence from the employes of the Hartford Rubber Works, located at Hartford, Conn., showing that as early as 1894 there was used a somewhat crude device for the manufacture of open single cure wrapped tread tires.

There is also evidence, called the Chicopee evidence, from employes of the Fisk Rubber Company, which shows devices for an open one cure wrapped tread process.

It seems unnecessary upon the question of anticipation to refer specifically to devices other than the devices proved in the Akron defense, further than to say that they thoroughly establish the fact that the single cure wrapped tread process was familiar in the art, and therefore that the patent in suit cannot be construed with the breadth that would be given to it if it were for the first apparatus which embodied this method of curing tires. It may, however, be properly considered upon the evidence in the case as for apparatus which comprehends rigid molds for the inner part of the tire, capable of exerting considerable molding pressure at that point, while leaving the outer part of the casing free for the open cure wrapped tread process. So considered I am of the opinion that it is anticipated by the production and use of substantially similar apparatus by the Goodrich Manufacturing Company, and that anticipation is not avoided by the fact that in the claims in suit the fillets are omitted. The lengthening of the edges of the pressure-rings so as to obviate the use of fillets is not indicated in the specification of the patent in suit; and if the omission of fillets from claims 1 and 2 is sufficient to support the inference that the patentee had in mind a structure of other form than that shown in the drawings and described in the specification, it must be upon the view

that such a change was obvious. There is described in the patent in suit nothing patentable over the prior Goodrich structure, even if complainant's pressure-rings were so constructed as to obviate the use of fillets.

I am of the opinion that claims 1 and 2 of the patent in suit are invalid, by reason of anticipation.

The bill will be dismissed.

LOVELL-McCONNELL MFG. CO. et al. v. WAITE AUTO SUPPLY CO.

(District Court, D. Rhode Island. July 22, 1912.)

No. 16.

1. PATENTS (§ 129*)—CONDITIONAL LICENSES—CONSTRUCTION.

A label attached to a patented article sold by the owner of the patent to a dealer, licensing its sale or use only on certain conditions, one of which was that by its acceptance the purchaser acknowledged the validity of the patent, reasonably imports that the condition relates only to the specific article to which the label is attached, and it does not estop the purchaser to contest the validity of the patent, when sued for its infringement by the sale of articles made by others and alleged to infringe, at least without proof that such indirect consequences of the acceptance of the condition were known and understood by the purchaser.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. § 129.*]

2. PATENTS (§ 280*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A complainant is not entitled to a preliminary injunction to restrain infringement by further sales by defendant of patented articles under a license agreement which it is alleged defendant has violated, where the bill also prays for additional relief which can only be granted if such agreement is still in force; complainant being required to elect between the two inconsistent positions.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. § 280.*]

Grounds for denial of preliminary injunction in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

In Equity. Suit by the Lovell-McConnell Manufacturing Company and others against the Waite Auto Supply Company. On motion for preliminary injunction. Motion denied.

Horatio E. Bellows, of Providence, R. I., and Geo. Cooper Dean, of New York City, for complainants.

J. Jerome Hahn, of Providence, R. I., and C. A. L. Massie, of New York City, for defendant.

BROWN, District Judge. This is a petition for preliminary injunction against alleged infringement of letters patent Nos. 923,048, 923,049, and 923,122, to Hutchinson, May 25, 1909. The patents relate to mechanically actuated diaphragm horns or alarms. Certain of these horns were sold to the defendant with a label attached thereto, in the following terms:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

License.

Lovell-McConnell Mfg. Co., Makers, Newark, New Jersey, U. S. A.

The instrument contained in this box is marked with and identified by its Serial No., is made by us under United States patents, granted March 14, 1899, No. 620,958; March 31, 1908, No. 883,643; May 25, 1909, Nos. 923,048, 923,049, and 923,122; May 3, 1910, Nos. 956,898, and 957,161; design patents January 19, 1909, Nos. 39,785 and 39,786, and February 2, 1909, No. 39,801; and is licensed and sold only under and subject to the following conditions assented to by purchase, and controlling all sales and uses thereof, any violation of which license conditions revokes and terminates all rights and license as to this and all other instruments of makers in violator's possession, and subjects violator to suit for infringement of said patents, without further notice.

(1) The instrument contained herein is licensed for use and sale only when sold at retail or to buyers for use at a price not less than \$. . . , and only for such time as our name plate, registered trade-mark and serial number shall remain unaltered and clearly legible thereon, and only when seller and buyer acknowledge that the above mentioned patents are valid as to all the claims thereof, and that the instrument is licensed under and covered by said patents.

(2) Dealers may sell to other dealers having actual notice of and assenting to the conditions of this license, but may not sell to any one designated by the makers as objectionable, and may not alter, erase, detach or conceal any of makers' marks, notices, licenses, tags or labels applied to the within instrument or to this box containing it.

(3) No deduction, discount, rebate, premium or bonus shall be allowed or given in connection with any sale or transfer at retail except that a 5% discount may be allowed where sale is made for cash.

(4) No license whatever is granted for purchase or sale by any one who has been notified that he is objectionable to makers; nor for purchase by or through, or sale by or to, any person, company, concern or association which offers or affords purchasers or users any membership, profit sharing or co-operative right or privilege.

(5) Purchase, sale or acceptance of this instrument is acceptance of and agreement to perform the conditions above stated.

Lovell-McConnell Mfg. Co., Makers.
Miller Reese Hutchinson, Patentee.

[1] The bill alleges that by purchase, by acceptance, and by resale the defendant is a purchaser who has repeatedly and specifically acknowledged the validity of said patents, and that by reason of the premises the defendant is now estopped to deny the validity of said patents. The bill also alleges that the defendant signed a supplemental selling license wherein it acknowledged its familiarity with complainants' system of selling horns under conditional licenses. It is charged that the defendant has advertised and sold, and threatens to continue to advertise and sell, automobile horns, designated as the "Newtone" horn, made by another manufacturer, but embodying said inventions, in infringement of the rights of complainants.

The bill prays an injunction against manufacture, use, or sale of the complainants' horns known as "Klaxon" and "Klaxonet" horns, of the kind purchased by the defendant from complainants, and also for an injunction against the use or sale of the "Newtone" horn or any similar horn at the same time that it uses, advertises, or sells the horn manufactured by complainants, and also against purchasing complainants' horns without special written permission of the complainants, etc.

The license states that the instrument is licensed under conditions assented to by purchase, that any violation of these conditions revokes and terminates all rights and license as to this and all other instruments of makers in violator's possession, and subjects violator to suit for infringement of patents without further notice. Paragraph 1 is in part to the effect that the instrument is licensed only when seller and buyer acknowledge the validity of the above-mentioned patents. Paragraph 2 in part provides that dealers may not sell to any one designated by the makers as objectionable; paragraph 4, that no license is granted for the purchase or sale by any one who has been notified that he is objectionable, etc.

The patents in suit have not been adjudicated, nor is general acquiescence shown. These complainants are prosecuting in the Eastern district of New York a suit upon these patents against the manufacturer of the Newtone horns, the Automobile Supply Manufacturing Company, wherein a preliminary injunction was denied. See *Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co.* (C. C.) 193 Fed. 658.

Under ordinary rules a preliminary injunction against the sale of "Newtone" horns would be denied upon the complainants' showing. The complainants contend, however, that the defendant is estopped to deny the validity of the patents in suit, by reason of a condition attached to the sale of complainants' horns, known as "Klaxons" and "Klaxonets"; the condition being set forth in the first paragraph of the license above quoted. It will be observed that this license contains no direct provision restricting the defendant from dealing in other horns than those manufactured by complainants. The proposition that the defendant has estopped itself from contesting the validity of the patents in a suit to enjoin its sale of the product of other manufacturers is very doubtful. The condition as to acknowledgment of the validity of the patents seems rather a limitation of rights acquired in the use of a particular instrument than a general agreement with the vendor. Even should it be held that the relation established by purchase with knowledge of such conditions is strictly contractual, a point which requires further consideration in view of the reference in *Henry v. A. B. Dick & Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, decided by the Supreme Court March 11, 1912, and to *British Mutoscope & Biograph Co. v. Homer*, 17 L. T. R. 213, there is ground for thinking that such contract must be confined to the specific subject-matter of the sale.

It is a peculiarity of this form of license that by its terms the instrument itself is licensed. The license seems to be treated as appurtenant to a specific instrument identified by a number. If the licenses are several, and severally accepted, it seems reasonable to confine restrictions imposed upon the purchaser to dealings with the specific subject-matter. The proposition that a purchaser of one of these instruments, with knowledge of the conditions, has thereby agreed to acknowledge the validity of the patents in suit for all purposes and in respect to other articles, is questionable for several reasons. Such an agreement by a purchaser may be altogether disproportionate to any

consideration coming to the purchaser of a single instrument. The acceptance of this proposition would be likely to impose upon a purchaser by a catching bargain conditions which he did not appreciate.

As the license contains no express provision against the sale of any other horns, nor any express restriction of complainants' ordinary legal rights in respect thereto, the attempt to deprive the purchaser of one of complainants' horns of the ordinary rights of sale and of ordinary rights of defense in respect to other articles, in the absence of evidence of full consideration for such a restriction, would have an aspect of unconscionableness and raise considerations of public policy. *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 238, 254, 12 Sup. Ct. 632, 637, 643, 36 L. Ed. 414, 420, 426.

The doctrine of acceptance of conditions upon the purchase of articles with labels, notices, or indorsements thereon requires at law specific proof that the conditions were brought to the purchaser's notice. In equity the chancellor should be satisfied, not only that the text was brought to the purchaser's attention, but that the implications and indirect legal consequences of the agreement were understood, or at least were such as were fairly obvious to a purchaser in the ordinary course of trade.

Upon the motion for a preliminary injunction against the use of the "Newtone" horn, I am of the opinion that the complainants' case is not aided by the contention that the defendant is estopped or has agreed not to contest the validity of the patents in respect thereto.

[2] The contention that the defendant is bound by the acknowledgment of the validity of the patents gives rise to an inconsistency, when we consider the case in respect to the prayer for an injunction against the sale of "Klaxons" and "Klaxonets." This contention seems to require us to assume that the license agreement is still in force. If abrogated by complainants, it can hardly be contended that the defendant is still bound by its terms. The complainants have an election to treat the license as still in force and to restrain a breach, or to consider it at an end. The difficulty in this case is that the bill involves inconsistent positions and not alternative positions. If the license is to be treated as in force, it is in force for all purposes, and the defendant cannot be treated as an infringer, but merely as one who has violated the terms of a contract still in force. The complainants may have grounds for their contention that the defendant is an infringer by reason of the sale of "Klaxon" and "Klaxonet" horns contrary to the terms of the license. Upon this point, however, there is doubt, in view of the facts. The complainants themselves cite cases showing that it is doubtful if the license has been abrogated and whether defendants can be treated as infringers. *American Graphophone Co. v. Victor Talking Machine Co.*, 188 Fed. 428, 110 C. C. A. 308; *Id.* (C. C.) 188 Fed. 431. Until, however, the complainants shall elect definitely which right they will claim, it does not appear whether the case should proceed upon the theory of infringement or of violation of the terms of an existing contract. Though the court has power to grant alternative relief, it has no power to make an election for the complainants between inconsistent rights.

The case presents also a further question as to whether equity should lend its aid to enforce the provision that a breach of conditions in respect to a single instrument shall revoke all rights as to other instruments in the violator's possession. Forfeitures of this character are not favored by equity and will not be aided upon merely technical legal grounds. Furthermore, the complainants fail to show that in respect to sales of Klaxon or Klaxonet horns by the defendant the complainants are likely to suffer such irreparable injury pending final hearing as to require a preliminary injunction.

Motion for a preliminary injunction is denied.

TURNER v. MOORE et al.

(District Court, D. Minnesota, Fourth Division. March 29, 1912.)

PATENTS (§ 328*)—INFRINGEMENT.

The Turner patent, No. 985,119, for steel skeleton concrete construction, *held* not infringed.

In Equity. Suit by Claude A. P. Turner against Morris E. Moore and Edward J. Sriver, copartners as Moore & Sriver. On final hearing. Decree for defendants.

Charles J. Williamson, of Washington, D. C., and L. A. Hubachek, of Minneapolis, Minn., for complainant.

H. E. Fryberger, of Minneapolis, Minn., for defendants.

WILLARD, District Judge. The only question which I shall consider is whether or not the defendants' building infringes the complainant's patent. Claims 1 and 4 of patent No. 985,119, issued to Turner on February 21, 1911, require: (a) A cantilever head; and (b) rods extending from said head downward into the column. The cantilever head has necessarily as a part thereof cantilever rods. Are the basket rods found in the Moore & Sriver building cantilever rods?

The slab is eight inches thick. (Defendants' Record, Sandberg, p. 258; Johnson, p. 277.) Sandberg, the foreman, knows what he testified about, because he measured the slabs. (Page 259.) The basket rods entered the slab from below only two inches. (Sandberg, p. 258; Johnson, p. 277.) Sandberg knows this, also, because he measured the pattern. (Page 260.) The rods turned at once at the top; they did not extend horizontally. (Defendants' Record, pp. 179, 322.) This is clearly shown in the building inspector's sheet No. 10, and also in the model presented by the defendants, the accuracy of which is established by the evidence. In the specification of the patent it is said (page 2, line 113) that the rods extend laterally into the slab substantial distances beyond the sides of the column.

Under these circumstances, Heidenrich did not greatly exaggerate when he said (Defendants' Record, p. 345) that the basket rod could not be a cantilever by the wildest stretch of the imagination. To be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a cantilever, some part of the rod must be in tension. The complainant in his brief speaks of the tension member of the elbow rod. (Page 54.) The basket rods in the Moore & Sriver building, extending into the lateral part of the slab only two inches, are below the neutral axis, and are not in tension. The basket rods serve an entirely different purpose from that served by Turner's elbow rods. The basket rods are used as a strut or brace. (Defendants' Record, Cowles, p. 42; Hamlin, p. 217; Houghton, pp. 275, 299, 311; Heidenrich, p. 346.)

It is true that Turner in his patent mentions supplemental bracket or brace rods (c^3). These braces also appear in the drawings for the Wisconsin freight house, and in those for the Lindeke, Warner & Co. building. But Houghton (Defendants' Record, pp. 266, 267) and Cowles (pages 160, 203) testify that when Turner presented the drawings for the Johnson & Bovey building they showed no such braces, that Turner said they were not necessary, but that Houghton insisted that they be put in. However this may be, the claims of the patent which are sued on do not include these braces as an element.

It is said, however, that in some of the columns on the first floor the basket rods extended above the slab rods, and the large photograph is relied upon to show this. A photograph is not always conclusive evidence of what it purports to represent; but, apart from this, Cowles testifies (page 201) that the instructions were to jack up the steel just before the concrete was poured. Cook says that in some places he used brick, and that the men pulled up the rods with hooks before the concrete was poured. (Page 290.) Cook, however, did testify that some of the basket rods on the first floor did extend into the slabs more than two or three inches, but that they found that the tops were in the way of the slab rods, and they made the basket rods shorter, so that they would just catch onto the form and hold them in place. He nowhere says that these longer rods had any horizontal section; on the contrary, he says that the rods used in the building were in the form of a hook, as shown in the model. (Page 253.)

But, even assuming that in some of the columns on the first floor the tops of the hooks did extend above the neutral axis, their value as tension or cantilever rods would be so small that they could not properly be called such. (Cowles, p. 196; Hamlin, p. 216.)

Although the basket rods are not cantilever rods, yet complainant says that the rods (f) are, that they with the ring (e) form a cantilever head, and that the basket rods constitute the member extending downward into the column.

It is to be observed that the plans did not call for the links, 16, Fig. 1, or the hooks, 19, Fig. 5, of the Cowles patent. (Defendants' Record, pp. 153, 159.) The evidence clearly shows that the basket rods used in the building were in no way fastened to the ring (e) or to the rods (f). (Houghton, p. 310; Cook, 299; Cowles, 42, 201.) The complainant in his brief does not seriously contest this proposition. (Page 64.)

It is evident that, in order to co-act with the cantilever head, its member extending downward must be attached to it. The specification of the patent says (page 2, line 26) that the primary function of

the member extending downward is to perform the office of an anchorage for the cantilever head. It thus appears that, while the ring (*e*) and the rods (*f*) may be a cantilever head, the element of a member extending downward is wanting in the defendants' building.

Concerning claim 6 little need be added. As Heidenrich says (page 366) the word "vertical" cannot in ordinary parlance include a case where there is an angle with the axis of some perpendicular body.

Let a decree be entered for the defendants, dismissing the bill, with costs.

BURROWES et al. v. FERGUSON BROS. MFG. CO.

(District Court, S. D. New York. August 1, 1912.)

PATENTS (§ 328*)—INFRINGEMENT—FOLDING TABLE.

The Burrowes patent, No. 766,988, for a folding table, construed in the light of the prior art and the proceedings in the Patent Office, *held* not infringed.

In Equity. Suit by Edward F. Burrowes and the E. T. Burrowes Company against the Ferguson Bros. Manufacturing Company. On final hearing. Decree for defendant.

L. S. Bacon and C. E. Dunn, for complainants.

E. Clarkson Seward and Wm. McK. Barber, for defendant.

PLATT, District Judge. This is a bill in equity, alleging infringement of patent 766,988, granted August 9, 1904, to Edward T. Burrowes, assignee of Franklin M. Burrowes, the alleged inventor, and demanding the usual remedies. The original bill alleges unfair competition also, but the charge is not supported by proof. The facts regarding the patent and its infringement have been examined with much more care than this brief memorandum would indicate.

When the claims are construed, as they must be, in view of the prior art, there is, beyond the shadow of a doubt, no infringement. I am also quite of the opinion that the claims relied upon are invalid, but I do not care to place the judgment upon that ground. If I were to take that last step, I should deem it my duty to analyze the art and the patent claims, in extenso, so that the line of reasoning which brings me to such a conclusion could be plainly understood. My health and the season of the year forbid such an effort.

When the claims are limited, as they must be, to the details of construction shown in the specifications and drawings, no discussion is needed. The burden of complainants' song is that, up to the time of the appearance of the patentee in the art, the best folding table in existence was a heavy, cumbersome thing, not easily carried about and set up in place, and that all on the sudden, like a flash of lightning out of a clear sky, along came this skilled workman in complainants' factory and evolved, as a boon to the perspiring public, the idea of a compact folding card table, which is very useful and of such a feather like weight, that anybody of either sex, with even a touch of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

muscular development, can manage it with ease, and that therefore he and his assigns should be protected against all other light and compact folding card tables, which are constructed on the general lines of the idea which he evolved and gave expression to.

It goes without saying that, if the patented idea was such a boon, it would deserve protection against a wide range of equivalent constructions; but I am bound to say that after a careful study of the prior art, and after learning how much the patentee conceded during his eventful trip through the Patent Office (which trip, by the way, would in my judgment have been disastrous if the examiner had scanned the prior art more closely), there cannot be found even a shred of pioneership about the patent. In my opinion, the trouble in this case is one which we frequently run across in patent cases. Long after the event, and in the light of later experience, the experts have built up for the patentee an original idea which never entered his mind when he was getting his patent. If the faintest notion of the pretty little thing for which he is now asking protection had caught a lodging in his mind during the heckling process which the examiner put him through, it is impossible to believe that he could have remained so impregably silent about it. Lumbering, heavy structures of different kinds were cited against him, and he yielded to them, never suggesting that the lightness of his structure was enough to take him away from the citations. The very fact that he expected to make his top of leather board or fiber board, which are two of the heaviest substances he could have used, seems to take away any possibility that he could have been thinking about lightness of weight. He was after compactness, and the positive engagement of the legs within the space made by the edges of the table, so as to facilitate transportation and save expense.

I am inclined to think that, if he had patented this idea now suggested for him, he might have been entitled to protection against this alleged trespass; but that thought has no bearing on the issue I am now deciding. He had no such idea, and therefore neither claimed nor got any such protection. I find, upon the facts before me, that the defendant's table does not infringe.

Let the bill be dismissed, with costs.

MILLS v. DENVER & R. G. R. CO.

(District Court, D. Colorado. June 26, 1912.)

No. 5,925.

1. ADVERSE POSSESSION (§ 7*)—RAILROADS—PUBLIC LAND—EFFECT OF ABANDONMENT.

Where a railroad company, which by the construction of its road has acquired a right of way over public land, has abandoned the same by a relocation of its line and the removal of its track, the old right of way becomes subject to the rules governing property privately owned, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

title thereto may be acquired by another by adverse possession under color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.*]

2. ADVERSE POSSESSION (§ 70*)—RAILROADS—RIGHT OF WAY OVER PUBLIC LANDS—EFFECT OF CHANGE OF LINE.

The predecessor of defendant railroad company by building its road in 1877 acquired a right of way over public lands which were afterward patented to complainant's grantors; there being no reservation of the right of way in the patents. In 1899 the railroad company changed its line, purchasing a new right of way from the owners over the lands and removing its track from the old right of way which was then inclosed and thereafter cultivated by the owners with the rest of the land. *Held*, that the abandonment of the old right of way must be assumed to have been a part of the consideration to the owners of the land for the new one, and that such owners had color of title to such old right of way which after the lapse of the statutory period gave them absolute title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394-414; Dec. Dig. § 70.*]

3. RECORDS (§ 9*)—SUIT TO REGISTER TITLE—PERSONS CONCLUDED—SERVICE BY PUBLICATION.

Under the Torrens Act (Laws Colo. 1903, p. 311), providing for the adjudication and registration of land titles, a railroad company which by the construction of its road acquired a right of way over a tract of public land under act of Congress, but afterward by a relocation of its line abandoned such right of way, which was inclosed and cultivated by the owner of the land, where there was nothing of record or on the ground to show its ownership, was properly brought into a suit brought by a purchaser of the land for registration of his title by publication as an unknown party and is bound by the judgment therein.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

In Equity. Suit by Ogden Mills against the Denver & Rio Grande Railroad Company. On motion for preliminary injunction. Motion granted.

Bartels & Silverstein and John H. Chiles, all of Denver, for complainant.

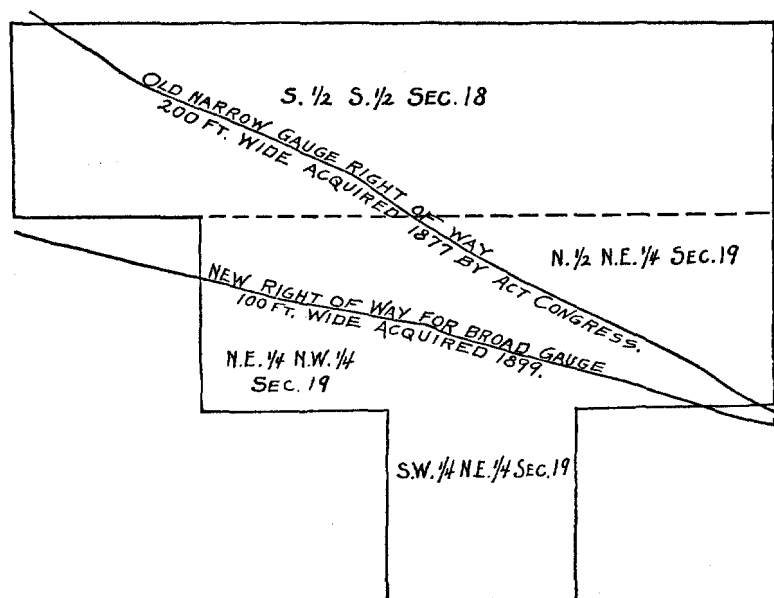
E. N. Clark and R. G. Lucas, both of Denver, for defendant.

LEWIS, District Judge. This is an application for a temporary writ of injunction. The facts are these:

Complainant is the owner of 320 acres of land in Huerfano county, holding registered title thereto under the so-called Torrens Act (Laws Colo. 1903, p. 311). The title was confirmed and registered in accordance with the provisions of said act on August 27, 1911. These lands were first entered about 1882, and patents conveying the title from the United States, without any reservation, were issued in 1890. In 1877 the Denver & Rio Grande Railway Company constructed its narrow gauge road across the lands, taking for that purpose a strip thereon 200 feet wide and about 1 mile long. Its right of way thus taken was acquired by virtue of Congressional Act June 8, 1872, c. 353, 17 Stat. 339, and the amendment thereto of March 3, 1877, c. 126, 19 Stat. 405. The section of the right of way across the lands

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was a part of the main line of said railroad between La Veta and Alamosa. It thus appears that the title acquired by the entrymen under their patents to the lands was subject to said right of way. The railroad was continuously operated as first constructed by said railway company and its successor, the Denver & Rio Grande Railroad Company, until November, 1899. Just prior to the last-named date, said railroad company had changed its line from narrow to broad gauge, and for that purpose had selected a new route for about 30 miles of its line between La Veta and Alamosa, and had purchased a strip of ground 100 feet wide across complainant's lands from his predecessor in title, and since said last date has continuously operated its road over said subsequently selected route. A rough outline showing the two routes across the lands follows:



Since 1899 the old right of way has been inclosed as a part of the lands, and for many years past has been cultivated, and is now in cultivation. There is not, and has not been for many years, anything to indicate the line across said fields of the original right of way. Soon after the new line was constructed, it was fenced on both sides across these lands, and the grade on the old right of way was plowed down, irrigation ditches were carried across it in places, and it became a common part of the cultivated fields. It was in this condition when complainant purchased the lands, and had been so for many years. There was nothing to indicate, to one going upon the lands, that a railroad had ever existed along the old route, and complainant had no knowledge that it had ever existed when he purchased. After the broad gauge road was constructed and had been in operation for several years, the defendant, a consolidated

corporation under the laws of the states of Colorado and Utah, succeeded to all of the rights and title held by said railroad company to the broad gauge line and also to all interest, if any it then had, in the old right of way on which the narrow gauge line had been constructed. A coal mine has been opened up at a point on the old narrow gauge right of way about six miles westerly from complainant's lands, and shortly before the bill was filed the defendant sent its servants into complainant's fields for the purpose of surveying and staking out the old narrow gauge line with a view to laying down a railroad switch track across the same along said old route from a point of connection with its main line just easterly of complainant's lands and extending thence along said old narrow gauge line to said coal mine for the purpose of hauling out to its main line for shipment the output of said mine.

And thereupon the complainant, a resident and citizen of the state of New York, filed his bill for the purpose of enjoining the defendant from the commission of its threatened acts as an alleged trespass.

On the filing of the bill a restraining order issued, and the defendant in its return to the order to show cause claims the right to take possession of the old right of way as owner thereof.

[1] 1. The defendant takes the position that under the rule announced in *Railway Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044, and *Railway Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639, the title which it claims, as under the act of Congress, to the old right of way, could not, *nolens volens*, be acquired from it. We do not believe the rule there announced has any application to the facts here. It was certainly not intended by the act to compel the railway company to operate its road over the originally selected route and prohibit thereafter a change in any part of such route, if conditions in the judgment of the company should thereafter render such change advisable. Such change would not likely be made in a rugged, mountainous country, such as we have in hand, until it was first ascertained that the change would promote the safe and economical operation of the road; and, after such a change had been made, the old grade under those conditions could have no semblance to the facts presented in those cases. The reason for the rule there announced does not exist here. One route for the line of its road was all that Congress intended to give it, or it expected to use. Furthermore, it is not now proposed by the defendant to retake, reconstruct, and operate its through line over the old route, but to take and use a part of the old route merely for the purpose of placing thereon and operating a coal mine switch. It is not its purpose to re-establish its through line on the old route. There being then, after the acquisition of the new line, no restriction in the congressional grant on the disposition of the old right of way, it became subject to the rules of property privately owned. It substituted the new route for the old. It took deeds from complainant's grantors to the new route for that purpose. The situation as it then existed between the parties dealing with the subject cannot be considered without reaching the conclusion that the abandonment of the old route by the railway company was

a part of the consideration for the giving of the new route by the owners of the land. *Pope v. Devereux*, 5 Gray (Mass.) 409; *Smith v. Lee*, 14 Gray (Mass.) 473; *Washburn on Easements & Servitudes* (4th Ed.) p. 707 et seq.; *Hickox v. Railway Co.*, 94 Mich. 237, 53 N. W. 1105; *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342; *Investment Co. v. Railroad Co.*, 108 Mo. 50, 17 S. W. 1000; *Trust Co. v. City*, 76 Fed. 315, 22 C. C. A. 334.

[2, 3] 2. Aside from the effect of the selection of the new route in the place of the old by the railroad company, coupled with the dealings between the parties in making the change, the defendant cannot now claim the old route, for two reasons: (1) The patents to the lands made no exception of the old right of way. They gave color of title to that strip. Complainant and his grantors have had actual possession of the strip, claiming it under color of title, in good faith, for more than seven years, and have during all of that time paid all taxes legally assessed. Complainant has thereby become vested with the title to said strip by virtue of compliance with the requirements of section 4089, Rev. Stat. Colo. 1908. *Leffingwell v. Warren*, 2 Black, 599, 17 L. Ed. 261; *U. S. v. Power Co.*, 209 U. S. 447-450, 28 Sup. Ct. 579, 52 L. Ed. 881. (2) If title was not thus passed out of the railroad company, then by registration under the Torrens Act—the original files in which proceeding and decree entered therein have been examined—an indefeasible title to said strip across complainant's lands is now vested in complainant.

The constitutionality of the Torrens Act has been sustained by the Supreme Court of the state. *People v. Crissman*, 41 Colo. 450, 92 Pac. 949. As to this, however, the defendant, in addition to its insistence that the estate which the railway company took under the grant to the strip in question could in no manner be rendered defeasible, further contends that the registration decree does not bind it, because it was not personally summoned in that proceeding, being brought in, if at all, by publication. The title of the railway company to the old right of way does not appear by public record in the counties through which it passed. There is no record in Huerfano county disclosing any such claim of right over complainant's lands. The instrument by which the railroad was conveyed to defendant from its predecessor, contained for description, as a part of the property conveyed, this:

"With a right of way and grade from a point near La Veta in Huerfano county via the originally constructed line of the Denver & Rio Grande Railroad Company to Veta Pass on the common boundary line of Huerfano and Costilla counties."

And this instrument was of record in said county when the registration proceedings were had. Mortgages given by the defendant and its predecessors were also of record, in which are found similar attempted descriptions of the old right of way. But none of these disclosed in themselves that complainant's lands were touched by said right of way and grade. When complainant purchased, his grantors had been for many years, and at that time were, in the exclusive possession of the part of the old right of way cross-

ing his lands, and had been continuously and were then cultivating the same; and this was the condition at the time the registration proceedings were initiated and carried through. So that there was nothing of record, or upon the ground, to advise the petitioner or examiner of titles, required by the act, that the defendant claimed any interest therein. Under this situation the Torrens Act (section 19) authorized the bringing in of the defendant by publication as an unknown party. The defendant is therefore bound. *Baart v. Martin*, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

The complainant is entitled to the writ. On filing bond with surety in the sum of \$5,000, to be approved by the clerk, it will issue.

WASHINGTON MARINE CO. v. RAINIER MILL & LUMBER CO.

(District Court, D. Oregon. July 15, 1912.)

No. 4,963.

1. SHIPPING (§ 47*)—CHARTER—CONSTRUCTION—DISCHARGE OF CARGO.

A provision in a charter of a steamer to carry timber, "cargo to be * * * taken from vessel at port of discharge by charterers or their agents," in connection with a further provision requiring the cargo to be "delivered as customary with steam schooners," did not require the charterers to unload the vessel, but to receive the cargo from her side, especially where that was the construction acted on by the parties.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

2. SHIPPING (§ 171*)—CHARTER—CONSTRUCTION—DEMURRAGE—"DEFAULT."

In a provision of a charter party for the payment of demurrage "for each and every day's detention by default of charterers," the word "default" should be construed as meaning the failure to perform some duty imposed by the contract, and such failure only renders the charterer liable for demurrage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 568; Dec. Dig. § 171.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1928-1930; vol. 8, p. 7630.]

3. SHIPPING (§ 184*)—DEMURRAGE—EVIDENCE CONSIDERED.

Evidence considered as to the demurrage which a shipowner was entitled to recover from a charterer for detention of the vessel in discharging beyond the lay days fixed by the charter party.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 596; Dec. Dig. § 184.*]

4. SHIPPING (§ 181*)—DEMURRAGE—BEGINNING OF LAY DAYS.

A notice of readiness to load or discharge required by a charter party to start the running of the lay days is unnecessary and may be considered waived, where the charterer was ready and the work was commenced at once.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-592; Dec. Dig. § 181.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. SHIPPING (§ 181*)—DEMURRAGE—COMPUTATION OF TIME.

Where a Sunday intervenes between the expiration of the lay days for discharging a vessel and the time when the discharge is completed, it is to be counted as a day of detention.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-592; Dec. Dig. § 181.*]

6. SHIPPING (§ 171*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—"Day BY DAY."

A provision of a charter party that the charterer shall pay demurrage "day by day" for detention of the vessel through his default does not require the owner to demand demurrage at the end of each day, but means one day after another or running days.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 568; Dec. Dig. § 171.*]

For other definitions, see Words and Phrases, vol. 2, p. 1837.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

In Admiralty. Suit by the Washington Marine Company, as owner of the steamer Washington, against the Rainier Mill & Lumber Company. Decree for libellant.

Snow & McCamant, of Portland, Or., for libellant.

Ralph R. Duniway, of Portland, Or., for respondent.

WOLVERTON, District Judge. This is a libel to recover demurrage for detention of the steamer Washington caused by the alleged failure of respondent to receive and take certain cargoes of lumber from the ship's side so as to enable the libellant to discharge the cargoes within the lay days specified in the charter parties under which the cargoes were carried; also, a small amount, to wit, \$28.70, for wages of stevedores working overtime. The lumber was shipped to be delivered under two charter parties of date, respectively, March 12, 1907, and April 24, 1907. Demurrage is claimed for one-half day's detention of the steamer on each of two voyages made under the first, known as voyages 10 and 11, and, under the second, three days on each of two voyages, known as 12 and 13, being for \$1,400 in the aggregate. The charter party of date March 12th provides, among other things:

"Cargo to be furnished to vessel at loading port, and taken from vessel at port of discharge, by charterers or their agents, furnished in three working days and taken in five working days."

That of April 24th:

"Cargo to be furnished to vessel at loading port, by charterers or their agents at the rate of not less than 150 M. feet per working day, and received at port of discharge in five (5) days, Sunday excepted."

And each of them stipulates:

"Lay days to commence at ports of loading and discharge immediately after notice, given in writing by the captain, that vessel is ready to receive or discharge cargo."

"For each and every day's detention by default of charterers, the charterers or their agents shall pay to the managing owners, day by day, in gold coin of the United States, demurrage at the rate of \$200.00 per day."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Cargo shall be received within reach of vessel's tackle (which is construed to mean within 60 feet of vessel's rail) and delivered as customary with steam schooners."

The cargoes were shipped at Rainier, Or., and transported to Oakland and San Francisco, Cal.

On voyage 10 the steamer arrived at the dock April 29, 1907, at 1 a. m. and began discharging at 9 a. m. She finished discharging at noon of May 4th.

On voyage 11 she arrived at the wharf May 16th at 6:50 a. m., began discharging at 9 a. m., and finished on the 22d at noon.

Arrived at the wharf on voyage 12 June 3d at 10 p. m., began discharging June 4th at 9 a. m., and completed her work June 11th at 10:30.

The thirteenth voyage ended at the dock June 24th at 6 a. m., began discharging at 7, and completed July 1st.

Much testimony has been adduced; but the principal dispute as to fact relates to the manner of discharging the cargoes by the steamer Washington and the manner of taking the same away from the ship's tackle by the respondent.

[1] A question is suggested, under the charter party of March 12th, whether the respondent should not only receive the lumber at the ship's side, but also unload it from the ship. The clause (7) requiring interpretation is an unusual one in charter parties. It reads:

"To be * * * taken from vessel * * * by charterers."

Its literal rendering would seem to require the charterers to unload the vessel, or to take the lumber as found laden on the vessel. Clause 10, however, requires the cargo to be "delivered as customary with steam schooners." This, taken in connection with the way in which the parties to the charter parties themselves treated the stipulation, leads to the rendering which requires the charterers to receive the lumber at port of discharge as stipulated in the charter party of April 24th. Such was evidently the intention of the parties when they entered into the contract, and such is the reasonable intendment of the contract itself. This requires the vessel to unload the cargo and the charterers to receive the same from the ship's side or from within reach of her tackle.

[2] Controversy has arisen as to the significance of the language "detention by default of charterers," contained in the charter parties. The term "default" employed in that relation in charter parties signifies failure on the part of the charterers to do or perform some duty or act which they have stipulated or are bound in pursuance of their contractual relations to do or perform. The term cannot be so broadly interpreted as to include all manner of causes of detention or delay, whether arising from act or omission in the discharge of duty on the part of the charterers or not. In other words, the contract is not absolute that there shall be no detention beyond a certain day for any cause, but that there shall be no detention on account of the failure of the charterers to perform their contractual obligations with the vessel or its owners. *1,600 Tons of Nitrate of Soda v. McLeod*, 61

Fed. 849, 10 C. C. A. 115; *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106.

[3] The controversy as to the fact centers about the charge on the part of the charterer that the vessel was at fault in the manner in which it persisted in discharging the lumber over the ship's side and lowering it upon the dock or wharf, and the charge on the part of the vessel that the charterer was derelict in not removing the lumber from the wharf with reasonable dispatch so as to afford room for disposing of it as fast as it could be taken from the ship. The especial complaint of the charterer is that the winch in use upon the *Washington* was defective and out of order much of the time, so that the operator was unable to control the sling-loads of lumber as they were taken from the vessel, and to lower them slowly upon the dock, so that they could be swung or directed, by the men on the dock when coming within their reach, to the desired place for landing; that the slings were lowered by irregular starts, sometimes running down rapidly and for uncertain distances, and not infrequently striking the wharf with such violence as to break up the lumber, and withal, rendering it dangerous for the men on the wharf to work about the sling until it was fully landed; and that thus the men were greatly delayed in removing the lumber from the wharf. Hence it is urged that whatever delay was encountered in unloading the *Washington* was caused by the bad operation of the winch and the irregular manner of unloading the lumber from the vessel.

I am convinced that the winch did work badly, and that this contributed to the delay and detention of the vessel, but that it was not the whole cause of such delay and detention. The lumber was sorted on the wharf, as it came off the vessel, before being carted away to the yard. To allow this to be done with the greatest convenience and dispatch, the lumber was delivered in three different places on the wharf, which could be done by swinging the hoisting appliance to accommodate it to the place of landing. It is disputed that the lumber was so discharged, but I am impressed that it was. The stevedores at work on the wharf in separating and removing the lumber were therefore unable to take it away as fast as it could be unloaded, and the greater part of the delay arose by reason thereof. This is also vigorously disputed; but, without going into the evidence, it is sufficient to say it has been shown to my satisfaction that the lumber was allowed to accumulate upon the wharf from time to time, which materially impeded the ship in unloading. Some of the wharves or docks where the unloading was done afforded limited floor space for the work, and, unless the lumber was cleared away as delivered, the vessel would be delayed for want of room. The respondent, to my mind, did not provide sufficient men to relieve the accumulation as it ought, and must be held responsible for by far the greater part of the delay and detention of the *Washington* beyond the stipulated lay days. Such delay and detention are properly chargeable to its default under the terms of the charter parties.

But it is insisted that, if any demurrage is properly chargeable to

respondent, it was settled or waived prior to loading for voyage 13. The loading evidently began for this voyage at Rainier on the afternoon of July 15th. The Washington was leaving Astoria for Rainier at 8 a. m. Of this Charles E. Fowler, who was representing the libellant, was advised by wire at Seattle. Fowler says that the ship arrived at Rainier in the afternoon, and in the afternoon Ben W. Reed, who represented the respondent, telephoned Fowler at Seattle that he would not load the ship until the demurrage was waived or settled, and a meeting between them was arranged to be had in Portland upon the subject. The exact time of the meeting is a matter of dispute. It is quite probable that Fowler came over to Portland on the evening of the 15th, and that Reed came up from Rainier on the same evening, but that they did not meet until the next morning. Reed testifies that at that meeting the demurrage charges were waived by Fowler, whereupon he directed his men to proceed with loading the boat. Fowler testifies that there was no ultimate adjustment of the matter, but that he assured Reed that they would come to some amicable settlement. He had given Reed a like assurance by letter as to one item of the demurrage. I am inclined to the view that the settlement was had as Reed testifies, although I think the boat was in the process of loading at the time. The parties came to Portland expressly on the one item of business about which they were not agreed, and it is scarcely probable that the matter was left as wide open after the conference as it had been before, and that no settlement whatever was reached. In this connection, it is suggested that, if the settlement was agreed upon, there was no consideration to support it; the respondent having entered upon the work of taking on cargo. The libellant, however, was willing at that time to adjust the matter by waiving the demurrage, and Reed was led to believe that it was so adjusted, and that future transactions would be governed accordingly, and libellant should not now insist upon recalling its agreement. This affects only voyages 10 and 11, as demurrage had been claimed only on these at the time of the agreement, and, considering that the half day's detention in each case was short, beginning at 9 a. m. and ending at noon, and that libellant was somewhat at fault in the entailment of the delay, I will disallow the claim in toto for these voyages.

As to voyage 12, the lay days ran up to June 9th, at 9 a. m. That day being Sunday, it could not be counted as a day of detention, as the lay days had not fully expired. Considering again the participating fault of the libellant in the delay, I will allow one day's demurrage on this voyage, three days on voyage 13, and nothing for the extra expense claimed as paid laborers for overtime. The libellant is therefore entitled to recover from respondent the sum of \$800.

[4] A question has arisen respecting the notice to be given under the stipulations of the charter parties of the ship's readiness to begin discharging her cargo. I find that no notice was given in that respect as it pertains to any of the voyages, but I further find that the respondent was ready with its men to receive the lumber at the time the ship began discharging in each instance, and that this fact constituted

a waiver of the notice. 268 Logs of Cedar, Fed. Cas. No. 14,295. The lay days began only with the hour that the unloading began.

[5] Sunday should be counted as a day of detention after the lay days have expired. *James v. Brophy*, 71 Fed. 310, 18 C. C. A. 49; *The Oluf* (C. C.) 19 Fed. 459.

[6] A point is made that the libelant should have demanded demurrage at the end of each day's detention; it being claimed that the language "shall pay to the managing owners, day by day," means that the payment shall be made each day as the detention continues, and that, if no demand is made for demurrage each day, it is waived. The phrase "day by day" simply means one day after another, or running days, to continue until the detention has ceased. *The Oluf*, supra.

THE AGNELLA.

(District Court, S. D. Alabama. July 15, 1912.)

No. 1,306.

1. COLLISION (§ 3*)—EVIDENCE (§ 516*)—FAULT—GENERAL USAGE.

General usages having the effect of obligatory regulations to prevent collisions may be referred to by the courts as furnishing the rule of decision to determine whether any fault of navigation was committed in a particular case, and the testimony of experts as to such general usage is admissible.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 3; Dec. Dig. § 3;* Evidence, Cent. Dig. § 2325; Dec. Dig. § 516.*]

2. COLLISION (§ 87*)—STEAMER AND PILOT BOAT—RULES GOVERNING MOVEMENTS.

There being no rules specifically governing the navigation of steam vessels and pilot boats during the maneuvers incident to the transfer of a pilot, their movements should be governed by the exercise of care and good judgment and established usage, and it is the duty of each vessel in such case to watch the movements of the other, and of the steamer to stop or come to a very slow speed at a safe distance from the pilot boat.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 178; Dec. Dig. § 87.*]

3. COLLISION (§ 11*)—FAULT—RULES OF NAVIGATION.

A vessel has the right to assume that another will conform to the law and established usage and should govern her own conduct accordingly.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 10; Dec. Dig. § 11.*]

4. COLLISION (§ 87*)—STEAMER AND PILOT BOAT—NEGLIGENT NAVIGATION OF STEAMER.

A collision in Mobile Bay between an incoming steamer and a pilot schooner, which was taking a pilot to the steamer, *held* due solely to the fault of the steamer, which had the pilot boat on her starboard side on a crossing course; it being shown that the pilot boat followed the established custom of the port, which was to stop ahead of the steamer and launch a small boat with the pilot and then proceed across the steamer's course, but that the steamer, instead of keeping her course at slow speed to pick up the pilot, turned to port and attempted to pass across the bows of the pilot boat.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 178; Dec. Dig. § 87.*]

In Admiralty. Suit by Thomas A. Johnson and others, owners of the pilot boat Jordan, against the steamship Agnella, for collision. Decree for libelants.

Stevens & Lyons, of Mobile, Ala., for libelants.

Pillans, Hanaw & Pillans, of Mobile, Ala., for claimant.

TOULMIN, District Judge. The schooner Jordan was a pilot boat operating in the harbor and bay of Mobile, and approaches thereto. On the 29th of April, 1911, while in the process of transferring a pilot from the said schooner to the steamer Agnella, outside of and in her approach to the entrance of the channel in the bay, said steamer collided with said schooner and seriously damaged her.

The libel is to recover the damages resulting from the collision. It alleges, in substance, that the collision occurred solely through the faults of said steamer, in that she changed her course and negligently undertook to cross the bow of the schooner. And the libel charges that said steamer was guilty of negligence in said conduct and maneuvers. It is denied by the respondent that the steamer is guilty as charged, and it is insisted that the schooner was at fault: (1) In attempting to cross the bow of the steamer; and (2) that those in charge of the navigation of the schooner were guilty of negligence in signaling the steamer to go to her rear.

[1] General usages having the effect of obligatory regulations to prevent collisions between vessels engaged in navigation are constantly referred to by the courts as furnishing the rule of decision to determine whether any fault of navigation was committed in the particular case; and, if so, which of the parties, if either, was responsible for the consequences. Evidence of experts as to such general usage regulating the matter is admissible. *The City of Washington*, 92 U. S. 31, 23 L. Ed. 600; *The Alaska* (C. C.) 33 Fed. 107. It was the duty of each vessel to watch the movements of the other. *The Monterey*, 161 Fed. 97.

[2] In the present case the steamer had observed the pilot boat and the launching of the yawl with the pilot for her in it one-half to three-quarters of a mile away. She should have observed their movements thereafter and to have come to a stop, or to a very slow speed at a safe distance from the pilot boat. We will consider later whether or not she did so.

The Monterey Case (D. C.) 153 Fed. 935, was an action for collision between the schooner pilot boat *Hermit* and the steamship *Monterey*. The court in its opinion said:

"The evidence is singularly barren of estimates of distance, and such as are given do not seem valuable, for the night was very dark, though clear, so that lights could readily be seen; but the ships themselves were concealed from each other until collision was inevitable."

And further said:

"It is obvious from the record, and is indeed admitted by both counsel, that the collision could not have happened without either (1) such mat-

tention on the part of the Hermit as laid her course directly across that of the Monterey, or (2) from an unlawful change of course and maintenance of high speed on the part of the Monterey."

The court held that the collision was due solely to the fault of the pilot boat in so changing her course as to cross the steamer's bow, and said:

"Whether the Monterey's speed was low or high, she was entitled to assume that the Hermit would not cross her bow." The Monterey (D. C.) 153 Fed. 935.

The case was appealed, and the Court of Appeals in its opinion said:

"If the steamer had observed the pilot boat, she would have come (as it was her duty to do so) to a stop or to a very slow speed at a safe distance from her."

Adding that:

"The conclusion is irresistible that those on board the steamer who ought to have been diligently observing the pilot boat were not doing so." The Monterey, 161 Fed. 97, 98, 88 C. C. A. 261, 262.

The decree of the court below was reversed, and both vessels were held at fault.

There was no statute defining the course of navigation to be followed by either vessel, and no custom or usage was shown or claimed defining such course. Moreover, the pilot boat in that case changed her course, leaving the wheel lashed while the pilot went below, and leaving no lookout.

The substance and effect of the decision of the Court of Appeals in the case is that the pilot boat was at fault in changing her course so as to cross the steamer's bow, in the absence of a statute or rule of navigation defining or authorizing such course to be followed, and in failing to diligently observe the movements of the steamer; and that the steamer was at fault in not diligently observing the pilot boat, or, if she did observe her, in not coming to a stop or to very slow speed at a safe distance from her.

"It is the duty of a steamship when about to take on a pilot at sea to come to a substantial stop, i. e., to reduce her headway to a minimum speed required to keep her in position. She should not adopt a veering course, calculated to thwart the maneuvers of the pilot boat as the latter approaches, but to come as near to a stop as possible, and leave the rest to the pilot boat." The Alaska (C. C.) 33 Fed. 107.

"In a suit to recover damages caused by the sinking of a pilot boat by a steamer during maneuvers incident to the transfer of the pilot, the evidence of experts is admissible to show the usage of navigation under the circumstances of the occasion." The Alaska (C. C.) 33 Fed. 107.

The court in this case said that:

"The conduct of both vessels is to be governed by the exercise of such care and good judgment, with reference to the particular circumstances, as would be exercised by prudent and skillful navigators under like conditions. Whether such care and good judgment have been exercised under the circumstances of a particular case is a question which may depend upon a usage of navigation, and may be ascertained by the opinion of experts."

Expert testimony is held to be competent, and the usage proved adjudged to constitute the rule of navigation. *The Alaska*, supra; *The City of Washington*, supra.

[3] Each vessel has the right to assume that the other will conform to the requirements of an established usage, and must govern her own conduct accordingly. *The Alaska*, supra; *The Monterey*, 153 Fed. 935, supra.

"The rule that vessels may each assume that the other will obey the law, or an established usage, is one of the most important in the law of collision." Authorities supra.

Local rules or customs are binding, and are enforced by the courts. Hughes on Adm. pp. 215, 232; *The Victory*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519.

"Under them, if followed, collisions need never occur unless by some negligence or inattention which no rules can prevent." Hughes on Adm. p. 215.

[4] The existence of a custom in this port on the part of pilot boats, when preparing to give a pilot to a steamer, to stop and launch a yawl ahead of the steamer and in her path, and to sail on ahead and across the course and bow of the steamer, is clearly proven. It was shown to be the custom for the yawl, with the pilot, to be left astern of the pilot boat, and for the steamer to come along and pick up the pilot. That this method of transferring a pilot from the pilot boat to a steamer was customary and proper is fully established by the testimony of pilots who had had practice and experience in the business, three of whom were with the pilot boat on the occasion of the collision. Indeed, the testimony of the master of the *Agnella* is substantially the same as that of libelants' witnesses as to the usage and practice shown by them.

The steamer was heading west. The pilot boat was sailing about south southeast. The vessels were approaching each other on intersecting lines. When a half or three-quarters of a mile away, the master of the steamer says he saw the pilot get into the skiff and two other persons in it with him plainly, a mile or three-quarters of a mile. He also says that, when he first sighted the pilot boat, he gave the man at the wheel orders to keep his course, to steer west; that he gave him no further orders until he was three ship's lengths from the pilot boat, and then gave him orders to steer south-west, and "kept giving him signals to steer south"; and that he changed his course four points to the south. The steamer's length is 212 feet. The wind was light and there was no sea. The collision occurred early in the forenoon. Said master says he at no time "saw so much open water between the skiff and pilot boat that he could run between them"; that he "only saw the skiff when she was towing astern." He says, however:

"I think the skiff was in tow of the pilot boat a short time before the collision. I did not see or notice it at the time of the collision. The last time I noticed the skiff she was only a few fathoms from the pilot boat. I noticed when the pilot first got into the skiff, a half or three-quarters of a mile away."

He testifies that when the pilot boat was about a couple of his ship's lengths from the ship, which was running at slow speed, about $3\frac{1}{2}$ miles, he began starboarding his helm and changed his course to southwest until he got a signal from the pilot boat to go astern of her; then he went full speed astern and changed his wheel hard to port; that he had so much headway that the ship would turn faster if he changed her helm to amidship, and he did so. He says he did not know whether the ship had lost her headway through the water when the schooner and ship came together. But he says if there had been no signal given by the schooner to go astern, and if he had not undertaken to obey the signal, he would have missed the schooner altogether; that he would have gone ahead of her. He adds:

"I think it (the collision) was due to the pilot signaling me to go astern instead of keeping on my course."

Regarding the launching of the yawl, and her position at the time of the collision, the testimony of the three pilots concerned and participating in the maneuver is, in substance, that when the pilot boat was from a quarter to half a mile ahead of the steamer, and some 250 yards north of the point at which the collision occurred, the yawl was launched, and Pilot Smith and two other men boarded her. She was towed for a short distance—some five minutes or so—by stern line from the schooner as she proceeded on her forward course across that of the approaching steamer, when the schooner let her go to await, near the path and on the starboard side of the steamer, her coming to take on the pilot; that at the time of the collision the yawl was north of and 200 to 250 yards astern of the schooner. It will be observed that the evidence of the master of the steamer on this point is not in conflict with that of the libelants' witnesses, except impliedly as to the position of the yawl. He says he noticed the yawl when the pilot first got into it; that, the last time he noticed it, it was only a few fathoms from the pilot boat, but he did not see or notice it at the time of collision.

The claimant's witness Aspaas, the helmsman on the steamer, testified that the pilot boat let go the yawl a very short time before the collision, and that there was never much space between the yawl and the pilot boat; but his evidence is so indefinite as to distance between them, and as to their relative positions, besides being contradictory in other respects to the evidence of the master, and in conflict with that of the pilots, it is entitled to little or no weight. And the testimony of claimant's witness Christiansen is so absolutely in conflict with the evidence of the other witnesses, and with the physical facts shown by the undisputed evidence in the case, as to render it unworthy of any consideration.

As to the claim of the master of the steamer that, had there been no signal from the pilot boat, and had he not undertaken to obey the signal to go astern, he would have missed the schooner, and there would have been no collision, the evidence of the pilots on the schooner is that the signal given and the pointing to the yawl with the pilot in it, well north of and astern of the pilot boat, was

given to apprise the steamer of the location of the yawl, and was given when the steamer was far enough away to enable her to easily go astern of the pilot boat and pick up the pilot. If such was the situation, as contended by the libelants, then manifestly there was no fault and nothing improper in the giving of the signal by the pilot boat. But if the fact was that the signal was given when the steamer was so close upon the pilot boat that, by the exercise of every means in her power she was unable to stop her headway, or to so change her course as to pass astern of the pilot boat, then, as stated by the master of the steamer, she could have passed safely across the bow of the pilot boat.

There was no obligation on the master and navigator of the steamer to have obeyed or have regarded the signal. It was optional with him to attempt to comply with it. If he deemed it unsafe or running a risk of collision with the pilot boat to have undertaken the maneuver adopted, he should not have attempted it, and that whether he understood the meaning of the signal or not. If the situation in which the steamer found herself was brought about through her fault or by her unskillful or improper maneuvers, she cannot visit the consequences on the pilot boat.

The master is presumed to have known better than any one else what his ship might and should do to avoid a collision under the circumstances, and under which he had no right to be controlled by those on board the pilot boat.

The testimony shows that the course and maneuver of the pilot boat was the customary one, and that adopted by the steamer was not. The latter's unnecessary deviation from her course west to that south or southwest in her attempt to cross the bow of the pilot boat was violative of the well-known usage and practice in such cases.

The steamer was neglectful of her duty required by the custom and the law in not proceeding on her course without deviation, and at slow speed, to enable the pilot boat to launch the yawl, with the pilot, on the course of the steamer for her to take on the pilot; or to stop in due season to enable the pilot boat to perform the duty devolving upon her, and then proceed on her course across the bow of the steamer and out of her way.

When the steamer changed her course, and, in her attempt to cross the bow of the pilot boat, came so near to her as to risk collision with her, she failed to exercise the precautions required by law to be taken when there is risk of collision. Such precautions must be taken in time to be effective against such risk, or they will constitute no defense to liability if collision occurs. *The Westhall* (D. C.) 153 Fed. 1010.

The steamer should have come to a stop or to a very slow speed at a safe distance from the pilot boat. *The Columbia* (D. C.) 27 Fed. 704; *The Alaska* (C. C.) 33 Fed. 111; *The Monterey*, 161 Fed. 97, 88 C. C. A. 259.

The master of the steamer must have failed to observe the movements of the pilot boat and of the yawl. He testifies he did not

notice those of the yawl after he observed it launched and the men in it. It was his duty to diligently observe these movements.

The evidence shows there was nothing effective that the pilot boat could do, in the extremity created by the steamer's manifest fault, to prevent the collision. *The Bulgaria* (D. C.) 168 Fed. 459.

Let a decree be entered for libelants, with reference to Richard Jones, clerk, as commissioner, to ascertain and report the damages to be awarded.

CHICAGO, B. & Q. R. CO. v. OGLESBY et al.

(District Court, W. D. Missouri, W. D. July 20, 1912.)

No. 3,884.

1. COURTS (§ 102*)—FEDERAL COURTS—STATUTORY REGULATION—APPLICABILITY.

A suit by a railroad company challenging the validity of an order of the Railroad Commission of Missouri, but not questioning the constitutionality of the statute authorizing the commission to make orders, and declaring, in Rev. St. Mo. 1909, § 3281, that orders shall be in force until overruled or modified on final hearing, is not within Act Cong. June 18, 1910, c. 309, § 17, 36 Stat. 557, prohibiting an interlocutory injunction restraining the execution of any statute on the ground of its unconstitutionality, unless the application shall be heard and determined by three judges and a majority concur in granting the application, but a federal court of equity acquires jurisdiction on the ground that constitutional guaranties are violated through a wrongful administration of the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 351, 352; Dec. Dig. § 102.*]

Jurisdiction of federal courts in actions involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Mining Co.*, 35 C. C. A. 7; *Earnhart v. Switzler*, 105 C. C. A. 262.]

2. COURTS (§ 307*)—FEDERAL COURTS—JURISDICTION.

Where a citizen of a state may go into a court of the state to defend his property against illegal acts of its officers, a citizen of another state may invoke jurisdiction of the federal courts for the same relief, and, when the jurisdiction of a federal court attaches, it is governed by its own rules of procedure.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850-854; Dec. Dig. § 307.*]

3. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

A federal court of equity may grant relief where a valid state law is wrongfully administered by officers of the state so as to make the administration an illegal burden on individuals, provided the necessary diversity of citizenship exists.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

4. COMMERCE (§ 62*)—REGULATION—INTERFERENCE WITH INTERSTATE COMMERCE—RAILROADS.

An order of a State Railroad Commission which requires a railroad company operating a road continuously into an adjoining state to operate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

each way daily a passenger train, in addition to the trains in operation, between the state line to a point in the state, does not interfere with interstate commerce, though the enforcement of the order may require the establishment of new terminal facilities.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 81; Dec. Dig. § 62.*]

5. RAILROADS (§ 109*)—REGULATIONS—REASONABLENESS.

The mere fact that the income from the expenditure at a particular point on a railroad may not earn a fair return on the capital invested at that point is not conclusive in determining the reasonableness of an order of a Railroad Commission requiring the improvement at such point.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 337, 338; Dec. Dig. § 109.*]

6. RAILROADS (§ 9*)—REGULATIONS—INVALIDITY—PLEADING.

A bill by a railroad company challenging the validity of an order of a State Railroad Commission, requiring the operation each way daily of a passenger train between designated points, in addition to trains in operation, which alleges that the enforcement of the order will compel greater facilities than is customarily given under similar conditions, that the passenger facilities sought to be enforced are not demanded by the reasonable necessities of the traffic affected, that the enforcement of the order will inflict on the company an unnecessary loss, and thereby take the company's property without due process of law, and deprive it of the equal protection of the laws, *prima facie* states the illegality of the order; and, where the expenses incurred in the operation of the train and required in the establishment of additional terminal facilities will inflict an irreparable loss and the company will be vexed by a multiplicity of suits for penalties imposed for violation of the order, equity has jurisdiction, and will grant a temporary injunction.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

In Equity. Suit by the Chicago, Burlington & Quincy Railroad Company against H. R. Oglesby and others. Temporary injunction granted.

O. M. Spencer and M. G. Roberts, both of St. Joseph, Mo., for complainant.

Elliott W. Majors, Atty. Gen., and Campbell Cummings, Asst. Atty. Gen., for defendants.

VAN VALKENBURGH, District Judge. The defendants in this case are, respectively, the members of the Board of Railroad and Warehouse Commissioners of the state of Missouri, the Attorney General of the state, and the prosecuting attorneys of Linn, Sullivan, and Putnam counties. The case arises because of an order of said Railroad and Warehouse Commissioners requiring the complainant on and after the 1st day of May, 1912, "to operate each way daily a passenger train in addition to the trains now in operation between the Iowa-Missouri state line near Mendota, Missouri, and Brookfield, Missouri," and through it complainant seeks to restrain the defendants from enforcing said order. The grounds for the relief sought are thus stated in the bill:

"(I) That the enforcement of said order requiring an additional passenger train daily each way on said local branch line, thus sought to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

enforced, would give greater facilities on the said local branch line than is customarily given under similar conditions by other railroads either in Missouri or in other states of the Union.

"(2) That the passenger facilities thus sought to be enforced on the said local branch railway are not justifiable or demanded by the reasonable necessities and conditions of the traffic affected thereby, and that the existing facilities for passenger traffic on the said local branch railroad within the state of Missouri are adequate, fair, and reasonable.

"(3) That without any justifiable necessity the enforcement of the said order will inflict and impose on the complainant a loss on said local branch railway within the state of Missouri and from Laclede to the state line in revenue amounting to over \$30,000 per year (which the complainant is entitled to have and needs), in addition to the present annual deficit of \$65,000 on all passenger traffic carried on said branch line within the state of Missouri as aforesaid, and that there has been no change in the volume of traffic on the said branch railroad that would in any sense warrant said order of said Commissioners for any additional train in each or either direction.

"(4) That, if your orator were compelled to comply with said order of the Railroad Commissioners, it would result in great loss and irreparable injury to your orator, for which it has no remedy at law, and would be in effect the taking of the property of your orator to an extent greatly in excess of \$30,000 per annum without due process of law, and without adequate compensation, contrary to and in violation of section 1 of article 14 of the amendment of the Constitution of the United States, and will deprive your complainant of equal protection under the laws as guaranteed to it by the Constitution of the United States.

"(5) That the enforcement of the said order of the Railroad Commissioners is a violation of those clauses of the Constitution of the United States in relation to commerce among the states, and that it is an attempt to place a substantial and direct burden upon transportation on the said branch line of railroad between the states of Missouri and Iowa, and compel your orator to run said proposed passenger train to the terminal facilities at Centerville, Iowa, or to expend large sums of money, to wit, over \$100,000 in unnecessarily building, erecting and maintaining terminal facilities at the state line between Missouri and Iowa."

A temporary restraining order was issued April 20, 1912, and at the hearing on May 11, 1912, complainant's application for a temporary injunction was opposed upon the following grounds:

(1) That the nature of the case presented requires the sitting of three judges to determine the application.

(2) The interstate commerce clause is not violated by the order.

(3) The cost of the proposed improvement ordered by the Commission is not controlling in determining the reasonableness of the order.

(4) That the orders of the Commission are *prima facie*, reasonable, and just, and, if in any way subject to the control of the courts, should not be interfered with unless manifestly abused, to the substantial injury of the complainant, and that the allegations of the bill are wholly insufficient.

[1] Section 17, Act June 18, 1910, c. 309, 36 Stat. pt. 1, p. 557, provides:

"That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or

by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application."

The purpose of this enactment is well known. It was intended to insure the concurrence of at least two of three judges, one of whom should be a justice of the Supreme Court, or a circuit judge, before a temporary injunction should issue suspending or restraining the enforcement of any statute of a state upon the ground of its unconstitutionality. Rate legislation in particular, and judicial construction of such legislation, was most prominently in the mind of the Congress. However, the law, by its terms, is not restricted to such; but manifestly the state statute, as a statute, was the subject-matter dealt with, and not the acts of state officers who are charged to have exceeded the powers conferred by a statute whose constitutionality is in nowise attacked. The bill in this case does not challenge the constitutionality of the act authorizing the Board of Railroad and Warehouse Commissioners to determine and fix the number, kind, and character of trains for the carrying of passengers, baggage, and express, to be operated upon railroads within this state, but other constitutional guaranties require that such powers must be exercised justly and reasonably, and, if not so exercised, then the law, though valid, is wrongfully administered by the officers of the state, who are, to that extent, acting without the authority of the law. From such unlawful acts the Constitution guarantees relief. This would be true in any event, but in the Missouri statute under consideration the right to grant such relief is expressly reserved to the courts.

Section 3281, Revised Statutes of Missouri 1909, provides:

"All orders of the Board of Railroad and Warehouse Commissioners when made in accordance with the powers conferred upon them by the laws of this state shall be in force and effect until overruled or modified on a final hearing by a court of competent jurisdiction."

[2] It will thus be seen that a remedy against unjust, unreasonable, or oppressive orders is expressly granted, and, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362-391, 14 Sup. Ct. 1047, 38 L. Ed. 1014. When the jurisdiction of a federal court of equity attaches, it is governed by its own rules of procedure, and not by those prevailing in the state jurisdiction. It is clear, therefore, that the constitutionality of this statute is not in question; and therefore it is not required that three judges should sit to hear and determine the application for a temporary injunction.

[3] The jurisdiction of the courts of the United States does not depend upon the unconstitutionality of the state statute. A valid law

may be wrongfully administered by officers of the state so as to make such administration an illegal burden and exaction upon individuals. That a federal court of equity can grant relief under such circumstances when diversity of citizenship exists is well settled. *Judson on Interstate Commerce* (2d Ed.) p. 178, § 112; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362-390, 14 Sup. Ct. 1047, 38 L. Ed. 1014. There is nothing in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, which contravenes this rule.

[4] We must agree with the defendants that the interstate commerce clause of the federal Constitution is not violated by this order which affects only the intrastate part of the line regardless of terminal facilities. It is an elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation. *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398. The primal duty of a carrier is to furnish adequate facilities to the public, and that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. And even though the carrier may operate its railroad continuously into another state, and the enforcement of the order might require it to establish new terminal facilities at expense and inconvenience, nevertheless the order, if not otherwise unreasonable, is not thereby rendered invalid. *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, *supra*; *Missouri Pacific Ry. Co. v. State of Kansas ex rel.*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

[5] It is also true that the mere fact that the income from the expenditure at a particular point upon a railroad may not earn a fair return upon the capital invested at that point is not conclusive in determining the reasonableness of an order of the Railway Commission requiring such an improvement. *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Missouri Pacific Ry. Co. v. State of Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

The difference between cases such as that at bar and those involving the establishment of maximum rates is succinctly stated by the Supreme Court in the following language:

"While the enforcement by a state of a general scheme of maximum rates so unreasonably low as to be unjust and unreasonable may be confiscation and amount to taking property without due process of law, the state has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public, even though it may entail some pecuniary loss." *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, *supra*.

The limitation upon this power, however, is thus stated in the opinion:

"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has

been settled that the right of ownership of railway property like other property rights finds protection in constitutional guaranties, and therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the fourteenth amendment. The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted. In coming to consider the question just stated, it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance and effect to exceed regulation, and be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws." *Id.*, 206 U. S., at page 20, 27 Sup. Ct., at page 592 (51 L. Ed. 933, 11 Ann. Cas. 398).

[8] In this case the bill charges that the enforcement of this order would compel greater facilities on this local branch line than is customarily given under similar conditions by other railroads either in Missouri or other states of the Union; that the passenger facilities thus sought to be enforced are not justifiable or demanded by the reasonable necessities and conditions of the traffic affected thereby; that without any justifiable necessity, the enforcement of the said order will inflict and impose on the complainant, not only a loss on said local branch railway within the state, but also a general and unnecessary loss to complainant, thereby taking the property of the complainant without due process of law and depriving it of equal protection under the laws. If these charges can be sustained, then the order is unjust and unreasonable, and the complainant is entitled to relief. The loss upon the local branch is not pleaded as conclusive evidence that the order is unreasonable. But, as was said by the Supreme Court in *Missouri Pacific Ry. Co. v. State of Kansas*, *supra*:

"The fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order."

The allegations of the bill under recognized principles of equity pleading state a *prima facie* case, and are sufficient to support the introduction of testimony from which it may ultimately be determined whether this order is, in fact, invalid because unjust and unreasonable, or whether it is a legitimate exercise of the power conferred upon the state officials by statute. If the order is, in fact, unreasonable, then the expenditure incurred in the way of train operation with its alleged attendant loss, and in the establishment of additional terminal facilities, if such be necessary, would inflict upon the complainant a loss that would be irreparable and irrecoverable, and entirely disproportionate to the inconvenience that would result to the public from temporarily suspending the operation of that order. On the other hand, it is alleged, and sufficiently appears, that complainant would be vexed by a multiplicity of suits for the collection of penalties imposed, should it refuse to comply with the order while testing its validity.

Under such conditions, in accordance with established practice, a temporary injunction should be granted. The defendants will be assigned to answer the bill in due course under the rule. An order may be drawn in accordance with the views herein expressed.

WILMINGTON CITY RY. CO. et al. v. TAYLOR et al., Board of Public Utility Com'rs of City of Wilmington.

(District Court, D. Delaware. March 5, 1912.)

No. 310.

1. CONSTITUTIONAL LAW (§§ 210, 252*)—FOURTEENTH AMENDMENT—PROTECTION OF PROPERTY—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW.

Corporations, equally with individuals, are within the protection of the fourteenth amendment of the federal Constitution with respect to their property, so that, subject to a legitimate exercise of the police power, no state can deprive them of their property without due process of law, or deny them the equal protection of the laws, which prohibition is leveled against such deprivation or denial by a state whether by direct act of the Legislature or by any other state instrumentality.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 679, 680, 728-731; Dec. Dig. §§ 210, 252.*]

2. CARRIERS (§ 10*)—PUBLIC UTILITY BOARD.

The public utility board for the city of Wilmington, created by Act March 29, 1911 (26 Del. Laws, c. 206), with power to supervise public utilities operating in that city, is an instrumentality of the state for the accomplishment of public purposes, and its acts concerning matters committed to it, though irregular, wrongful, or illegal, are acts of the state.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 14-20; Dec. Dig. § 10.*]

3. CONSTITUTIONAL LAW (§ 318*)—DUE PROCESS OF LAW—PUBLIC UTILITY COMMISSION—STREET RAILROAD RATES—INVESTIGATION.

Where a citizen instituted a proceeding before the Wilmington public utility board to compel certain street car companies to resume the sale of 6 fare tickets for 25 cents, it was sought by such proceeding to deprive the railway companies of their property, which could only be done by due process of law, which required a tribunal having jurisdiction, notice, and an opportunity for a fair hearing and defense.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

4. CARRIERS (§ 2*)—CONSTITUTIONAL LAW (§ 318*)—DUE PROCESS OF LAW—STREET RAILROAD RATES—REDUCTION BY PUBLIC UTILITY BOARD—FAIR HEARING.

A citizen instituted proceedings before the Wilmington public utility board to compel certain street railway companies to resume the sale of 6 fares for 25 cents by the mere filing of a communication addressed to the board, complaining that the companies had abolished the sale of such tickets, and asking that they be summoned to appear and present reasons for such action, without alleging that such discontinuance was unlawful or unreasonable. The railway companies appeared and claimed that such discontinuance was within their chartered authority and legal rights, and offered to establish the same by proof; but the board, on the advice of its attorney, without forming or promulgating any rules for the conduct of the hearing, notified the companies that the board would not take into consideration the chartered rights and franchises thereof,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whereupon the board, without considering the reasonableness or legality of the change in rates, passed an order requiring the companies to resume the sale of 6 fares for 25 cents. *Held*, that such inquiry did not disclose either judicial or legislative impartiality on the part of the board between complainant and the railroad companies and did not amount to due process of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2;* Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

5. CARRIERS (§ 12*)—STREET RAILROADS—FARES—REASONABLENESS.

Where certain street railroads, after having sold 6 fares for 25 cents for 10 years, discontinued such sale and charged a straight 5-cent fare, the presumption, if any, arising from the previous long sale at the lower rate, that such rate was reasonable, was a rebuttable one, so that, in a proceeding before a public utility board to compel the resumption of the lower rate, the railway companies were entitled to make a full defense on the law as well as on the facts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

6. CARRIERS (§ 12*)—FARES—REGULATION—STREET RAILROADS.

On an issue as to the reasonableness of a straight 5-cent fare charged by street railroad companies, the fact that another trolley line may have sold 6 fares for 25 cents was wholly inconclusive, the reasonableness of the rate depending on the excellence of service, commodiousness of cars, cost of construction and maintenance, change in wages paid to employes, and other circumstances which might justify an increase in the price.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

7. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—FEDERAL LAWS.

Diversity of citizenship is unnecessary to confer federal jurisdiction, where complainant pleads a threatened deprivation of its property without due process of law by a board of public utility commissioners acting as a representative of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

8. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—FEDERAL CONSTITUTION—DUE PROCESS OF LAW.

Where a public utility board, acting as an instrumentality of the state, ordered complainants—street railway companies—to resume the sale of 6 fares for 25 cents without affording complainants a full and fair hearing on the merits so as to constitute due process of law, such order constituted a violation of complainants' rights, guaranteed by the federal Constitution, regardless of the provisions of the state Constitution and laws; and hence complainants were not bound to seek relief in the state courts either by appeal or original suit, but were entitled to invoke the jurisdiction of the federal courts, on the ground that the suit arose under the Constitution and laws of the United States, to restrain the enforcement of such order.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

Jurisdiction of actions involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purch. Co. v. Boston & N. C. C. & S. Min. Co.*, 35 C. C. A. 7; *Earnhart v. Switzer*, 105 C. C. A. 262.]

9. CARRIERS (§ 18*)—STREET RAILROADS—REGULATION—PUBLIC UTILITY BOARD—POWERS—APPEAL.

Under Act March 29, 1911 (26 Del. Laws, c. 206), creating the Wilmington public utility board, with power to supervise and regulate street railways and other public utility corporations in that city, with power to fix

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rates, etc., and also providing for an appeal from any order of the board to the superior court, which is given jurisdiction to hear and determine the appeal on the merits of the matters forming the basis of the order, the utility board, and not the court, is the body having the last legislative word in a determination of the reasonableness of rates, its order being a legislative act by an instrumentality of the state exercising delegated authority, so that on an appeal the court's duty is limited merely to an affirmance or reversal, without jurisdiction to amend or correct the order of the board or substitute another order therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

10. CARRIERS (§ 18*)—REGULATION—FARES—APPEAL.

An appeal from an order of the Wilmington public utility board requiring traction companies to resume the sale of 6 fares for 25 cents, authorized by Act March 29, 1911 (26 Del. Laws, c. 206), is confined to the record of the proceedings before the utility board as certified by its secretary, so that where, by the action of the board, the railway companies were not permitted to present by way of defense to a prima facie case made against them matters of law or fact deemed by them to be essential as affecting the merits, they could obtain no relief by appeal.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

11. CARRIERS (§ 18*)—REGULATION OF CHARGES—RIGHT TO RELIEF—ADEQUATE REMEDY AT LAW.

Where certain street railway companies were ordered by a public utility board to resume the sale of 6 fares for 25 cents as a result of proceedings which did not afford due process of law and were ordered to pay a penalty of \$100 a day if they failed to comply with the order, they had no adequate remedy at law, and were therefore entitled to apply for relief by injunction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

12. INJUNCTION (§ 135*)—PRELIMINARY INJUNCTION—ISSUANCE.

The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

13. INJUNCTION (§ 132*)—PRELIMINARY INJUNCTION—OBJECT.

A preliminary injunction is a mere provisional remedy, the legitimate object of which is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing on the merits or the dismissal of the bill for want of jurisdiction or other sufficient cause.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

14. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—ISSUANCE.

Where, in a doubtful case, the denial of an injunction on the assumption that the complainant ultimately will prevail would result in greater detriment to him than, on a contrary assumption, would be sustained by the defendant through its issuance, the injunction should usually be granted; the balance of convenience or hardship being ordinarily a factor of controlling importance in cases of substantial doubt either as to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—11

the law or facts of the case, or both, existing at the time of the granting or refusing of the writ.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307-309; Dec. Dig. § 137.*]

15. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—OBJECT.

Where the sole object for which a preliminary injunction is sought is the protection of property or legitimate business or the maintenance of the status quo until the question of right between the parties can be decided on the final hearing, the injunction may be allowed, even though there be serious doubt of the ultimate success of the complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307-309; Dec. Dig. § 137.*]

In Equity. Suit by the Wilmington City Railway Company and others to restrain Henry M. Taylor and others, constituting the Board of Public Utility Commissioners for the City of Wilmington, from enforcing an order requiring defendants to resume the sale of six street railway tickets within the City of Wilmington for twenty-five cents. On application for a temporary injunction. Granted.

Herbert H. Ward and John F. Neary, both of Wilmington, Del., for complainants.

Daniel O. Hastings, City Sol., of Wilmington, Del., for respondents.

BRADFORD, District Judge. In this case the Wilmington City Railway Company, hereinafter called the city railway company, the Front and Union Street Railway Company, hereinafter called the Front Street company, Wilmington and Edgemoor Electric Railway Company, hereinafter called the Edgemoor company, and Wilmington and Philadelphia Traction Company, hereinafter called the traction company, have applied for a preliminary injunction to restrain until the determination of the case or the further order of the court Henry M. Taylor, Samuel G. Cleaver, Joseph Jackson Pierce, William H. Vance and C. Frederick Bacher as members of and constituting the Board of Public Utility Commissioners for the City of Wilmington, hereinafter called the utility board, its servants, etc., from enforcing or attempting to enforce by suit or otherwise a certain order made by that board September 1, 1911, directing the traction company to renew, beginning with the starting of its cars September 20, 1911, the sale of six tickets for twenty-five cents, commonly known as strip tickets, within the city of Wilmington, which tickets when sold should entitle the holders thereof respectively to the same rights and privileges as to the fare or ride and transfer on the cars of that company in the city of Wilmington as were given to its passengers immediately prior to August 13, 1911; and further directing that the traction company in default of compliance with the above order should be subject to and should pay a penalty of one hundred dollars per day for the violation thereof. The utility board was created by act of assembly March 29, 1911, chapter 206, vol. 26, Del. Laws. Section 3 provides, among other things, that the board "shall have power to make all needful rules and regulations for its government and proceedings" and "may engage the services of experts to assist them in arriving at the proper deter-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mination of any question that may be brought before them for determination." Section 4 is as follows:

"Section 4. The said Board shall have supervision over all public utilities operating within the limits of the said City of Wilmington; and the term 'Public Utilities' as used in this act is herein defined to include all street railway, express, traction, gas, electric light, heat and power, water, telephone and telegraph corporations, associations or joint stock companies operating within the limits of the City of Wilmington for public use. The said Board shall have general supervision over all public utilities as herein defined, within the limits of the City of Wilmington, and shall have power, after hearing upon notice, by order in writing:

"a. To require every such public utility as herein defined to comply with the laws of this State relating thereto or with any legally adopted ordinance or regulation of the said City of Wilmington or with any of the terms of the franchise under which such public utility operates.

"b. To require every such public utility as herein defined to furnish safe and adequate service.

"c. To require every such public utility as herein defined to keep its books, records and documents so as to afford an intelligent understanding of its business.

"d. To direct any such public utility as herein defined, found to be granting unjust, unfair or unreasonable discriminations, to immediately cease from so doing.

"e. To investigate any accident happening in the said City of Wilmington in connection with any such public utility as herein defined.

"f. To hear and examine complaints concerning rates charged by any such public utility as herein defined, and to make such recommendations and orders as it may deem proper concerning such rates.

"g. To make such recommendations as it may see fit to concerning such public utility as herein defined, and to see that all laws of the State and all lawful ordinances of the City of Wilmington are complied with by such public utility, and it shall cause action to be brought against any such public utility violating any such law or ordinances through the Attorney General of the State of Delaware or the City Solicitor of the City of Wilmington."

Section 5 provides, among other things, that the board "shall have the power to compel the attendance of witnesses and the production of books, papers, accounts and documents, to swear witnesses and to issue subpoenas." Section 6 is as follows:

"Section 6. All orders made by said Board pursuant to the power and authority given by this act, shall be served on the public utility to be affected thereby, within a reasonable time after such order is made by the delivery of a certified copy thereof to the person to be affected thereby, or to any officer or agent of any corporation, association or joint stock company upon whom a summons may be served in accordance with the provisions of the laws of this State. Such order or orders shall take effect within a reasonable time, such time to be fixed in such order. Within thirty days from the date of service of any such order or orders, any party to the proceedings, person or company affected may appeal from such order or orders to the Superior Court of the State of Delaware, by filing a notice of appeal, setting forth the order appealed from, with the Prothonotary of the said Court, which said Court is hereby given jurisdiction to hear and determine such appeal on the merits of the matters forming the basis of the order. The taking of an appeal shall not stay the operation of the order appealed from but a stay may be granted by the Court in its discretion, either with or without terms and conditions. The form of procedure, except as herein outlined, shall be prescribed by the said Court by rule. In default of compliance with the said order when the same shall have become operative, said person, corporation, association or joint stock

company, upon whom said order shall have been made, shall be subject to a penalty not exceeding one hundred dollars per day for the violation thereof, to be recovered in the said Superior Court in an action of debt at the suit of the Board."

Section 9 provides that the city solicitor of Wilmington "shall be the legal adviser for the said Board."

The city railway company was chartered February 4, 1864, chapter 406, vol. 12, Del. Laws, with power to "locate, construct, operate and maintain a city railway for the carriage of passengers and freight for compensation within the city of Wilmington, with the privilege also of extending such railway to any place or places outside of the city, not more than six miles distant from the city limits." By an amendment to its charter, passed March 26, 1891, chapter 187, vol. 19, Del. Laws, it was provided that the company "shall not at any time be allowed to charge a greater amount than five cents for any one fare or ticket or ride in their cars through the said city." The company accepted July 23, 1906, the provisions of the constitution of Delaware of 1897. Incor. Rec. L, vol. 2, p. 534. In June, 1910, the charter of the company was further amended, Incor. Rec. P, vol. 3, p. 467, providing, among other things:

"The said corporation shall further have power to lease or demise or otherwise dispose of by any contract partaking of the nature of a lease or demise, for any term not exceeding one thousand years, its real estate and railways as the same are now located and constructed, or as the same may be hereafter located and constructed; in pursuance of any and every lawful authority now existing, or which may hereafter exist, together with all the branches, extensions, sidings, turnouts, tracks, rights of way, fixtures, equipment, choses in action, wires, rolling stock, real and personal property of every nature and description, easements, licenses, public and private, liberties, appurtenances, tenements, hereditaments, of whatever kind or description, and wherever situate, now held, owned, used or controlled by said company, and which at any time hereafter or during the term of such lease may be by it held, owned, used or acquired, incident to or connected with the maintenance, operation, construction or extension of its said railways and appurtenances, and also all the rights, powers, privileges and franchises which now or at any time hereafter or during the term of such lease may be lawfully possessed, exercised or enjoyed in or about the use, operation, management, maintenance, renewal, extension, improvement, or ownership of its railways, property and appurtenances aforesaid."

The Front Street company was chartered February 20, 1877, chapter 432, vol. 15, Del. Laws, with power to "locate, construct, operate and maintain a city railway, for the carriage of passengers and freight for compensation, within the city of Wilmington." An amendment passed April 8, 1891, chapter 188, vol. 19, Del. Laws, conferred upon the company "the privilege also of extending such railway to any place or places outside of said city, to the distance of not more than six miles beyond the city limits" and provided that the company "shall not at any time be allowed to charge a greater amount than five cents for any one fare or ticket or ride in their cars through the said city." June 1, 1910, the company accepted the provisions of the existing constitution. Incor. Rec. K, vol. 3, p. 597. In June, 1910, the charter of the company was further amended, Incor. Rec. Q, vol. 3, p. 250, con-

ferring upon it a power similar in nature and extent to that given the city railway company to lease or demise its railways and property, etc. The Edgemoor company was chartered April 20, 1906, under the general incorporation act of March 10, 1899, chapter 273, vol. 21, Del. Laws, "for the purpose of constructing, maintaining and operating a railway, for the transportation of freight and passengers" within the city of Wilmington. In June, 1910, the charter of the company was amended, conferring upon it a power similar in nature and extent to that given to the city railway company and the Front Street company to lease or demise its railways and property, etc. The traction company was chartered under the general incorporation act June 25, 1910, with the following, among other, powers:

"To buy, lease, or otherwise acquire, hold, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of the property, real and personal, rights of way, easements, rights, licenses, public and private, liberties, privileges and franchises, of every description, of any railroad, railway, street car, traction, electric light or power company, and of any other kind of public service or private corporation, whether of this state or of any other state; to manage, operate, administer and control the property, real and personal, rights of way, easements, rights, licenses, public and private, liberties, privileges and franchises, of every description, of any such railroad, railway, street car, traction, electric light or power company, public service corporation or private corporation, whether of this state or of any other state, so bought, leased or otherwise acquired; to do and perform any and all acts and things whatsoever necessary, proper or convenient in the management, operation, administration, control, possession, ownership, or disposal, of any property, real or personal, rights of way, easements, rights, licenses, public and private, liberties, privileges and franchises of every description, of any railroad, railway, street car, traction, electric light or power company, public service corporation or private corporation, whether of this state or any other state, so bought, leased, held or owned by it."

The city railway company, in and by the name of "Railway," by indenture bearing date July 1, 1910, and sealed and delivered on that date, for the considerations therein set forth, leased and demised to the traction company, in and by the name of "Traction," its successors and assigns, among other things, for a term of 990 years then next ensuing, subject to determination as therein provided:

"All its real estate wheresoever located, and any and every interest therein, legal or equitable, and its railways as the same are now located and constructed or as the same may be hereafter located and constructed, in pursuance of any and every lawful authority now existing or which may hereafter exist, together with all the branches, extensions, bridges, sidings, turnouts, tracks, rights of way, easements, licenses public and private, fixtures, equipment, choses in action, liberties, lands, machinery, depots, stables, shops, stations, buildings, structures, improvements, poles, wires, motors, power-houses, engines, boilers, dynamos, electrical plants, electrical apparatus, horses, cars, and other rolling stock, tools, implements, rails, machinery, harness, equipment, stable furniture and other personal property generally of every kind or description, appurtenances, tenements and hereditaments of whatever kind or description and wherever situate, excepting supplies in store rooms, now held, owned, used or controlled by railway, and which at any time hereafter, during the term of this lease, may be by it held, owned, used or acquired, incident to or connected with the maintenance, operation, construction, extension or business of its said railways and appurtenances; also all the rights, powers, privileges and franchises which are now or at any time hereafter during the term aforesaid may be lawfully

possessed, exercised or enjoyed in or about the use, operation, management, maintenance, renewal, extension, improvement or ownership of its railways, property and appurtenances above demised."

On the same day, July 1, 1910, the Front Street company and the Edgemoor company, by indentures bearing that date, for the considerations therein set forth, leased and demised for a similar term, subject to determination as therein provided, their respective railways, property and franchises, to the traction company.

Under these leases from the city railway company, the Front Street company and the Edgemoor company, the traction company has been and is operating the railway lines of the lessor companies. For a while after the incorporation of the city railway company and the Front Street company the rate of fare was eight cents per passenger for a single trip, which rate was voluntarily and gradually reduced until it reached five cents, with certain transfer privileges. The established rate charged by the traction company and its lessor companies never has been less than five cents, although for a period of ten years or more prior to August 13, 1911, on the request of passengers using the lines of the above mentioned companies six tickets in a strip were sold to them for twenty-five cents. In the absence of such request fare was collected at the established rate of five cents. The extension of this privilege or option to obtain six tickets for twenty-five cents, instead of five tickets for that amount, did not abolish or suspend the established five cent rate. By order of the traction company the sale of strip tickets or six fares for twenty-five cents was discontinued on the leased lines operated by it from and after August 13, 1911. Under these circumstances Thomas M. Monaghan presented to the utility board August 18, 1911, a written complaint, as follows:

"Wilmington, Del., Aug. 18, 1911.

"To the Honorable Board of Public Utilities.

"Gentlemen: I desire to respectfully present the following complaint. The Wilmington & Philadelphia Traction Company has abolished the strip tickets (six for twenty-five cents) and I ask your Commission to immediately summon said company to appear and present reasons for this action. Any proof in support of this complaint will be furnished at any time your Board may appoint.

"Very respectfully,
"No. 700 West 4th St."

Thomas M. Monaghan.

Monaghan's complaint was simply that "The Wilmington & Philadelphia Traction Company has abolished the strip tickets (six for twenty-five cents)." He did not allege that the discontinuance of the sale of such tickets was in any respect either unlawful or unreasonable. The only proof he undertook to furnish was to support the complaint, namely, that the traction company had discontinued the sale of six fares for twenty-five cents, and his only prayer was that the utility board "immediately summon said company to appear and present reasons for this action." The complaint contained absolutely no issuable allegation, save the fact of discontinuance, which could hardly be disputed. It did not aver that the established five cent fare was unjustifiable or improper. It assumed, apparently without regard to

chartered rights or the financial necessities of the traction company, that the public interest demanded that six full five cent fares should be sold for twenty-five cents, and thereby five-sixths of a cent be saved on each strip to those who wished to invest twenty-five cents at once in fares. Doubtless there are many persons in the community who would find it convenient or profitable were the traction company to carry them for a fare of one cent or free or give them a bonus for riding on its cars; and with persons so carried the company would enjoy unbounded popularity. But such self-sacrificing altruism toward the general public would hardly be compatible with proper regard for the interests of those who in good faith have invested their money in the railway enterprise in the legitimate and natural expectation of a fair and reasonable return. However, by direction of the utility board, notice was served on the traction company that the former would hear and examine the above complaint August 22, 1911, at the city hall in Wilmington. On the last named day the traction company appeared by its president and counsel and presented to the utility board an answer to the complaint, as follows:

"Wilmington, Del., August 22, 1911.

"To the Board of Public Utility Commissioners for the City of Wilmington.

"Gentlemen: Your notice of August 18th, 1911, issued in accordance with the Resolution of your Board the same day upon the complaint of Mr. Thomas M. Monaghan et al. duly received. In recognition of your notice The Wilmington & Philadelphia Traction Company in answer to the complaint of the said Thomas M. Monaghan et al. says:

"(1) It is true that by an order of the Wilmington and Philadelphia Traction Company said company ceased to sell to the public after Sunday, the 13th day of August, what the complainant has styled 'Strip Tickets'; or 'Six Tickets for Twenty-five Cents.'

"(2) While the traction company recognizes the propriety of the Board of Public Utility Commissioners entertaining any complaint properly brought before them, and the corresponding propriety for the traction company to make reply thereto, the traction company respectfully states that its action was taken, as it is advised, clearly within the chartered authority of its lessor companies and within its own legal rights. The traction company would further state that this action was not taken hastily or without due consideration, but on the contrary with a view of the fulfillment of its obligations to the city of Wilmington, as a corporation, to the traveling public and to its employees, creditors and stockholders. The traction company further submits that it is not within the jurisdiction of the Board of Public Utility Commissioners or any other tribunal to make orders relative to the rate of fare which it should charge, within the limits of five cents per passenger.

"Very respectfully,

Wilmington & Philadelphia Traction Co.

"By Oscar T. Crosby, President.

"Ward, Gray & Neary, Counsel."

This answer presented to the utility board the contention of the traction company, in substance, as follows: First, that its action in discontinuing the strip tickets was "clearly within the chartered authority of its lessor companies and within its own legal rights"; second, that such action "was not taken hastily or without due consideration, but on the contrary with a view of the fulfillment of its obligations to the city of Wilmington, as a corporation, to the traveling public, and to its employes, creditors and stockholders"; and, third, that

"within the limits of five cents per passenger" it was not in the power of the utility board or any other tribunal "to make orders relative to the rate of fare which it should charge."

The subject of the discontinuance by the traction company of the sale of strip tickets in connection with Monaghan's complaint came before the utility board for consideration at two meetings, held August 22 and September 1, 1911. And at the conclusion of the latter meeting, without the examination of a book or the swearing of a witness, and solely upon an admission drawn from the counsel for the traction company, not by Monaghan, but by the counsel for the utility board, that for a period of ten years prior to August 13, 1911, strip tickets had been sold by the traction company and its lessors, the order in question in this suit was made. The complainants contend that the enforcement of this order would involve a violation of article I, section 10 of the Constitution of the United States, providing that no state shall pass any law "impairing the obligation of contracts"; of the fourteenth amendment of the Constitution of the United States, providing that no state shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and of certain provisions in the constitution of Delaware. It is unnecessary to consider in this connection the prohibitions contained in the constitution of Delaware. Further, while incidental reference will be made to article I, section 10 of the Constitution of the United States, it will not be necessary on the present application to determine whether the enforcement of the order is or is not forbidden by section 10 of that article.

[1] A number of jurisdictional questions have been presented and argued by counsel, as well as certain points touching the propriety or regularity of proceeding in this court under the circumstances for the injunctive relief prayed. But the substantial inquiry on the merits is whether the enforcement of the order of the utility board would or probably would contravene either or both of the provisions of the fourteenth amendment, forbidding any state to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. It is well settled that corporations are equally with individuals within the protection of the fourteenth amendment with respect to their property. Subject to a legitimate exercise of the police power, no state can deprive them of their property without due process of law, or deny them the equal protection of the laws, or, as it has been judicially paraphrased, of the protection of equal laws. The prohibition is leveled against such deprivation or denial by a state, whether by direct act of the legislature or by any other state instrumentality. In *Chicago, Burlington, etc., R. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, the court through Mr. Justice Harlan said:

"The prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the

state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' "

And again, in *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, the court through Mr. Justice Peckham said:

"The provisions of the fourteenth amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state."

[2] The utility board is an instrumentality of the state of Delaware for the accomplishment of public purposes and its acts in and about matters committed to it are the acts of the state. The suggestion that in so far as such an instrumentality acts irregularly, wrongfully or illegally it does not represent the state, because the state has not authorized it so to act, is utterly unsound. If it were otherwise the fourteenth amendment would possess no practical efficiency with respect to the action or threatened action by such instrumentality; for no relief could be had under that amendment against irregular, wrongful or illegal action taken or threatened by it, while in the absence of such irregular, wrongful or illegal action there would be nothing to complain of and consequently no occasion for asking or possibility of obtaining relief. The material consideration is whether the state instrumentality in denying a person or depriving him of the protection of the amendment is acting *virtute officii*, or proceeding under the grant of authority given it by the state, or within the general scope of its functions, and not whether in so acting it is acting irregularly, wrongfully or illegally. [3] The proceeding instituted by Monaghan through the presentation of his complaint to the utility board was for the purpose of compelling the traction company to receive from those, who were ready and willing to pay at one time twenty-five cents for street car fares, only four and one-sixth cents for each fare, instead of the established rate of five cents per fare. In this manner it was sought to take or deprive the traction company of its property. This could not constitutionally be done "without due process of law." The decisions leave no doubt as to the general features and requirements of due process of law. While it varies according to the nature of the proceeding, in such a proceeding as that under consideration notice and a fair opportunity to defend are essentials. In *Iowa Central Railway Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467, the court through Mr. Justice, now Chief Justice, White said:

"It is clear that the fourteenth amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

In *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165, the court through the same learned judge said:

"The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form. * * * The due process clause of the fourteenth amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it."

In *Hooker v. Los Angeles*, 188 U. S. 314, 23 Sup. Ct. 395, 47 L. Ed. 487, 63 L. R. A. 471, the court through Mr. Chief Justice Fuller said:

"The fourteenth amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard."

In *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97, the court through Mr. Justice Moody refers to the requirements of due process of law, namely, that "the court which assumes to determine the rights of parties shall have jurisdiction" and that "there shall be notice and opportunity for hearing given the parties" as "two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries." [4] In the light of these principles, so reiterated as to have become elementary, was due process of law observed by the utility board in the procedure which resulted in the making of the order complained of? Was the traction company accorded a fair hearing and an adequate opportunity of presenting its defense to Monaghan's indefinite complaint? As has appeared, the traction company in its answer set forth, in substance, that its action in discontinuing the strip tickets was within the chartered authority of the lessor companies and within its own legal rights; that such discontinuance was ordered after due consideration and in view of its obligations to the city of Wilmington, the traveling public, and its employes, creditors and stockholders; and that it was not in the power of the utility board "within the limits of five cents a passenger" to make orders touching the rate of fare to be charged. Here was an answer involving grave questions of fact and law, presented by a reputable company rendering important service to the traveling public, which it was the duty of the utility board to allow the traction company a full, fair and adequate opportunity of supporting. The utility board had power to make orders touching rates only "after hearing upon notice"; and "hearing" in this connection means a fair and bona fide hearing. It was thoroughly equipped under the law of its being for conducting a full investigation of all matters in dispute, whether of fact or law. The city solicitor was ex officio its legal adviser whose especial duty it was to advise it upon matters of law and procedure. And it had full power to make all needful rules for its proceedings, to engage the services of expert accountants to assist it, and to compel the attendance of witnesses and the production of books, papers, accounts and documents. Thus fully

armed with the means of investigation and decision there could be no legitimate excuse for an omission to accord the traction company full opportunity to present its defense.

Monaghan having made his complaint, and the traction company having put in its answer, it was incumbent upon the utility board in the performance of its duty, judicial in its preliminary stages and legislative at the end, to observe strict impartiality toward the parties. Although there is some conflict, apparent rather than real, in the affidavits, it satisfactorily appears that at the meeting of August 22, 1911, the utility board through its counsel positively refused to take into consideration the charters or chartered rights of the traction company and the lessor companies. Monaghan in his affidavit alleges that at that meeting the traction company stated to the utility board both through its counsel and its president that the traction company had the charter right to charge a straight fare of five cents, and that neither the utility board nor any other tribunal could compel them to reduce that fare by selling six tickets for twenty-five cents; and that the utility board through its counsel replied that that was a question that should be decided by the courts and the board could not assume to decide that question in favor of the traction company in view of the power given the utility board by the statute which created it. Henry P. Scott, who was present at the meeting of August 22, 1911, alleges in his affidavit, in substance, that, after the counsel for the traction company had denied the right or power of the utility board to regulate the rates of fare to be charged "within the limits of five cents per passenger" and Crosby had stated that the position of the traction company was that the right to suspend the sale of strip tickets was a charter right not to be abolished by any tribunal, Vance, one of the members of the utility board, asked that the traction company "produce the various franchises under which it is operated" and that "before any answer could be made to this request" the members of the utility board decided to go into an executive session "to map out their proceedings" and retired with their counsel for a conference. It is not stated at whose request or instance the members of the utility board retired for a conference before any answer could be made to the request of Vance that the traction company "produce the various franchises under which it is operated." The affidavit then proceeds as follows:

"After the conference Mr. Hastings announced that he had advised the Board that, regardless of whatever the charter rights may be, it had a right to make an order upon the company to restore the sale of tickets, unless the company choose to make a defense on the merits of the case at this time; that the complaint made a prima facie case, and the company must put in a defense on the merits or the commission would make an order upon the company with respect to the matter of rates. Mr. Neary at this point stated that he was ready to offer to the Board evidence of the company's charter rights. The Board refused to receive such evidence and Mr. Neary asked whether the Board would disregard the company's charter rights. Mr. Hastings replied that under the conditions of this case he would advise the commission to make an order regardless of the charter rights of the company. He further stated that he did not feel that he should be called upon to decide the legal questions involved in the consideration of the charter rights

of the company and that he did not intend to enter into a consideration of any such questions; that the commission had the right on the face of the law and that he would advise them to assume jurisdiction, and further, that if there was one chance of upholding the law he thought the commission should take that chance."

Crosby in his affidavit in chief fully corroborates the foregoing statement of Scott. There is no contradiction of their allegation that Vance, one of the members of the utility board, requested at the meeting of August 22, 1911, that the traction company "produce the various franchises under which it is operated" or that the utility board, without waiting for any reply to this request, retired with its counsel for a conference, or that the utility board after the conference, under the advice of its counsel, refused to take into consideration the charter rights and franchises of the traction company. Certain affidavits on the part of the utility board have been presented to the effect that the affiants were present at the meeting of August 22, 1911, and heard the president of the utility board say that the board would receive any testimony or evidence that the traction company desired to offer, and that the latter company did not offer any evidence. Indeed, the affiant John S. Hamilton speaking of that meeting says:

"That he knows positively as one who was there during the entire hearing, that at no time was the Wilmington and Philadelphia Traction Company refused an opportunity to put in evidence anything it wanted; that the counsel for the board repeatedly stated to the officers and counsel for the traction company that the board was prepared to consider anything that the company should lay before it."

If the above statement was intended by the affiant to apply to an opportunity on the part of the traction company to put in evidence its charter rights and have the same considered by the utility board it is grossly misleading and not only in conflict with the affidavits of Monaghan, Scott and Crosby, but with controlling evidence hereinafter quoted. If, on the other hand, it was intended to apply only to the introduction of testimony or evidence, other than charter rights, it may in a qualified sense be correct. The affiant Artemus Smith states in effect that he was present during the whole meeting of August 22, 1911, and is positive that at no time during that meeting did the counsel for the traction company or its officers "offer to introduce into evidence any charters, leases or other documents." If this statement means that no charters, leases or other documents were offered in evidence, it is literally and technically true; for while the traction company appeared at that meeting pursuant to notice, there is no evidence that it had been required to bring with it or had with it at that time its charters, leases or other documents. Such a statement is not inconsistent with a refusal by the utility board, without an actual offer, to consider such charters, leases or documents. It appears from the affidavits of Crosby and Scott, and without contradiction, that the president of the utility board stated at its meeting August 22, 1911, that "the position of the board was that of persons trying to find out where they stood." And Taylor, Cleaver, Pierce, Vance and Bacher, all the members of the board, state in their affidavits:

"That none of the members of the said board are lawyers and upon legal questions are compelled to rely upon the advice of the city solicitor who is the board's legal adviser."

If the utility board and its counsel did not know what was the proper procedure to adopt time would have been well spent in duly considering the subject and formulating such rules and regulations as might be necessary for an orderly investigation of the case before them, and its just determination upon the merits, instead of precipitately plunging ahead in the dark. For, as already stated, the act conferred on the utility board power to make all needful rules and regulations for its proceedings, to compel the attendance of witnesses and the production of books, papers, accounts and documents, and to swear witnesses and issue subpoenas. The court does not perceive that any exigency existed which could demand or justify summary and irregular methods in dealing with so important a matter as an adjustment of rates to be charged by the traction company. No formal conclusion was reached by the utility board August 22, 1911, and an adjournment was taken until August 31, 1911, and a further adjournment until September 1, 1911. The proceedings of the meeting on the last named day were taken down stenographically by Charles G. Guyer and reproduced by him in typewriting and duly verified on his oath as a full verbatim report of what was said on that occasion. The correctness and accuracy of Guyer's report has not in any respect been disputed or questioned on either side. At the meeting September 1, 1911, Herbert H. Ward, Esq., appeared as counsel for the traction company. Guyer's affidavit in connection with those of Crosby, Scott and Monaghan fully establishes the fact that the utility board, acting under the advice of its counsel, absolutely refused to take into consideration what the traction company deemed and claimed to be important rights acquired by and secured to it under its charter and the leases of the lessor companies. Guyer's report is in part as follows:

"Mr. Ward: As I understand it, the board, at the meeting—the minutes of which have just been read—[August 22, 1911], decided that they would not, as a preliminary to the making of an order, consider what the charter rights of the company were, and that the counsel for the board, representing the commission, stated that he would not submit any opinion to the board upon that point, but that the board in effect, decided that the only question which they would consider was a question as to the reasonableness of the rate of five cents. Is that a correct statement of the position?

"President Taylor: That is true.

"Mr. Ward: * * * As I understand the position of the board is that on a complaint, such as Mr. Monaghan has filed, they put it up immediately to the person or company cited in, and that before they make their order they will make no inquiry as to the legal right of the person cited in to do the thing which he is doing and about which complaint is made. Of course, you realize that this question of rates is, probably, the biggest and most difficult question, both of fact and of law, that your board would ever have to consider, and I think it is a misfortune to you and a misfortune to the General Assembly that created you and to the community, and certainly a misfortune to us, that it is the first question that has come before you before you have established rules of your government and established bases of judgment in accordance with which we could put in evidence. I submit to you that the decision of the board practically leaves us only one thing to do. Our rights are our rights. Our rights consist of facts and law, and for the

board to announce in one breath 'we will not consider your legal rights, but will direct you to put in evidence, or ask you to put in evidence,' that creates a situation which is impossible, absolutely impossible, legally or equitably. I cannot conceive of a board of utilities taking that position. * * * The position of the board practically leaves us—and what I have said has led me up to this, and I have tried to explain our position, so that you, at least, will feel that we have only this thing that we are doing, or that we can do. If the board declines to consider our rights as rights, we do not feel that we can put in evidence. That is one ground why we do not feel that we can put in evidence, and the ground, as I stated a moment ago, that our rights are a compound of facts and law, and if you decline to consider our legal rights, why should we offer evidence? How can we offer evidence? What is the issue? Of course, the issue before this board is not so simple as, 'Did we or not stop selling strip tickets, six for a quarter?' That is not the question of fact before the board. The question of fact before the board is whether that was a reasonable order that we made, whether we may reasonably, under our rights, charge five cents. But what is the rule by which we shall establish reasonableness? Has the board laid down any principles on which we can introduce evidence? Has anybody come in here and stated that our charge was unreasonable? If they had said it was unreasonable, would that give us any basis upon which we could introduce evidence, not knowing what the board would finally establish as a rule of unreasonableness? The point I am trying to make plain to you is that we cannot introduce evidence at large, helter skelter, without knowing what point we are aiming at, or what straight edge we must hew along. As the case stands now, for us to put in evidence would be folly, because we have nothing to prove. There is no issue before the board, and naturally we cannot put in evidence.

* * * * *

"Mr. Hastings: Mr. Ward, I am certain that it is due to you, at least, and probably to myself and to everybody concerned in this question, to explain my position, and to state, as you already know, that the commission is largely relying upon me for their advice as to how they should proceed in determining this question. It is new to them. It is new to me. I have taken the law and read that, and have undertaken to follow that as best I could. It seems to me that any lawyer, if he stops to think a minute, will agree that my position is correct, when I take the position that this board should take jurisdiction and should not put it up to their legal adviser to advise them whether or not they can do this thing. I have taken the position that this law gives this board jurisdiction over the rates charged by public utilities. That is what the law on its face gives to them. Whether or not their charter rights will enable them to charge five cents, or any other rate of fare, it seems to me should not be left to a board not consisting of lawyers, and the burden of deciding that question should not be put upon any official. Suppose, for instance, I should examine that question and I should agree with counsel for the traction company that they were within their rights, and I should write an opinion to this board that they were, in my judgment, within their rights, what would my position be? If you think for a moment you can see I couldn't live in this town with such an opinion over my signature. In the first place, I take it that there are fully fifty per cent. of the lawyers that would say 'Hastings is wrong; I don't agree with him'; I take it that ninety per cent. of the people would say that he was wrong. Why should I shoulder that responsibility upon myself and thereby relieve the traction company, assuming that I should agree with you, that the question is right. I go further than that, and I say that if I should examine the question and should conclude with you that in my judgment in court you could establish your position and show that this commission had no jurisdiction over your rates, if I should examine that question and should come to that conclusion, I should say to this board, 'Gentlemen, on the face of this thing you are given jurisdiction to act, and my advice to you is to act and let the court say whether or not my opinion and the opinion of the counsel for the traction company is correct, or whether

it is incorrect.' The court is the person to decide that, and it seems to me it is no great hardship upon this traction company to put them in court to decide that one question.

* * * * *

"Mr. Hastings: We inquired the other day, and I understood the traction company was going to look it up and admit it, as to how long the sale of these strip tickets had been in existence before this order was made. Mr. Ward: If we knew we should be willing to admit it but it is a question. Mr. Hastings: Eight or ten years? Mr. Ward: I really do not know. If you want us to say eight years or ten years, we will say it—whichever you prefer. Mr. Hastings: I do not want you to say anything except the facts. Mr. Ward: I do not know what the facts are. Mr. Hastings: I want to get it on the record that it has been in existence for some years. Upwards of ten years? Mr. Ward: We think you can say upwards of ten years. Mr. Hastings: That will be entered on the record, that that is admitted."

The affidavits show that when the traction company appeared before the utility board August 22, 1911, and through its president offered to answer any questions pertinent to the investigation, the utility board, through its counsel, inquired if it was the position of the traction company that it would "answer only on interrogation" and on being informed that the company was present to furnish to the utility board any information that it might desire pertinent to the investigation, asked how long strip tickets had been on sale in Wilmington. The president of the traction company stated he was not sure as to the length of time such tickets had been on sale, but that the traction company would supply that information. The counsel for the utility board said that he wanted the time fixed and have it go into the record of the proceedings before the utility board.

The situation which confronted the utility board September 1, 1911, made it incumbent on its legal adviser to instruct it as to the proper course of procedure by which the "merits of the matters forming the basis of the order" it might make should be justly and intelligently determined as between the parties, and a proper record of its action be made for the purpose of an appeal to the superior court, should one be taken. Nine days had elapsed since the traction company had first appeared before the utility board, when its attention had been drawn to the fact that no proper rules or regulations for the hearing of the case were in existence, and there was no legitimate reason why in the interim it should not, under the advice of its counsel, have adopted some rational and proper course or method of procedure, worthy of the name of due process of law, and calculated for the attainment and not the defeat of justice. It is an absurdity to suppose that within the intent of the act a hearing and determination of the "merits of the matters forming the basis of the order" do not involve questions of law as well as of fact, or that chartered rights may be wholly ignored. It was the right of the traction company to have its claim of chartered power to charge a "straight five cent fare," made and insisted on in good faith, considered by the utility board, whatever might have been the conclusion thereafter reached by the board as to the existence of such power. It is difficult to conceive of treatment more arbitrary, injurious or ruthless than that to which the traction company was subjected by the utility board. A malefactor taken

redhanded in the commission of crime would have had a constitutional right to a measure of protection and consideration denied to the traction company. The board, influenced and practically controlled by its own counsel, instead of maintaining an attitude of judicial and legislative impartiality as between Monaghan and those he may be supposed to have represented, and the traction company, became the prosecutor and displayed a spirit of partisanship and hostility toward that company from the beginning to the end of the hearings on August 22 and September 1, 1911. Yet it does not appear that there was any discourtesy or want of respect on the part of the traction company toward the utility board or any act or conduct of the former intended or calculated to provoke animosity on the part of the latter. While the utility board professed itself ready to hear from the traction company a "defense on the facts" tending to show a straight five cent fare was only reasonable, Monaghan's complaint did not charge that such a fare was unreasonable, no rules or principles of procedure had been adopted by the board, and it, through its counsel, had absolutely refused to give any consideration to the chartered rights of the traction company, whatever they might be. The traction company was thus placed in an intolerable and practically impossible position. Knowing that any appeal it might take would be heard and determined by the superior court "on the merits of the matters forming the basis of the order" and having been arbitrarily, intentionally and wrongfully denied any consideration by the utility board of the chartered rights upon which it relied, it was justified in declining to put in only a part of its defense. Under the circumstances its course was reasonable and sensible and such as would have been pursued by any one intending not to be precluded from an assertion of his rights in a proper tribunal. The utility board having, through its counsel, obtained from the traction company an admission that strip tickets, six for twenty-five cents, had been sold by it for a period of ten years prior to August 13, 1911, without any intimation of the use to be made of such admission, took, through its counsel, the position that the uninterrupted sale of strip tickets on such terms during that period gave rise to a prima facie presumption that it would be unreasonable to refuse to sell six fares for only twenty-five cents, or in other words to charge twenty-five cents for only five fares where the purchaser desired to obtain for that sum six fares. On the basis of this reasoning the order complained of was made, imposing the maximum penalty.

[5] If such a prima facie presumption existed as was claimed on the part of the utility board it was rebuttable, and the traction company had a right to rebut it, but was prevented from and practically denied that right through the refusal of the board to allow it to make a full defense as well on the law as the facts. The board was not entitled to the benefit of any presumption of the kind while excluding the traction company from the benefit of a full defense. In *Mobile, etc., Railroad Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, the court through Mr. Justice Lurton used the following language, approved by the same

court in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 82, 31 Sup. Ct. 337, 55 L. Ed. 369:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

But as in the case of an act of the legislature the creation of a *prima facie* presumption will not avail where the person against whom it is urged is precluded from fully presenting his evidence in rebuttal, so here, in the absence of such a legislative act, the utility board can take nothing by its claim of *prima facie* presumption.

[6] It does not appear that any member of the utility board possessed experience, special training or information rendering him competent in the absence of proper evidence laid before him to form a reliable opinion upon the reasonableness or unreasonableness of "a straight five cent fare." It is obvious that the fact that another trolley line may have sold six tickets for twenty-five cents is wholly inconclusive. Excellence of service, commodiousness of cars, cost of construction and many other factors representing varying conditions may render a price for tickets which is wholly reasonable in the one case, unreasonable in the other. So it is evident that the mere unexplained fact that a trolley line during a former period may have sold six tickets for twenty-five cents affords at most very slender support to a contention that a subsequent change from six to five tickets for that sum involves an unreasonable exaction from the traveling public. Cost of maintenance, change in wages, and a variety of other circumstances may fully justify such increase in price. Clothed with ample power fully to investigate the merits of the case and do equal justice between the parties the utility board allowed itself to be led into a course of action which was the antithesis of "due process of law." An examination of the affidavits has produced the conviction that it is at least very doubtful whether "a straight five cent fare" is unreasonable. And if for the purpose of the present application it must consequently be assumed that the discontinuance of the sale of six tickets for twenty-five cents was reasonable and justifiable, it must be held that the order made by the utility board was an attempt to deprive the traction company of its property without due process of law.

[7] Much was said at the hearing and is contained in the briefs of counsel touching the question of the jurisdiction of this court to entertain this suit. The act of March 3, 1875, c. 137, 18 Stat. 470, as amended by the acts of March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), provides that:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive

of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States," etc.

Diversity of citizenship is unnecessary in such cases. This suit when brought satisfied the jurisdictional requirements above mentioned. It was instituted after the judicial code of the United States of March 3, 1911, c. 231, 36 Stat. 1087 (U. S. Comp. St. Supp. 1911, p. 128), was enacted, but before the date of its going into effect, which was January 1, 1912. By virtue of the judicial code the circuit courts of the United States were abolished on the last named date, and this suit was transferred from the circuit court of the United States to the district court. Section 290 of the judicial code provides, among other things, that all suits pending in the circuit courts on the date of its taking effect should thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein. And section 299 provides, among other things, that:

"The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect * * * any suit or proceeding * * * pending at the time of the taking effect of this act," etc.

[8] Hence the principles and authorities which would be pertinent on the question of jurisdiction of the circuit court of the United States, had the judicial code not been enacted, are pertinent to the consideration of jurisdiction of this suit as transferred to this court. In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, in which appeals had been taken from the circuit court of the United States for the southern district of New York, a bill had been filed by the Consolidated Gas Company of New York against the city of New York, the attorney general of New York, and the gas commission of New York, to enjoin the enforcement of certain legislative acts and of an order made by the gas commission, which subsequently became the public service commission, relative to rates for gas in New York city. The jurisdiction of the circuit court had been challenged. The Supreme Court in sustaining the jurisdiction of the circuit court said through Mr. Justice Peckham:

"At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the public service commission, in their brief in this court. They assume to criticize that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens v. Virginia*, 6 Wheat. 264, 404 [5 L. Ed. 257]), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

Raymond v. Chicago Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; *Home Telephone Co. v.*

Los Angeles, 211 U. S. 265, 278, 29 Sup. Ct. 50, 53 L. Ed. 176; Minneapolis v. Street Railway Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; City of Owensboro v. Cumberland Tel. & Tel. Co., 174 Fed. 739, 99 C. C. A. 1; Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Cleveland v. Cleveland City Railway Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; City Railway Co. v. Citizens' Railroad Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; and Love v. Atchison, T. & S. F. Ry. Co., 185 Fed. 321, 107 C. C. A. 403—were all heard on appeal from the circuit court of the United States, and on the question of jurisdiction are in line with Willcox v. Consolidated Gas Co. Other cases, not on appeal, but in line with Willcox v. Consolidated Gas Co. on the question of jurisdiction are Spring Valley W. Co. v. City & County of San Francisco (C. C.) 165 Fed. 657; Delaware, L. & W. R. Co. v. Stevens (C. C.) 172 Fed. 595; Atchison, T. & S. F. Ry. Co. v. Love (C. C.) 174 Fed. 59; and San Francisco G. & E. Co. v. City, etc., of San Francisco (C. C.) 189 Fed. 943.

At the conclusion of the hearing on the present application the counsel for the utility board referred to Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, and Seattle Electric Co. v. Seattle, R. & S. Ry. Co., 185 Fed. 365, 107 C. C. A. 421. The former case does not seem to have any pertinency to that before the court. There a bill had been filed to enjoin the city of New York, the board of rapid transit commissioners, and others from proceeding with the construction of a certain rapid transit railroad tunnel in a place not included in the "routes and general plan" adopted with reference to the construction of such tunnel, on the ground that it would deprive the complainant of his property without due process of law in violation of the fourteenth amendment. The court through Mr. Chief Justice Fuller said:

"The city acts through the Rapid Transit Board, which possesses the powers specifically vested. It is empowered to prescribe the routes and general plan of any proposed rapid transit railroad within the city, and every such plan must 'contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected.' Consents of the municipal authorities and the abutting property owners to construction on the routes and plan adopted must be obtained, and any change in the detailed plans and specifications shall accord with the general plan of construction, and, if not, like consents must be obtained to such change. The bill asserted that the easterly tunnel section under Park avenue was not within the routes and general plan consented to, and that the construction was unauthorized. * * * Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment. * * * In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions."

The proceeding there sought to be enjoined was not within the grant of authority conferred. But here the utility board, although

acting irregularly and wrongfully, was proceeding under the grant of authority given it by the state to "hear and examine complaints concerning rates * * * and to make such recommendations and orders as it may deem proper concerning such rates." The distinction in principle between the present case and *Barney v. City of New York* plainly appears from the latter portion of the opinion in that case. The New York case wholly fails to establish the proposition that the action of the utility board in making the order complained of was not the act of the state. *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, 185 Fed. 365, 107 C. C. A. 421, was decided by the circuit court of appeals for the ninth circuit. In the court below a street railway company had obtained a preliminary injunction against another street railway company, restraining the latter from constructing a railway on Rainier avenue in Seattle, under an ordinance of that city, on the ground that the complainant, which had for many years been operating a line of railway along that avenue under an earlier franchise, would be greatly damaged and deprived of property without due process of law in contravention of the Constitution of the United States. On appeal from the interlocutory decree the circuit court of appeals held that the franchise granted to the complainant was not exclusive, and that, as under the franchise granted to the defendant compensation was required to be made for damages occasioned by the laying of tracks, the latter ordinance did not conflict with the Constitution of the United States and therefore the court below was without jurisdiction to entertain the suit. But instead of resting the decision upon that ground the court unnecessarily went further and said:

"But there is a further, and as we believe a conclusive, objection to the claim of right on the part of the complainant to invoke the jurisdiction of the circuit court on constitutional grounds. It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of provisions of the Federal Constitution. If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without due process of law, still it would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides, in article I, § 3, as does the fourteenth amendment to the Constitution of the United States that: 'No person shall be deprived of life, liberty, or property without due process of law.' Under this provision of the state constitution the ordinance would be as invalid as under the Federal Constitution. It would not be a state law. It would be with respect to the former, as the complainant charges in its complaint with respect to the latter, 'without authority in law, null, and void, and of no force and effect.' The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy on an appeal from the highest court of the state to the Supreme Court of the United States."

The substance of this holding is well stated in the syllabus as follows:

"A suit to enjoin the enforcement of a municipal ordinance on the ground that it will deprive complainant of its property without due process of law

is not within the jurisdiction of a circuit court of the United States as involving a constitutional question, where the state constitution contains a similar prohibition, and the ordinance, if invalid under one, is equally so under the other; the rule being that in such cases the remedy must be first sought in the state courts."

Several things may with propriety be said of this holding. In the first place, it was wholly unnecessary to the determination of the case; the decision being fully supported on the first ground. Second, the cases cited in support of the proposition do not sustain it. They are *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, which has already been considered, and *Hamilton Gaslight Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, where it was held that a city ordinance not passed under legislative authority is not a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts. The court through Mr. Justice Harlan said:

"The jurisdiction of that court [the circuit court of the United States] can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the state has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts."

These two cases fall far short of the proposition advanced in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, and at the same time are clearly distinguishable from the case in hand. While in those cases there was either a legislative prohibition or a lack of legislative authority to construct the tunnel or pass the ordinance, here there is no question as to the legislative authority of the utility board to regulate rates by making "such recommendations and orders as it may deem proper concerning such rates." This distinction was clearly recognized by the circuit court of appeals for the sixth circuit in *City of Louisville v. Cumberland Tel. & Tel. Co.*, 155 Fed. 725, 84 C. C. A. 151, 12 Ann. Cas. 500, where it was held, as stated in the syllabus, that the circuit court of the United States has no jurisdiction to enjoin the enforcement of a municipal ordinance on the ground that it impairs the obligation of a contract or deprives the complainant of property without due process of law, in violation of the Constitution of the United States, when the bill alleges that no power had been granted to the municipality by the constitution or legislature of the state to pass such ordinance. The court through Judge, now Justice, Lurton, said:

"This is a bill filed in the circuit court to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Louisville, on the ground that the ordinance was violative of the obligation of a contract between the complainant and the city, and also on the ground that the rates prescribed were unreasonable, unjust and confiscatory, and, if enforced, would deprive complainants of their property without compensation and without that due process of law guaranteed by the fourteenth amendment. * * * Jurisdiction was invoked upon the contention that this is a suit arising under the Constitution or laws of the United States. That the bill does aver that the ordinance impairs the obligation of a contract

and is also an attempt to deprive complainant of its property without due process of law is plain enough. But the constitutional prohibitions which are invoked run against the state, and the state alone, while the bill of the complainants in plain words negatives state action by averring that 'no power to regulate the rates charged by your orator or other telephone companies' has been granted 'by the constitution or the legislature of the state of Kentucky, or in any other way,' and that the enactment of said ordinance was and is beyond the power of the common council of said city, and the said ordinance void and an assumption of power and authority upon the part of the said common council unwarranted and unfounded.' If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises. * * * If the state has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service then the establishment of rates under this power would be the establishment of rates by the state itself."

As before stated, here the state has conferred authority upon the utility board with respect to the regulation of rates. Third, the proposition advanced in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.* seems essentially unsound. While the constitution of a state is, subject to the Constitution and laws of the United States, the supreme law of the state, the Constitution of the United States is the supreme law of the land, and within the scope of its operation, the supreme law of the state, to the exclusion of any inconsistent provisions in the state constitution or laws. The prohibition of the fourteenth amendment relating to due process of law is self-executing and its scope and force can neither be increased nor diminished by any state. But it does not destroy the state or its instrumentalities. In declaring that no state shall deprive any person of life, liberty or property without due process of law, it prohibits action by the state through any of its instrumentalities which would have that result, and whether the state constitution does or does not contain a similar prohibition is wholly immaterial on the question whether action by a state instrumentality is action by the state and as such forbidden by the amendment. The prohibition of the amendment having precisely the same force and operation in the absence, as in the presence, of a similar prohibition in the state constitution, if in the former case any given action by a state instrumentality would be the act of the state, it would equally in the latter, other things being equal, be the act of the state. The co-existence in the federal and state constitutions of similar prohibitions is unimportant on the question of authority to represent the state, and consequently on the question of the jurisdiction of the circuit court, now the district court, of the United States. Fourth, it is difficult, if not impossible, to reconcile the proposition advanced in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.* with the fact that the Supreme Court of the United States has in many cases, of which a number have been hereinbefore cited, recognized and upheld the jurisdiction of the circuit court of the United States over suits for injunctive relief against the orders or legislative action of commissions and other state

instrumentalities, based on the constitutional prohibition in question, in states creating such commissions and instrumentalities and having a similar prohibition in their constitutions. Illinois, Michigan, Minnesota, Virginia, Washington and other states are in this category, each having the constitutional prohibition that "no person shall be deprived of life, liberty, or property without due process of law." Fifth, the circuit court for the northern district of California in *San Francisco, G. & E. Co. v. City, etc., of San Francisco* (C. C.) 189 Fed. 943, repudiated the proposition advanced in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.* in a carefully considered opinion by Judge Van Fleet. The points decided are well summarized in the syllabus as follows:

"A suit by a gas company to enjoin enforcement of a municipal ordinance fixing the price of gas, passed in the exercise of powers conferred by the state constitution, as being confiscatory and depriving complainant of its property without due process of law, in violation of the fourteenth constitutional amendment, presents a federal question under such provision which gives a federal court jurisdiction, notwithstanding the fact that the state constitution contains a like provision, and on the facts alleged in the bill the ordinance would be invalid thereunder.

"Where a state has conferred power on some one of its agencies to perform a certain function involving the exercise of discretion, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the state, is none the less the act of the state within the contemplation of the constitutional prohibition against deprivation of life, liberty, or property without due process of law."

The learned judge with respect to the contention that the bill did not disclose a case arising under the Constitution or laws of the United States for the reason that the facts stated did not show "state action" said:

"This is predicated upon the argument that, conceding that the state has vested in a tribunal or functionary full and plenary power, as here, to do a certain thing, an act done under such authority is not the act of the state in the sense here involved, unless it be so done as to be legally unassailable; that is, so done that, if passed in review by the highest judicial tribunal of the state, it would necessarily be held valid in form and substance; that anything less than this is not state action. In other words, to apply the principle to the concrete case presented by the bill, that the above provision of the constitution of the state vesting in municipalities the power to fix gas rates must be read in conjunction with the provision of the same instrument that no person shall be deprived of his property without due process of law; and if an ordinance adopted under the supposed authority of the first is found to be obnoxious to the second by fixing rates so unreasonably low as to be confiscatory of the property of those affected, or is invalid for any other reason under the constitution or laws of the state, then the adoption of such ordinance cannot be said to have been had under the authority of the state in a sense to bring it within the prohibition of the fourteenth amendment. * * * This contention, while not new, is nevertheless somewhat startling in view of the history of this character of litigation in the federal courts, wherefrom it has been very generally assumed that the question had been definitely set at rest."

One of the powers conferred on the utility board is "to direct any such public utility as herein defined [including street railways], found to be granting unjust, unfair or unreasonable discriminations, to immediately cease from so doing." In this case the traction company having by its action in August, 1911, confined itself to the former

practice of the lessor companies of charging "a straight five cent fare," the utility board is undertaking, not to secure uniformity in the matter of fares, but to create and enforce a discrimination as between passengers on the one hand who are able and wish to pay for only one fare at a time and those on the other who are able and wish to spend twenty-five cents at a time in tickets; thus compelling the former to pay five cents and the latter only four and one-sixth cents for each fare. Whether this is a just, fair or reasonable discrimination may depend upon the facts when satisfactorily established in the case by plenary proofs. It by no means follows that because such a discrimination formerly was voluntarily made by the lessor companies, and may have been reasonable at the time, the traction company should now, under changed conditions, be forced by the utility board to re-establish such a discrimination. What was reasonable then may have since become the reverse.

A case strongly resembling in some of its features that under consideration is *Lake Shore, etc., Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. It there appeared that an act of the legislature of Michigan provided that one thousand mile tickets should be kept for sale at the prices therein named at the principal ticket offices of the railroad companies therein referred to; that such tickets might be made non-transferable, but when so required by the purchaser should be issued in the names of the purchaser, his wife and children; that should any such ticket be presented by any other than the person or persons named thereon the conductor might take it up and collect fare, and thereupon such ticket should be forfeited; and that each one thousand mile ticket should be valid for two years only after the date of purchase. Smith having demanded and been refused a one thousand mile ticket for himself and his wife pursuant to the provisions of the above section applied for and obtained from the state circuit court a mandamus to compel the railway company to issue such ticket upon payment of its price. The supreme court of Michigan affirmed the order granting the mandamus and the case was taken by writ of error to the Supreme Court of the United States, where the judgment of the supreme court of Michigan was reversed on the ground that the act was forbidden by the fourteenth amendment. The court through Mr. Justice Peckham said:

"The two questions of a federal nature that are raised in the record are, (1) whether the act violates the Constitution of the United States by impairing the obligation of any contract between the State and the railroad company; and (2) if not, does it nevertheless violate the fourteenth amendment of the Constitution by depriving the company of its property or liberty without due process of law or by depriving it of the equal protection of the laws. If we should decide that this act violates any provision of the fourteenth amendment it would be unnecessary to examine the question whether there was any contract between the State and the company as claimed by it. We will, therefore, first come to an investigation of the legislative authority with reference to that amendment. If unhampered by contract there is no doubt of the power of a state to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public, and

whether they are or not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law. * * * The question is presented in this case whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a rate of transportation for a less sum than the general rate provided by law. * * * The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to contract and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. * * * The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word 'convenience,' it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience. The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. * * * Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a price lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company. * * * If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by

the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations. But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law, when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the legislature are reasonable. This, of course, applies to rates actually fixed by that body. * * * True it is that the railroad company exercises a public franchise and that its occupation is of a public nature, and the public therefore has a certain interest in and rights connected with the property, as was held in *Munn v. Illinois*, 94 U. S. 113, 125 [24 L. Ed. 77], and the other kindred cases. The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power. * * * It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company. * * * The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means. The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling or using their property in a manner in which the public have an interest. In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community."

The case now under consideration is not differentiated in principle from *Lake Shore, etc., Railway Co. v. Smith* by the fact that there the court was dealing with an act of the legislature while here the

court is concerned with the action of the utility board. For that board as an instrumentality of the state created by the legislature cannot possess power superior to that of its creator. Further, while one thousand mile tickets continued in force for only two years and were for the use of the purchaser and his family, the strip tickets continued good indefinitely and could be transferred at will by delivery to other persons. Further, on the assumption that a "straight five cent fare" for each passenger was not unreasonable, it is on principle unimportant, so far as concerns the existence of right on the part of the utility board to enforce the discrimination involved in the sale of six tickets for twenty-five cents, whether those able and willing to purchase such tickets would form a large or only a small proportion of the total number of passengers carried. On the above assumption of the reasonableness of a "straight five cent fare" for all, the loss to the traction company through the sale of the strip tickets would, subject to results flowing from possibly or probably increased patronage, grow with the number sold. Whether a "straight five cent fare" for all would be reasonable or unreasonable cannot safely and satisfactorily be determined on the ex parte affidavits but is a question properly to be decided only after plenary proofs have been adduced in the case. But *Lake Shore, etc., Railway Co. v. Smith* possibly does not establish the proposition that under no circumstances strip tickets, although involving a discrimination, can be used by a street railway company in connection with single fares. That case did not involve the consideration of fractions of a cent. But a street railway case may have to do with such fractions. It is conceivable that in a given case, and in the absence of any fixed charter rate, a uniform charge of six cents for each fare would be extortionate and unreasonable, while a uniform rate of five cents would be unreasonably low and not insure a legitimate return on the investment, and that the enforcement of it would be confiscatory of the property of the railway company; or a case may be supposed where a similar statement would be applicable as between a uniform rate of five cents and a uniform rate of four cents for each fare. If in the former case a uniform rate of five and two-fifths of a cent, and in the latter a uniform rate of four and three-fifths of a cent, would insure a fair return on the investment, and there were here a coin having the same value relatively to a cent that in France the centime has to a sou there would be no occasion, unless merely as a matter of convenience, for the use of strip tickets, as the five and two-fifths of a cent or the four and three-fifths of a cent could be exactly paid in cents and the lesser coin. In fact the currency of such lesser coin could always allow the payment without discrimination of a uniform fare, reasonable in amount, and exactly or approximately equal to what would insure a fair return on the investment. But in the absence of such lesser coin, and with cents to deal with, it may be the exception and not the rule that a given number of cents will either exactly or approximately represent a uniform fare, just at once to the railway company and to the public. At this point and in the absence of any charter provision fixing and measuring the price of a

fare, two questions may arise not proper to be determined now, namely, first, whether, where circumstances will not allow uniformity of fare with respect to all passengers without injustice to the public, on the one hand, or the railway company on the other, strip tickets in connection with single fares may be resorted to as a means of securing to the railway company a proper return, and at the same time protecting the public against, not inequality, but extortion; and, second, whether uniformity or approximate uniformity of rates, so far as the coinage system of the country will allow can be deemed unreasonable or unequal within the meaning of the fourteenth amendment.

Prentiss v. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, is of controlling importance on the question of the right to proceed in the circuit court of the United States without the taking by the traction company of an appeal to the superior court. In that case appeals had been taken from the circuit court of the United States for the eastern district of Virginia by the Virginia state corporation commission. The commission had made an order fixing passenger rates for the Atlantic Coast Line company and certain other railroad companies which were alleged to be confiscatory, and the railroad companies, without taking an appeal from the commission to the supreme court of appeals as provided for in the constitution of Virginia, obtained from the circuit court of the United States final decrees granting injunctive relief against the enforcement of the order. From these decrees appeals were taken to the Supreme Court of the United States. The confiscatory character of the rates was admitted by demurrer in the court below. By way of defense it was claimed that the proceedings before the commission were proceedings in a court of the state which the courts of the United States were forbidden by section 720, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 581), to enjoin; that section providing that

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The court through Mr. Justice Holmes said:

"The question principally argued, and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the courts of the United States are not at liberty to impugn. The State Corporation Commission is established and its powers are defined at length by the constitution of the state. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that for some purposes it is a court within the meaning of Rev. Stats. § 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the state to supervise, regulate and control public service corporations, and to that end, as is said by the Supreme Court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial and executive powers. * * * Before prescribing or fixing any rate or charge, etc., it is to give notice * * * of the substance of the contemplated action and of a time and place when the commission will hear objections and evidence against it. If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the Supreme Court of Appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that

court, if it reverses what has been done, is to substitute such order as in its opinion the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the state can review, reverse, correct or annul the action of the commission, and in collateral proceedings the validity of the rates established by it cannot be called in doubt. When a rate has been fixed, the commission has power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company the fines and penalties established by law. But a hearing is required, and the validity and reasonableness of the order may be attacked again in this proceeding, and all defenses seem to be open to the party charged with a breach. * * * We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned. * * * We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States. But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by section 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, therefore is an act legislative, not judicial in kind. * * * Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. § 720, no matter what may be the general or dominant character of the body in which they may take place. * * * The decision upon them cannot be res judicata when a suit is brought. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362 [14 Sup. Ct. 1047, 38 L. Ed. 1014]. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. * * * The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law res judicata, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the Supreme Court of Appeals itself. *Atlantic Coast Line Ry. Co. v. Commonwealth*, 102 Va. 599, 621 [46 S. E. 911]. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation in advance. * * * Litigation cannot arise until the moment of legislation is passed. * * *

It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants, would be proceedings in court and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent. 'A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' * * * Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists. We should hesitate to say, as a general rule, that a right to resort to the courts could be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed. It might be said that a citizen has a right to assume that the constitution will be respected, and that the very meaning of our system in giving the last word upon constitutional questions to the courts is that he may rest upon that assumption and is not bound to be continually on the alert against covert or open attacks upon his rights in bodies that cannot finally take them away. It is a novel ground for denying a man a resort to the courts that he has not used due diligence to prevent a law from being passed. * * * No rate is irrevocably fixed by the state until the matter has been laid before the body having the last word. * * * On the question of contract as on that of confiscation it is reasonable and proper that the evidence should be laid, in the first instance, before the body having the last legislative word."

Yet, while fully recognizing the jurisdictional power of the circuit court to entertain the bills, the Supreme Court for reasons having no application to the case in hand, directed that they be retained to await the result of appeals if the railroad companies saw fit to take them. The court said:

"It appears to us that the most plausible objection to these bills is not the one most dwelt upon in argument, but that they were brought too soon. * * * Our hesitation has been on the narrower question whether the railroads, before they resorted to the circuit court, should not have taken the appeal allowed to them by the Virginia constitution at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule. * * * The question that we are considering may be termed a question of equitable fitness or propriety, and must be answered on the particular facts. * * * The railroads went into evidence before the commission. They very well might have taken the matter before the Supreme Court of Appeals. No new evidence and no great additional expense would have been involved. The state of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think

their rights to be, before resorting to the courts of the United States. If the rates should be affirmed by the Supreme Court of Appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the circuit court, without fear of being met by a plea of *res judicata*. It will not be necessary to wait for a prosecution by the commission. We may add that when the rate is fixed a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state, and will be the proper form of remedy. * * * There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the constitution, requires, by section 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. 1 Pollard's Code of Virginia, c. 56a, 714. It may be that when an appeal is taken to the Supreme Court of Appeals this section will be held to apply and the appeal be declared too late. We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice a possibility. If the present bills should be dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again."

On "the particular facts" controlling the "question of equitable fitness or propriety" the court, while admitting the circuit court's "power to entertain the bills at the present stage," retained them to await the result of any appeals the railroad companies should see fit to take. But the particular facts there were wholly different from those here. First, whatever doubt there was in that case as to the application of the six months limitation of the right to appeal, there can be no doubt here that no appeal could be taken save "within thirty days from the date of service" of the order; for the act creating the utility board specifically provides this limitation. Thus the traction company could by no possibility secure relief by appeal. Second, on an appeal from the state corporation commission to the supreme court of appeals the latter tribunal was clothed with legislative functions. It had the powers of affirmation, reversal and substitution. It was "the body having the last legislative word." But here the utility board, and not the superior court, was the body having the last legislative word. Its order was "a legislative act by an instrumentality of the state exercising delegated authority." *Grand Trunk Ry. v. Indiana R. R. Comm.*, 221 U. S. 400, 31 Sup. Ct. 537, 55 L. Ed. 786, citing *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150. [9] Admittedly the superior court has no legislative function to perform on an appeal. Its duty is purely judicial. It is without authority to amend or correct the order of the utility board or substitute another order for it. Its duty is merely that of affirmation or reversal. It is "given jurisdiction to hear and determine such appeal on the merits of the matters forming the basis of the order." The proceeding on the appeal being purely judicial and in a state court could not

be enjoined by a court of the United States. Section 720, U. S. Rev. Stat. Third, in view of the foregoing considerations, had the traction company taken an appeal to the superior court it would have elected the state tribunal instead of the federal, been bound by such election, and deprived of the right thereafter to have its constitutional rights passed on by a circuit court of the United States. Fourth, in the Virginia case the railroad companies went into evidence before the state corporation commission and there is nothing to show that they were not afforded an adequate opportunity to present their defense or that it was denied fair and full consideration. The Supreme Court said, "They very well might have taken the matter before the Supreme Court of Appeals," and after paying high tribute to both the commission and the court of appeals said:

"It seems to us only a just recognition of the solicitude with which their [the railroad companies'] rights have been guarded, that they should make sure that the state in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States."

But here the proceedings before the utility board, far from being due process of law, were a travesty upon justice; and upon the board, and not the superior court, devolved "final legislative action." But beyond and in addition to the foregoing considerations the utility board practically prevented the traction company from taking an appeal to the superior court, and now cannot equitably found upon the absence of such an appeal any objection to the propriety of the maintenance of this suit. As before stated, the superior court is given jurisdiction to hear and determine the appeal "on the merits of the matters forming the basis of the order," and the court is authorized to prescribe by rule the procedure on the appeal. Pursuant to this authority and about three weeks after the order in question had been made by the utility board the court adopted the following rule:

"When an appeal is taken from an order made by the Board of Public Utility Commissioners for the City of Wilmington, the same shall be heard and determined by the Superior Court upon the record of the proceedings had before said Commissioners. Upon the filing of the notice of appeal in any case, the Prothonotary shall forthwith issue citation to the appellee returnable within ten days, and shall also forthwith issue notice to the said Board of Public Utility Commissioners to be served upon any member thereof, and to be returned within ten days, commanding them to send to said court, together with the notice, the record of their proceedings in the case, certified under the hand of the Secretary and seal of the Commissioners."

[10] As the superior court on appeal is confined to the record of the proceedings before the utility board as certified by its secretary, and the appeal must be heard and determined "on the merits of the matters forming the basis of the order," it is evident that the traction company, if not permitted by the utility board to present by way of defense to "a prima facie case" made against it matters of law or fact deemed by it essential as affecting the merits, as appears to have been the case here, it would naturally be deterred from taking an appeal, even were it necessary to take one under ordinary circumstances before proceeding in the circuit court of the United States to enjoin the order. Further, the character of the record of the proceedings

before the utility board was such as might also have some effect in deterring the traction company from taking an appeal. While under the act creating the utility board it is made the duty of its secretary to "record the proceedings" of the board it appears from the affidavit of Herman B. Bothum, the secretary, and from other affidavits, that the record of the proceedings of the board August 22, 1911, and September 1, 1911, were defective and incomplete. He states that he kept an accurate account of the "material things done and said at such meeting"; that with respect to the meeting August 22, 1911, he did not transcribe "all that was said in the discussion upon the subject before the board," but did "take down and make notes of all things of any importance"; and that the exhibit attached to his affidavit is a true and correct "report of the record" made by him at the hearings in question, "as the same appears upon the minute book kept by him of the meetings of said board." It does not appear that the affiant Bothum is a lawyer or possessed qualifications enabling him to determine what portions of the proceedings were "material" or "of any importance" and what portions not material or important. It was certainly his duty to make a faithful record setting forth in effect, if not literally, all matters of substance said or done in connection with the hearing of Monaghan's complaint. Yet precisely the features which deprive the proceedings of all semblance of due process of law were omitted by him from his report or record. Further, the affidavits show that even the recitals forming part of the order complained of are misleading and unfair. This case does not disclose any of the features which induced the court in *Prentis v. Atlantic Coast Line* as a matter of "equitable fitness or propriety" or of "the most proper and orderly course in cases of this sort when practicable," to retain the bills to await the result of appeals should the railroad companies see fit to take them. With respect to the point now under consideration this case falls directly within the general principle enunciated in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034. In the latter case it is important to observe that the action of the court in *Prentis v. Atlantic Coast Line* was explained on the ground that the complainants should have taken the appeal "while the rate of fare in litigation was still at the legislative stage." On this point *Atchison, T. & S. F. Ry. Co. v. Love* (C. C.) 174 Fed. 59, and *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 107 C. C. A. 403, being the same case on appeal, are instructive. Judge Hook in the court below, in reference to *Prentis v. Atlantic Coast Line*, said:

"On appeals to the Supreme Court of the United States it was held that the proceedings for fixing rates and charges whether in the commission or in the state court of appeals on appeal were legislative in character, although the principal aspect of those tribunals may be judicial; and it was said, in substance, but in carefully measured terms, that the legislative process fixing the rates complained of was not so complete as to give an absolute, unqualified right to resort to the courts, and that considerations of comity and equitable fitness or propriety would be best subserved by an appeal by the railroad companies from the legislative order of the commission to the state court of appeals. * * * The doctrine of the Virginia cases does not apply, because the prescription of the passenger rate had passed the legislative stage, and had become a completed rule of action."

In the same case on appeal Judge Sanborn, delivering the opinion of the circuit court of appeals for the eighth circuit, with respect to the Virginia case, said:

"The Supreme Court of the United States did not deny the jurisdiction of the United States circuit court, or its power to issue the injunctions, but held that the function of the supreme court of appeals of Virginia on the appeal from the order of the commission was legislative, and that, as the legislative process of fixing the rate was not complete until an appeal had been taken and had been determined, or until the time to take it had expired, the more courteous and orderly course of procedure would be for the companies to pursue their appeal to the supreme court of appeals of Virginia before they sought relief from the national court."

But here the making of the order complained of was the end and full completion of all legislative action, and the time limited by the act creating the utility board for taking an appeal had expired before the suit was brought.

On the question how far and on what grounds the courts may be justified in enforcing the furnishing of six five cent fares for twenty-five cents, the cases seem to be more or less variant. *Minneapolis v. Street Railway Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, was an appeal from a decree of the circuit court of the United States enjoining the city of Minneapolis from enforcing against the Minneapolis Street Railway Company an ordinance of that city requiring the sale of six tickets for twenty-five cents, in violation of a contract with the railway company growing out of a prior ordinance which was ratified by the legislature of Minnesota, giving the company a right to charge five cents for the transportation of each passenger. The court, in affirming the decree below enjoining the enforcement of the latter ordinance, through Mr. Justice Day said:

"We think that the requirement of the ordinance, that the company should operate its road by the sale of tickets six for a quarter, as required by the ordinance of February 9, 1907, was an enactment by legislative authority which impaired the obligation of the contract then held and owned by the complainant company."

Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, was the same in principle and similarly decided. But, as heretofore stated, it is unnecessary to consider the contract impairment clause of the constitution on the present application. In *City of Reading v. United Traction Co.*, 232 Pa. 303, 81 Atl. 304, a bill had been filed by the city against the United Traction Company, the Front & Fifth Street Railway Company and the Reading Transit Company; the United Traction Company having been the lessee of the various street railways in Reading including the Front & Fifth Street railway, and the Reading Transit Company having become the lessee of the United Traction Company. It appeared that Walter A. Rigg, son of the president of the United Traction Company, wrote a letter October 6, 1906, to the chairman of the railways committee of Reading, in which it was stated that if certain rights and privileges were granted with respect to the Front & Fifth Street line and the Schuylkill Avenue line "there would be no increase in fare." In consequence of this letter in connection with previous negotiations an ordinance

was passed December 8, 1906, granting the desired rights and privileges and providing that "the rate of fare shall not exceed five (5) cents for a single fare, or six tickets for twenty-five (25) cents." March 18, 1910, the United Traction Company discontinued the sale of strip tickets at the rate of six for twenty-five cents on all the leased lines, and on the above mentioned bill an injunction issued commanding the operating company to "restore and continue the practice as to the sale of tickets on its cars pursued prior to March 18, 1910"; and commanding it "to sell to passengers on the cars of the said United Traction Company in the city of Reading six tickets for twenty-five cents, each ticket constituting one fare." On appeal the supreme court of Pennsylvania reversed the decree below and dismissed the bill, the court through Mr. Justice Brown saying:

"The bill avers and the answer admits that for years prior to the date of the filing of the bill the rate of fare charged by the United Traction Company for a continuous passage, with transfers at various intersections of its railways, had been five cents, or, at the option and request of passengers, six tickets, each constituting one fare, were sold for twenty-five cents and each of said tickets was good for a ride upon any of the cars of the company at any time and was accepted in the same manner and to the same effect as if a cash fare of five cents had been paid. What the company did after the letter of October 6, 1906, from Walter A. Rigg, and the approval of the ordinance permitting the connection of the Front & Fifth Street Railway Company's track with the Schuylkill Avenue line, was merely a continuance of what it had done of its own motion for a long time prior thereto, and, not having been required by any law, ordinance, contract or agreement with the city to introduce a strip system, or to continue it, the company's right was to discontinue it at any time prior to the approval of the ordinance which in the opinion of the learned chancellor below, has imposed upon the company the duty of selling to all passengers on its cars in the city of Reading six tickets for twenty-five cents, each ticket constituting one fare and good on any of its lines. The question before us is not whether, under the ordinance, the United Traction Company ought to be compelled to sell six tickets for twenty-five cents, good over the Schuylkill Avenue or Front & Fifth Street railway line. The bill was not filed for the purpose of having that question determined. * * * Even assuming that Rigg was authorized to act for the United Traction Company, or, if not authorized to act for it, that it subsequently ratified what he did, what was done by him that committed the company to an agreement to continue for all time to sell six tickets for twenty-five cents, each good for a single fare over any one of the lines operated by it? His letter to the chairman of the railways committee of councils related solely to the proposed change in the operation of but two of the lines leased by the traction company. They were the Schuylkill Avenue and the Front & Fifth Street lines. * * * As there was nothing in Rigg's letter to indicate that when he wrote he had in his mind all of the lines operated by the traction company, so there is nothing in the ordinance to indicate that the sale of six tickets for twenty-five cents, good over all of its lines, was to be continued by the United Traction Company; and one of its valuable rights is not to be taken from it by any process of reasoning to show that, under the circumstances, it had impliedly agreed to surrender such right. * * * Nothing in the letter nor in the ordinance can be construed into an agreement by the United Traction Company to continue the general sale of strip tickets, and its right was, and the right of the Reading Transit Company, its successor, is, to charge a fare of five cents for every passenger riding on its lines, except as it may be committed by the ordinance of December 8, 1906, to continue to sell six tickets for twenty-five cents, good to or from points on the Schuylkill Avenue and Front & Fifth Street railway lines. That question, however, is not to be passed upon until it is properly raised."

The above case is a distinct authority to the effect that, except in so far as the United Traction Company may have been mediately or immediately bound by contract to sell six tickets for twenty-five cents, it could not be compelled to do so. The above case left two points open for future determination; first, whether the ordinance of December 8, 1906, in connection with Rigg's letter of October 6, 1906, constituted a binding contract for the sale of strip tickets, and if so, second, what railway lines were within the scope of that contract. On these two points the court of common pleas for Berks county passed in *Reading v. Transit Co.*, 4 Berks Co. L. J. 189, holding that there was a binding contract and that consequently the sale of strip tickets could be compelled thereunder. But the court expressly based its decision upon the ground of contract. It said:

"The Supreme Court in that case [*City of Reading v. United Traction Co.*] explicitly declined to pass upon the question (as one not raised in it) whether the Traction Co., and the Transit Co. as its successor, are committed to a continuation of the sale of 6 tickets for 25 cents 'good to or from points on the Schuylkill Avenue and Front & Fifth Street railway lines.' That question is therefore still open; and it is the question and the only question presented in this case. The city, indeed, does not in its bill claim that the defendant companies are bound to sell tickets on any other part of their railway system connecting, by continuous circuit or by transfer, with the lines mentioned, good from the point of sale to points upon the latter lines. * * * Here we have to do with an understanding expressly formulated in the Traction Co.'s proposition to the city, upon the footing and faith of which the franchise was indisputably granted, and relating to the operation of that very franchise as part of a single and physically unbroken circuit."

In *Sternberg v. State*, 36 Neb. 307, 54 N. W. 553, 19 L. R. A. 570, decided in 1893, it appeared that an ordinance of the city of Lincoln provided with respect to street railways that:

"No company shall charge or receive more than 5 cents fare for each passenger carried on any of said roads, nor more than 25 cents for each package of 6 tickets."

The municipal code of Lincoln provided that the railway company there dealt with "shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances." It was held that the ordinance was valid, upon the ground that:

"The general regulations and control of such railways are under the police powers of the city government, and the municipality may enact all reasonable rules for that purpose."

In the same year, also, *Detroit v. Ft. Wayne & B. I. R. Co.*, 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79, 35 Am. St. Rep. 580, was decided. It is similar in principle to and follows *Sternberg v. State*. The right of the city of Detroit by ordinance to compel the sale of eight tickets for twenty-five cents was upheld upon the ground of the police power of that city. If a necessary condition for the granting or operation of a street railway franchise be that the company shall issue strip tickets, and the company accepts the franchise, it, of course, becomes contractually bound to issue such tickets. But the police power of the state cannot be invoked at will to deprive a railway corporation of

its property by an arbitrary and unreasonable adjustment of rates. In order to justify a compulsory reduction in the fares to be collected by the traction company the facts as well as the law of the case should be fully developed and considered in plenary proceedings; for, while the traction company should not be permitted to exact unlawful and exorbitant fares from the public, it must be borne in mind that, in the language of the court in *Missouri Pacific Ry. v. Nebraska*, 217 U. S. 196, 206, 30 Sup. Ct. 461, 462, 54 L. Ed. 727, 18 Ann. Cas. 989:

"Railroads after all are property protected by the constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

[11] On the point of equitable in contradistinction to legal relief there can be no question. The complainants are not obliged to wait for an indefinite period in order to obtain defensive relief in actions which may be brought in the state court for the recovery of the penalty of one hundred dollars per day, even if they could successfully defend without first having had the order complained of declared invalid. They are entitled to the protection of this court against the enforcement of that order and their remedy is properly and, indeed, necessarily, in equity for injunctive relief. There is nothing for which the complainants could here maintain an action at law. It is not a question whether equity furnishes a more convenient remedy. It gives the only remedy, there being no legal remedy whatever in this court under the circumstances.

[12] On the question of the circumstances determinative of the propriety of granting or withholding preliminary injunctions there are certain well settled principles. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. [13] The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. [14] But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hard-

ship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to or widely vary in degree as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. [15] Where, however, the sole object for which an injunction is sought, is the protection of property or legitimate business, or the maintenance of the status quo, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, even though there be serious doubt of the ultimate success of the complainant. There is abundant authority in support of these views. *Russell v. Farley*, 105 U. S. 433, 438, 26 L. Ed. 1060; *City of Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161; *Glascott v. Lang*, 3 Myl. & C. 451, 455; *Hadden v. Dooley*, 74 Fed. 429, 431, 20 C. C. A. 494; *Great Western R. Co. v. Birmingham, etc., R. Co.*, 2 Phil. Ch. 597; *Shrewsbury & Chester R. Co. v. Shrewsbury R. Co.*, 1 Sim. N. S. *410, *426, *427, *432; *Denver & R. G. R. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579; *Buskirk v. King*, 72 Fed. 22, 18 C. C. A. 418; *Sanitary Reduction Works v. California Reduction Co. (C. C.)* 94 Fed. 693; *Southern Pac. Co. v. Earl*, 82 Fed. 690, 27 C. C. A. 185; *New Memphis Gas & Light Co. v. Memphis (C. C.)* 72 Fed. 952; *Indianapolis Gas Co. v. Indianapolis (C. C.)* 82 Fed. 245; *Georgia v. Brailsford*, 2 Dall. 402, 1 L. Ed. 433. The application of these principles to the case in hand not only justifies but requires the awarding of a preliminary injunction. The only evidence before the court, aside from the bill and its exhibits, consists of ex parte affidavits, which are inconclusive and to a certain extent conflicting on material points. The evidence, such as it is, preponderates on the side of the complainants. But the case is not ripe for final decision, and to render one now would be both premature and improper. A final decision should be reached only after a thorough, orderly and rigid investigation of the facts, in connection with the law, so conducted as to allow the application of the usual and most satisfactory test of truth, namely, the examination, cross examination and re-examination of witnesses, and also the production of books, papers and accounts. Further, the "balance of convenience or hardship" here operates in favor of the complainants. While the granting of a preliminary injunction will temporarily require those to pay "a straight five cent fare" who would prefer to save five-sixths of a cent on each fare by purchasing six tickets for twenty-five cents, the refusal of such injunction might seriously embarrass and possibly prove disastrous to the established business and property of the traction company. An interlocutory decree for a preliminary injunction may be prepared and submitted.

MUTUAL BENEFIT LIFE INS. CO. v. HEROLD.
Internal Revenue Collector.

(District Court, D. New Jersey. July 29, 1912.)

1. INTERNAL REVENUE (§ 4*)—EXCISE TAX—STATUTES—CONSTRUCTION.

Corporation Tax Act (Act Cong. Aug. 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]) § 38, imposing a special excise tax on corporations, is within the rule that a statute providing for the imposition of taxes shall be strictly construed, and that all reasonable doubts in respect thereto shall be resolved against the government and in favor of the citizen.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 4, 5; Dec. Dig. § 4.*]

2. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—MUTUAL INSURANCE COMPANY—PREMIUM “DIVIDEND.”

Corporation Tax Act (Act Cong. Aug. 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]) § 38, imposes an excise tax on insurance companies equivalent to 1 per cent. on the entire net income above \$5,000 received by it from all sources during the year, exclusive of amounts received by it as dividends on stock of other corporations, etc., subject to the tax, such income to be ascertained by deducting all losses sustained and not compensated by insurance or otherwise, including a reasonable allowance for depreciation and sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds. *Held*, that the word “dividends” was used in such act in its popular sense as representing profits, and that so-called dividends of a mutual company doing business on the level premium plan, consisting merely of the portion of the loading of the premium charged in excess of the cost of insurance and returned annually to the policy holders after the first year, so far as the same were used to reduce subsequent premiums, were not “income * * * received,” and were, therefore, not subject to taxation. Such rule, however, does not apply to a “dividend” declared in the case of a full-paid participating policy, wherein the policy holder has no further premium payments to make, which dividend constitutes a participation in the profits and income of the invested funds of the company.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2143-2147.]

3. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—INSURANCE COMPANIES—INCOME RECEIVED—RESERVE—SUPPLEMENTARY POLICY CONTRACTS.

Where a mutual insurance company issued supplementary policy contracts, by which the amount due on policies that had matured was paid in annual installments for a given term of years, or during the lifetime of the beneficiary, instead of in one sum, and, to secure such payments, was required by state law to maintain a reserve, it was entitled to deduct such reserve from its income received in determining the amount on which it was liable for excise taxation under Corporation Tax Act (Act Cong. Aug. 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]) § 38, providing for deduction of the net addition, if any, required by law to be made within the year to reserve funds.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

4. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—INSURANCE COMPANIES—“INCOME”—CASH OR REVENUE BASIS.

Corporation Tax Act (Act Cong. Aug. 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]) § 38, imposes an excise tax on the net in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

come received during the year by insurance companies, to be ascertained by deducting from the gross income all ordinary and necessary expenses actually paid within the year in the maintenance and operation of the business, all losses actually sustained within the year and also all sums other than dividends paid within the year on policy and annuity contracts, interest actually paid within the year on bonded indebtedness, all sums paid by it within the year for taxes, and all sums received by it within the year as dividends on stock of other corporations, etc. *Held*, that the word "income," as used in such act, meant that which had "come in" or had been already received, and that the net income so taxable should be determined on a cash, as distinguished from a revenue, basis, and did not include uncollected and deferred premiums and interests, accrued and due, but not actually received.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3501-3507; vol. 8, p. 7685.]

5. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—OFFICE FURNITURE AND EQUIPMENT—RENEWAL—DEDUCTION.

An ordinary expenditure by a mutual life insurance company for renewal of office furniture and equipment did not constitute assets, but was rather an expense of maintenance and operation, which it was entitled to deduct in determining the net income on which it was taxable, under Corporation Tax Act (Act Cong. Aug. 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. 1911, p. 946]) § 38, authorizing the deduction of a reasonable allowance for depreciation of property, if any.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

At Law. Action by the Mutual Benefit Life Insurance Company against Herman C. H. Herold, Collector of Internal Revenue, to recover certain alleged internal revenue corporation taxes imposed on plaintiff and paid under duress. Judgment for plaintiff.

John O. H. Pitney, John R. Hardin, and David Kay, Jr., for plaintiff.

John B. Vreeland, U. S. Dist. Atty., and H. P. Lindabury, Asst. U. S. Dist. Atty., for defendant.

CROSS, District Judge. This action was instituted in the Supreme Court of this state, and removed by certiorari to this court, where the same was tried without the intervention of a jury, which was waived pursuant to the statute. Testimony in the case having been taken, counsel for the respective parties agreed upon a statement of facts, which they requested the court to find in the nature of a special verdict, and direct the same to be entered of record as such, with which request the court has complied.

The plaintiff seeks to recover from the defendant certain taxes which it alleges were illegally assessed against it, under and by virtue of the provision of the act of Congress entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909 (36 Stat. 112, c. 6, § 38 [U. S. Comp. St. Supp. 1911, p. 946]), which taxes so assessed amount to \$61,853.98. The statement of facts admits that the taxes were paid under protest and duress, and that the plaintiff

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has complied with all of the prerequisites necessary to entitle it to recover so much of said taxes as it may be adjudged herein were erroneously or wrongfully assessed and collected. The plaintiff was incorporated by a charter granted by the state of New Jersey in 1845 (P. L. 1845, p. 25) for the insurance of life risks. It is a mutual company, without capital stock or stockholders. Its policy holders are its only members, and they select its directors from their own number. Its business is conducted on the mutual level premium plan.

Pursuant to section 38 of the act of Congress above referred to, the plaintiff duly filed the return thereby required for the years 1909 and 1910, showing the gross income received by it during those years, respectively, and other matters required by that act, and the excise tax assessed thereon against the plaintiff for those years was duly paid. Subsequently, and in the year 1911, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, amended the return for the years above mentioned, and levied an additional assessment against the plaintiff for the year 1909 of \$26,789.83, and for the year 1910 an additional assessment of \$35,064.15, which sums the plaintiff alleges were illegally assessed and seeks to recover by this action.

The portions of section 38 of the act above referred to especially applicable to this case may be found in paragraphs 1 and 2. Paragraph 1 provides that:

"* * * Every insurance company now or hereafter organized under the laws of the United States, or of any state or territory of the United States, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such * * * insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed. * * *"

And paragraph 2 provides that:

"Such net income shall be ascertained by deducting from the gross amount of the income of such * * * insurance company received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; * * * (third) interest actually paid within the year on its bonded or other indebtedness, etc.; * * * (fourth) all sums paid by it within the year for taxes, etc.; * * * (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies, or associations, or insurance companies, subject to the tax hereby imposed. * * *"

[1] At the outset it may be remarked that a statute providing for the imposition of taxes is to be strictly construed, and all reasonable doubts in respect thereto resolved against the government and in

favor of the citizen. This principle is so well established that the citation of any considerable number of authorities in its support is unnecessary. In *Spreckels Sugar Co. v. McClain, Collector, etc.*, 192 U. S. 397, 416, 24 Sup. Ct. 376, 382 (48 L. Ed. 496), Mr. Justice Harlan quoted with approval the following language of Judge Gray:

"Keeping in mind the well-settled rule that the citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and that, where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid."

In *Benziger v. United States*, 192 U. S. 38, 24 Sup. Ct. 189, 48 L. Ed. 331, it was held, with reference to a classification under the tariff act, that the provision of the statute—

"should be liberally construed in favor of the importer, and, if there were any fair doubt as to the true construction of the provision in question, the court should resolve the doubt in his favor."

That case cited with approval *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821, and *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690, in which latter case it was held that:

"It is * * * a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import."

Four points have been raised and argued by counsel: First, whether certain so-called dividends are or are not "income * * * received" within the meaning of the statute; second, whether certain so-called "supplementary policy contracts" should be represented in the reserve funds; third, whether for the purpose of taxation the corporation's statement should be made on a "cash" or on a "revenue" basis; and lastly, whether expenditures for replacing furniture, etc., should be considered as an investment or an expense.

[2] These questions, of which the first is the most important, will be considered in the order named. Before proceeding, however, to determine whether "income * * * received" includes, not only cash receipts, but also deductions from renewal premiums allowed on account of overpayments of previous years, it seems both advisable and necessary to quote at some length from the statement of facts:

Paragraph 4 thereof, after describing the three methods employed in mutual life insurance of securing from members, contributions to meet losses, proceeds as follows:

"The level premium plan is the one in general use by all insurance companies, including plaintiff. Under this plan the maximum annual contribution which any member can be called upon to pay is uniform throughout the life of the policy. The member pays during his early years a sum in excess of the current cost of his insurance. This excess is applied to the creation of a reserve or self-insurance fund, which serves to maintain the insurance

in the later years, when the stipulated level premium would be insufficient to meet the current cost of insurance on the mutual premium plan.

"Whether a mutual company be conducted on the assessment plan, the natural premium plan, or the level premium plan, the member receives his insurance at cost. The assessment company collects its premiums after the death has actually occurred and the cost is thereby ascertained. The mutual level premium company collects its estimated premiums in advance and adjusts the actual cost afterwards.

"The calculation of premium rates for life insurance involves, first, the adoption of a table of mortality, showing the probable death rate for each age of life; second, the adoption of an assumed rate of interest such as the company may safely expect to realize upon its invested assets during the lifetime of the policy. These two factors determine what is technically known as the net or mathematical premiums, which are the sums sufficient and necessary to pay all outstanding policies as they become claims, provided deaths occur exactly in accordance with the table of mortality and the rate of interest earned on the investment of such premiums is exactly equal to the rate assumed. To the net or mathematical premiums there is added a sum, technically known as 'loading,' for the purpose of meeting the expense of conducting the business, as well as any unforeseen contingencies, such as an abnormal death rate due to war or pestilence. The net or mathematical premium, increased by the 'loading,' constitutes the premium rates stipulated in the policies of insurance.

"Premium rates so computed are, in the experience of life insurance companies, generally found to be in excess of their requirements. In a mutual company such excess constitutes its margin of safety and must be liberal. Such a company has no capital stock and must rely entirely upon its premiums to meet unusual contingencies. They must be sufficiently large to assure the company's ability to pay its claims as they accrue beyond peradventure. Their policies may run for a period of 50 or even 75 years, and the stipulated premium cannot be increased after the policy is issued. In computing their rates the companies use, therefore, a table of mortality showing an admittedly higher death rate than that which will probably be realized. The assumed rate of interest on investments is also lower than that which the company expects to realize. The provision for expenses and contingencies is greater than would ordinarily be required. Mutual companies have these three margins of safety, and, normally, each assumption is in excess of what is actually required. They result in excess or redundant premiums.

"According to the practice of the plaintiff, at the end of each year the excess of income over disbursements is ascertained, and, after setting aside so much of said excess as is required for the increase in policy reserves and other liabilities, the balance is added to the dividend fund. Each policy holder's share in this fund is then ascertained, and before his next premium falls due he is advised of the amount thereof and that the company will accept in full settlement of such premium the difference between the premium written in his policy and the amount standing to his credit in the dividend fund, which has arisen out of previous premium payments. The policy holder may, if he desires, withdraw his share of the dividend fund in cash; or this share is paid to him if he discontinues his policy, or is paid in addition to the amount insured if the policy becomes a death claim. The fund is available for emergencies; but unless so used by the company it is not depleted from year to year, except by such actual cash payments as are made from it as above mentioned.

"The method of calculating premiums and ascertaining and disposing of the excess described in this and the two preceding paragraphs is practiced, not only by the plaintiff, but by other mutual life insurance companies generally.

"Plaintiff permits the policy holder to pay the full stipulated premium, instead of the difference between the stipulated premium and the amount standing to his credit in the dividend fund. In such cases the difference between the amount so paid and the sum required to continue the policy in force is used by the plaintiff, either in the purchase of additional insurance

or to shorten the endowment or premium-paying period, as the insured elects. * * *

From the foregoing it appears that where, as in a mutual company, insurance is effected at cost, it is essential, in order to constitute a margin of safety, that its premium rates should be larger than it might, reasonably be expected would be required to carry the insurance. To effect this purpose a table of mortality is used which shows an admittedly higher death rate than that which will probably prevail, while the assumed rate of interest on its investments is made lower than it is expected will be realized, and the provision for contingencies and expenses is made greater than would ordinarily be necessary. This course is adopted for the reason that a mutual company, having no capital stock, is compelled to rely upon its premiums to meet unexpected losses and contingencies. Paragraph 7 of the statement of facts shows clearly how the dividend fund is created. Each policy holder may, at his option, withdraw his dividend—that is, his share of such fund—in cash, or have it applied in reduction of the subsequent year's premium, or to purchase additional insurance, or to accelerate the payment period. Such option is conferred by the following or a similar clause which appears in all of the outstanding policies of the company:

"After this policy shall have been in force one year, each year's premium subsequently paid shall be subject to reduction by such dividend as may be apportioned by the directors. Dividends thus created will be applied either in reduction of premium or upon the addition or accelerative endowment plan, or paid in cash at the option of the insured."

The policy holder, therefore, although he has paid more at the beginning of the year than was necessary to provide for the cost of carrying his insurance, will nevertheless, at the end of the year, when such cost has been actually ascertained, receive the benefit of the overcharge by way of a so-called dividend. Thus the policy holder receives his insurance at cost, while at the same time the stability and solvency of the company have been reasonably and properly guarded and maintained. In all cases where the policy holders, in the exercise of their options during the years 1909 and 1910, in question, withdrew their dividends in cash, the amount thereof was included in the plaintiff's statement, and the tax thereon imposed by the government was paid. The government claims, however, that where the dividends to the policy holders are not withdrawn in cash, but, pursuant to the option allowed them, have been applied in one or other of the ways above mentioned, they are to be regarded as cash dividends paid by the company upon which the government is entitled to impose, as it did impose, the tax in question.

The true situation, however, is this: The policy is issued at a fixed premium, as determined by the company's table of rates. That stipulated premium cannot be increased, but may be lessened annually by so much as the experience of the preceding year has determined it to have been greater than the cost of carrying the insurance, and the difference between the amount of the stipulated premium and the cost of carrying the risk constitutes the so-called dividend. This dif-

ference, however, is not in any real sense a dividend. The term as used is technical and well understood in insurance circles, and as so understood has a widely different signification from that ordinarily attached to the word "dividend." It operates, as already stated, merely to abate or reduce the stipulated premium called for by the contract of insurance, to the extent and for the reason that it has been determined by experience that the policy holder paid for his insurance during the preceding year more than it actually cost the company to carry the risk. This excess payment represents, not profits or receipts, but an overpayment—an overpayment because, being entitled to his insurance at cost and having paid more than it cost, he is equitably entitled to have such excess applied for his benefit. It makes no difference what this excess is called. The question is, What does it represent? Does it in any wise or to any extent represent earnings or profits received by the company, so as to constitute it a part of its income; or does it merely represent an overpayment?

Under the terms of his policy, the policy holder may at his option withdraw such excess in cash, and thereby impart to it a quasi appearance of profits; but its character is not thereby changed. In that case, however, he would, if he desired to continue his policy, be required to pay the full premium as therein stipulated; whereas, if he desired such premium reduced to what experience had shown was the actual cost of his insurance, he could have the excess over such cost applied in reduction of the stipulated premium and pay only the cost price for the ensuing year; and, assuming that the cost price as determined by the experience of the first year remained the same for 5, 10, 15, or other number of years, that original excess payment would serve to carry his insurance at cost during all of the succeeding years. The following extract from the brief of counsel for the complainant fully and clearly illustrates the point:

"It appears that if the company issues a policy with a premium of say \$100, and it is found at the end of the year that the payment of that sum at the beginning of the year was \$10 in excess of the actual cost of the insurance, the company holds this amount in a 'dividend' fund, and collects from the policy holder, in full settlement of the second year's premium, \$90. At the end of the second year it might be found that this payment of \$90 was \$2 in excess of the cost of the insurance during the second year, so that the company would hold \$12 which had been paid in excess of the cost of the first and second years' insurance. The insured would then pay \$88 as a premium for the third year. If during the third year the death rate among the company's members should increase abnormally, so that the company would be required to use \$4 of the \$12 standing to the policy holder's credit in the dividend fund, leaving \$8 therein, it would be necessary for the insured to pay \$92 in settlement of the premium for the fourth year's insurance. The amounts returned for taxation would be \$100 the first year, \$90 the second year, \$88 the third year, and \$92 the fourth year. Instead of paying \$92 the fourth year, the policy holder might pay \$100, and in this case \$92 would be applied to continue the original policy in force and \$8 would be used to buy additional insurance, or to shorten the premium-paying term, in which case \$100 would be returned for taxation. The several amounts of \$10, \$12 and \$8 represent the so-called dividends or amounts standing to the credit of the policy holder in the dividend fund, which, unless withdrawn in cash by the policy holder, are paid by the company, in addition to the amount insured, when the policy becomes payable as a claim."

From the foregoing it appears that what the company receives in cash, and all that it so receives where the dividend is applied in abatement of renewal premiums, is the difference between the stipulated premium and the so-called dividend. In such cases the dividends are not sums paid to the policy holder and by him returned in cash. They are not "income * * * received." The policy holder has not paid the premium stipulated in his policy, but a premium reduced by his share of a fund, as ascertained by the directors, composed of excess premiums. This seems to be the view which has been uniformly taken by the courts, in so far as their decisions have been brought to my attention. In *Mutual Benefit Life Insurance Co. v. Commonwealth*, 128 Ky. 374, 107 S. W. 802, the Supreme Court of that state so held, as will appear from the following extract taken from a somewhat lengthy opinion:

"It is clearly shown by the evidence, and conceded by counsel for the state, that the reports as made by the appellant company embrace all first, or original, premiums, the premiums receipted for on the face of the policies, and also the subsequent, or renewal, premiums, except to the extent that such renewal premiums were reduced by what is termed 'dividends.' It is the contention of the appellee that such renewal premiums should have been reported, without such reduction or abatement, as having been received by the company 'in cash or otherwise'; while the appellant company contends that the reduction from the nominal, or stated, premium as made was a contract right of the policy holder, and constituted no premium or part of the premium received by the company 'in cash or otherwise.' And these opposing contentions present the question in this case. * * *

"The present statute reads: ' * * * All premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this state or out of this state on business done in this state during the year ending the 30th day of June last preceding. * * * ' The appellant, every year before a premium falls due, determines how much of the stipulated premium it will exact from the insured. The diminution, whether it be called a 'dividend' or 'surplus,' goes in the abatement of the renewal premium, and the insured pays only the difference. The insurance company, therefore, received, not the full renewal premium, but the difference between the stipulated premium and this dividend or portion of surplus. All that the insurance company receives in cash or otherwise is this difference. * * *

"The commonwealth is claiming to tax the appellant upon money which it never received at all. The appellant says that it is only required to pay upon money which it receives in cash or otherwise, except that it admits that it is bound to pay the full tax on the original premium receipted for on the face of the policy, without regard to whether it in fact received such premium or not. The answer sets out the course of business of the appellant, and shows what money it has received and what money it has not received, and shows that the difference between it and the commonwealth is that the commonwealth is attempting to charge it for the full amount of premiums stipulated for in the face of the policy, although it does not exact, and has not the right to exact, such full amount, being required to give to the policy holder the advantage of the dividend or surplus, or whatever it may be called, in the diminution of the nominal premium. * * *

"Now, the truth is that this overpayment (called 'dividend') is not a dividend in any sense of the term; nor is the failure of the company to collect the full amount of the premium in after years a credit in any sense of the term. A sum of money applied as a credit can never be used for the same purpose again. If I owe A. \$50, and he owes me five notes of \$150 each, when I credit him on the first note with the \$50 I owe him, he cannot require me to credit the same sum on the remaining four notes as they fall due. But that is just what the state is insisting on being done in this case. The

policy holder makes the overpayment of premium technically called 'loading,' and the company holds this sum and calls it a 'dividend,' and the state says that this is a crediting of the same sum on each of the after-accruing premiums, and should be considered as so much collected each year by the company, and as having been paid 'otherwise' than as cash.

"In order to bring the matter before our minds distinctly, let us assume that in 1900 A. takes out a policy in the appellant company in which the stipulated premium is \$150 per annum, that of this sum \$100 would be sufficient to carry the risk in ordinary times, and that \$50 is what is called 'loading,' collected in order to meet the contingencies of the future. Now, in 1900 the policy holder pays the full amount of the premium, \$150. After that the company says to him, 'You need only pay \$100 per annum; and, as long as the \$50 of overpayment you made in 1900 remains unexhausted, your annual premiums will be really \$100, instead of \$150, as stated in the policy.' The account in five years would be stated as follows:

| | |
|--|----------|
| 1900, beginning of the insurance period, premium paid..... | \$150 00 |
| 1901, premium paid..... | 100 00 |
| 1902, premium paid..... | 100 00 |
| 1903, premium paid..... | 100 00 |
| 1904, premium paid..... | 100 00 |
| 1905, premium paid..... | 100 00 |
| Total | \$650 00 |

"Obviously the total amount of money paid by the policy holder and received by the insurance company is \$650, and it has received no more, either in cash or otherwise; and on the sum so received it is conceded that appellant has paid the tax due. If we look only at the method of bookkeeping of the appellant and have regard only to the terms it uses, there is much in the appearance of the case thus presented to warrant the position of the commonwealth as to its right to tax the so-called 'dividends' said to be annually credited on the premiums due from policy holders; but the law looks below the mere appearance of things, and has regard to the reality, and, thus looking, it sees that the appellant misuses the terms 'dividend' and 'credit,' and, as shown above, pays no dividend and allows no credit, but that, in reality, all that it does is to collect on the first premium a sum sufficient to meet the contingencies of any given year of the future, and then abstains from collecting any further overpayment while the first remains on hand."

The opinion in the foregoing case has incorporated in it, somewhat at length, an opinion by the Appellate Branch of the Court of Common Pleas of Pennsylvania, in *Commonwealth v. Penn Mutual Life Insurance Co.*, 1 Dauph. Co. Rep. 233, from which the following extracts have been taken:

"But we think the so-called 'dividends to policy holders' are not 'net earnings or income,' and do not represent such earnings, and that defendant is not liable to tax in respect to them. Notwithstanding the mass of testimony and exhibits on this point, including the ingenious questions of the able counsel on either side, followed by answers from the officers of the company, called as witnesses, not always as clear or intelligent as might have been expected, the facts are few and simple, as we have found them above. It is strenuously contended by the able special counsel for the commonwealth that, because these abatements are entered on the books of the company as 'dividends to policy holders' or 'surplus to policy holders,' they therefore represent net earnings or income, and furnish a measure of the liability of the company to taxation. Whatever these statements may be called, they are in reality what we have stated in the finding of facts. The amounts they represent are mere negative quantities, abstract statements, not of what is, or is to be, received or to 'come in,' but what is not to be received. The calculations are made for the express purpose of determining how much of the

amount which the company might receive shall not be received, and one of the items which make up the apparent amount upon the basis of which this calculation is made is the sum which was abated and not received during the preceding year. In short, the whole proceeding is merely a method by which the books of the company are made to show what would be the actual gross debtor and creditor accounts of the company, if the whole amount of the premiums was collected and a part was afterwards returned to the policy holders, while in fact it is neither collected nor returned. * * * It is a fallacy to suppose that the real nature of the transaction is that the policy holder pays his whole stipulated premium and receives his share of the dividend or distribution of surplus."

In *State of Minnesota v. Mutual Benefit Life Insurance Co.*, decided December 15, 1909, in the district court of the Second judicial district of that state (opinion not reported), it appears that a state statute required insurance companies to pay annually a tax equal to 2 per cent. of all premiums received by them or their agents in that state, in cash or otherwise, during the preceding calendar year. The claim was there made by the state that the defendant company should pay—

"the tax on an amount represented by the maximum premiums called for in the policy, covering not only the amount the policy holder pays each year in cash, but also including any amount the policy holder receives credit for on such premium in the form of a dividend. In short, the state claims the insurance company in effect receives the maximum premium in cash in this state in such year, although but part is paid by the insured in cash and the balance is in the form of a credit given by the company on account of a dividend allowed."

In disallowing the state's claim, the court in its opinion says:

"The dividend declared in any year is applied in reduction of the next maturing premium on the policy of the insured. It follows that, where a dividend has been apportioned and applied to the reduction of the premium named in the contract, the policy holder pays to the company and the latter receives in cash only the difference between the maximum premium and the amount of the dividend, and these dividends, as the facts disclose, represent a surplus arising out of premiums previously paid, upon which the defendant company has already paid the state its two per cent. tax. The word 'premium,' as used in this statute, is subject to the limitations expressed in the words which follow and in a measure control its use, to wit: 'Received in this state in cash or other obligations.'

"The statute apparently does not require the company to pay the 2 per cent. tax on the full amount of premium named in its policies in this state. If so, the law would have so stated. On the contrary, the language is 'two per cent. on all premiums received in cash and other obligations in this state.'"

In *Fuller v. Metropolitan Life Ins. Co. of New York*, 70 Conn. 647, 41 Atl. 4, the court said:

"[It [net premium] is the sum paid yearly by each to furnish the stipulated protection for all. But the policy holders must pay, not only for the cost of insurance, but also for the expense of management; so to the net premium is added a sum deemed sufficient to pay expenses and provide for contingencies, which is called the 'loading.' In this way the policy holders pay the sum necessary for the cost of insurance and expense of management. The amount of the net premium is calculated upon the basis of certain tables of mortality, and upon the assumption that the company will receive a certain rate of interest upon all its assets, and the amount of the loading is calculated upon a certain assumed rate of expense. Now, it may happen

that the rate of mortality experienced by the company is less, and the rate of interest actually received is greater, than that assumed, and that the ratio of actual expense is less. In such case the company has in reserve more than enough, with the anticipated annual premiums, to provide for future cost of insurance and management. It has a sum which is not needed for the purpose for which it was paid. This sum is called 'profits.' It is in fact a surplus resulting from overpayments by policy holders. This surplus is derived from money paid by the insured and received by the company for a particular purpose; i. e., providing for cost of insurance, expense of management. If not needed for that purpose, it should, in equity, be returned to the policy holders. They do not, however, own it, or have any legal control over its distribution. Part of it, indeed, is derived from contributions of policy holders who are dead; but the equity is recognized, and it is the duty of the company, when a surplus is ascertained, to return such portion as it does not deem proper to keep as a guaranty fund to the existing policy holders in equitable (i. e., as nearly as practicable) proportion to their overpayments or contributions. Such return of overpayments, whether in cash or by application on future premiums, or by increase of the amount insured, is a dividend. This is the meaning of 'dividend,' and the only meaning it has or can have in connection with mutual insurance."

In *New York Life Insurance Co. v. Styles*, 59 L. J. Q. B. 291, L. R. 14 App. Cas. 381 (1889), it was held as follows:

"That the surplus premium income of a mutual insurance company, derived from and annually returned to participating policy holders, is not assessable to income tax as profits or gains arising from any profession, trade, or vocation exercised in the United Kingdom."

In the opinions of Lords Herschel and MacNaghten, the following passages appear:

Lord Herschel:

"In the case before us certain persons have associated themselves together for the purpose of mutual assurance; that is to say, they contribute annually to a common fund, out of which payments are to be made in the event of death to the representatives of the persons thus associated together. Those persons are alone the owners of the common fund, and they, and they alone, are entitled to the management of it. It is only in respect of his membership that any person is entitled to be assured a payment upon death. * * * Can it be said that the persons who are thus associated together for the purpose of mutual insurance carry on a trade or vocation from which profits or gains accrue to them? I cannot think so. I am aware that the surplus income with which we are concerned is called 'profits' in the documents of the appellants. But both the learned Lords who formed the majority in *Last's Case* repudiated the idea that because moneys, which were not in fact profits, are erroneously so called, this would make them 'profits' within the meaning of the Income Tax Acts. I entirely concur. We must look to see whether they are really so or not. Persons who agree to contribute to a common fund for mutual insurance certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. This may result either from the contributions having, owing to an erroneous estimate or overcaution, been originally fixed at a higher rate than was necessary, or from the death rate being lower than was anticipated. Can it be properly said that, under these circumstances, the association of mutual insurers has earned a profit? The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore

more than ought to have been contributed by them, for this object; and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a 'profit' arising or accruing to them from a trade or vocation which they carry on. It is true the alternative is allowed them of leaving the excess in the common fund, and so increasing their representatives' claim upon it in case of death; but I cannot think that this makes any difference. Mr. Bremner truly pointed out that, if these so-called bonuses were to be regarded as representing profits, it followed that, if the premiums were trebled, the profits would be increased in proportion."

Lord MacNaghten:

"Certain persons agree to insure their lives among themselves on the principle of mutual insurance. They take care to admit none but healthy lives. They contribute according to rates fixed by approved tables, and they invite other persons to come in and join them by insuring their lives on similar terms. The rates fixed by the tables are taken as being sufficient to provide for expenses, to meet liabilities, and to leave a margin for contingencies. What is to become of the surplus, if everything goes right? The practice is to take an account every year of assets and liabilities, and to give the insured the benefit of the surplus, either by way of reduction of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied, or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view, or for any purpose, as gain or profit earned by the contributors. I do not understand how persons contributing to a common fund in pursuance of a scheme for their mutual benefit, having no dealings or relations with any outside body, can be said to have made a profit when they find that they have overcharged themselves, and that some portion of their contributions may be safely refunded. If a profit can be made in that way, there is a field for profitable enterprise, capable, I suppose, of indefinite expansion."

In *Tenant v. Smith*, 61 L. J. P. C. 11 [1892] A. C. 150, a case which arose under the English Income Tax Act, Lord MacNaghten said:

"It is a tax on income in the proper sense of the word. It is a tax on what comes in, on actual receipts, * * * not on what saves his pocket, but on what goes into his pocket."

Gresham Life Assurance Society v. Bishop, 71 L. J. K. B. 618, A. C. 287, was also a case growing out of a provision of the English Income Tax Act, to the effect that "the duty to be charged in respect" of interest arising from foreign securities "shall be computed on a sum not less than the full amount of the sums which have been or will be received in Great Britain, in the current year, without any deduction or abatement." It was held that the tax was to be assessed on the amount of such interest as was actually received in that country during the year, and not on the amount constructively received in yearly accounts of profit and loss.

The above cases furnish a clear exposition of the nature and character of the dividends considered in this case. Not only is their reasoning inherently persuasive, but their authority is enhanced by the fact that there are no conflicting decisions, or at least none have been brought to the court's attention. Counsel for the government denies not so much their intrinsic weight as their relevancy, claiming that the

act under consideration has abrogated or nullified them. In other words, it is contended that by the express language of the act no dividends declared by life insurance companies can, in the ascertainment of their net income, be deducted from their gross income. No distinction between dividends is admitted, no matter how, for what purpose, or from what fund declared, or whether paid or unpaid. All are alike, and all must be taxed, because they represent income "received." If, however, as contended, Congress had in mind the cases above cited, and intended by the clause of the act in question to overrule them, it can hardly be urged that it used very clear or apt language to express its intention. On the contrary, it would appear from its language that it intended to give those cases its approval, and adopt and continue the distinction thereby created.

In seeking to ascertain the intention of Congress, it seems but reasonable to assume, in the absence of anything to the contrary, that it used the word "dividends," as applied to insurance companies, in the sense it had long and generally borne in insurance matters, which sense had, moreover, been confirmed by repeated judicial decisions. The term should, in other words, be given what might not inappropriately be called its trade signification. *Hedden v. Richard*, 149 U. S. 346, 13 Sup. Ct. 891, 37 L. Ed. 763. Hence, when it refers to dividends "paid," it means dividends paid, and not an application of excess premium payments in abatement or reduction of subsequent premiums. The word "paid," as used by Congress, is highly significant. It clearly shows that it had cash payments in mind. Not only does this appear from its inherent meaning, but by its use in other clauses of the section providing for deductions from gross income. The expression "gross income," as used in the act, means gross cash receipts, and the deductions which were directed to be made therefrom, in order to ascertain net "income * * * received," were deductions of cash expenditures. The principle of cash receipts and cash expenditures underlies the structure of the entire section. To hold that "paid" has a different meaning when applied to dividends from that given it in several clauses of the immediate context would be unwarranted. It should be held to mean dividends which have been paid in cash during the year, and repaid to the company as premiums. Counsel for the complainant, speaking of such dividends, well say:

"Unless so received and paid back to the company, they do not constitute 'income * * * received.' The question of income is to be determined, not by what the parties might do, but by what they do do."

If, therefore, a policy holder by the express provision of his policy elects to have a previous overpayment of premium applied in reduction of a succeeding stipulated premium, what he pays, and all that he pays, or can be required to pay, is the reduced premium, and that is all that the company receives by way of income, and all that it is liable to be taxed for. Such a construction of the act in no wise contravenes its purpose, which was to subject to taxation cash dividends, which, as statistics show, form a very large item in insurance business. Since, then, there is subject-matter which the clause of the act plainly embraces, there is neither reason nor propriety in broaden-

ing its scope of construction, so as to make it include that which, by strong implication, at least, it excludes. To do so would be violative of one of the chief rules of construction applicable to acts concerning taxation.

Before leaving this branch of the case, it seems proper to say that dividends of the kind under consideration should not be confused with dividends declared in the case of a full-paid participating policy, wherein the policy holder has no further premium payments to make. Such payments having been duly met, the policy has become at once a contract of insurance and of investment. The holder participates in the profits and income of the invested funds of the company. His case is, therefore, radically different from that of a policy holder whose dividend represents merely the excess cost of his insurance, which excess at his request, and pursuant to the terms of his policy, has been applied in abatement or reduction of a future premium. But it may be urged that the fund for which the so-called dividends are declared on mutual policies is likewise largely derived from interest on the company's investments, and that this shows that in a real sense such dividends are, after all, declared from the earnings, profits, or income of the company. This proposition might be entitled to weight, were it not for the fact that, in so far as the fund from which such dividends are declared is produced from interest on the company's invested funds, it has already been subjected to, and has paid, taxes under the act in question.

Furthermore, while perhaps not illegal, it is in a sense unfair, and therefore presumably contrary to the intention of Congress, as between a mutual company and a stock company, to tax the dividends in question as income received. The policy holder in a stock company pays a uniform and fixed premium each year. The premium in his case is not 'loaded,' but is presumed to represent cost as nearly as may be, for the reason that the stability of his policy is assured by the stock of the company, and not, as in the mutual plan, by premium payments avowedly in excess of the cost of the insurance. It would seem to be fair and equitable, therefore, between the two classes of companies, to tax them upon the premiums actually paid them by their policy holders, and not to tax one class upon premium payments actually received and the other upon payments which at the utmost are only "constructively received."

My conclusion, therefore, is that by the clause in question Congress did not overrule the authorities above cited, but, on the contrary, crystallized them into statute law, and by so doing exempted from taxation dividends of the character in controversy.

[3] The next question for consideration is whether the so-called supplementary policy contracts should be represented in the reserve fund. Concerning such contracts, the statement of the case is as follows:

"The plaintiff's policies contain an option to have proceeds paid in annual installments for a given term of years, or during the lifetime of the beneficiary, instead of in one sum. If the option is exercised, such policy upon which payments have fallen due are styled 'supplementary policy contracts.' In life insurance, the word 'reserve' means the sum which the company must

have on hand in order to meet its policy obligations. The company's reserve is also defined as the value of all its outstanding policies. The insurance commissioners of New Jersey and insurance commissioners of the other states of the United States require the plaintiff to cover its obligations on supplementary policy claims by reserve for that purpose."

The question is whether the Commissioner of Internal Revenue had the right to deduct from the company's return the net additions to reserve on account of supplementary policy claims, on the ground that they were not required by law. These obligations seem to come fairly within the definitions of reserve, as above given. Notwithstanding the policy holder has died, there still remain unpaid under the policy certain installments not presently due, but which will mature from time to time in the future. These are as much policy obligations as they would have been if payable in one sum immediately upon the death of the insured. They have a value, and that value must be estimated, and, when estimated, adequate provision made for their payment as they mature, which can only be done by the establishment of a suitable reserve. Furthermore, such reserves are "required by law" within the meaning of the act. As appears by the agreed statement of facts, the commissioners of insurance of all the states require the establishment of a reserve to cover the obligations of the company on such supplementary policy contracts. This fact of itself tends strongly to show that they are required by law. Indeed, the companies cannot transact business in the several states, except upon compliance with such regulations. It also appears in the stipulation that:

"Life insurance experts and actuaries consider supplementary policy claims as included in the term 'outstanding policies,' and as properly represented in the reserve fund of the company."

Such testimony is expert testimony of the highest character and ought not to be ignored. Furthermore, the statute of New Jersey, entitled "An act to provide for the regulation and incorporation of insurance companies, and to regulate the transaction of insurance business in this state," approved April 3, 1902 (Comp. St. N. J. p. 2836), by section 24, requires that:

"The commissioner of banking and insurance shall annually make, or cause to be made, valuations of all outstanding policies of every life insurance company doing business in this state."

And by section 56 of the same act it is provided that the commissioner of banking and insurance may apply for the appointment of a receiver whenever he shall ascertain, by examination of any life insurance company, "that the assets are not equal to the net value of all outstanding policies." Since, then, it appears that policy claims of the character referred to are outstanding policy obligations of the company, which, although not presently payable, have a value capable of ascertainment, it follows that they are required by law to be represented in the reserve for their security and protection.

Thus in *Bankers' Life Insurance Co. v. Howland*, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374, the court said:

"A life insurance company is chargeable with what is called a premium reserve, representing what it must have in on hand to meet its ultimate liability on its policy."

And in *New Haven Trust Company v. Gaffney*, 73 Conn. 480, 47 Atl. 760, the court, in speaking of the reserve which life insurance companies are ordinarily required to maintain, said:

"Such a reserve is a fund which must equal in amount at all times the aggregate policy liabilities at their then present value."

My conclusion on this branch of the case is that these supplementary policy contracts are required by law to be represented in the reserve fund, and that so much of that fund as is annually set apart for that purpose is not subject to the tax in question.

[4] The third point is whether, for the purpose of taxation, the corporation's statement should be made on a cash or revenue basis, or, stated in another way, whether uncollected and deferred premiums and interest accrued and due, but not actually received, are proper subjects of taxation. The statement of facts concerning uncollected and deferred premiums and interest, due and accrued, but unpaid, is in part as follows:

"State insurance commissioners require insurance companies to report each year the amount of uncollected and deferred premiums as of the end of that year, but do not allow them to enter them upon their books as assets. 'Uncollected premiums' are stipulated premiums which have fallen due, but concerning the payment of which the company has not been advised at its home office. Policy holders have the option of paying yearly premiums in semi-annual or quarter-annual installments. The portion or portions of yearly stipulated premiums for the year just ended, which have not fallen due at the end of the calendar year, are called 'deferred premiums.'

"The company never, in fact, receives the full amount of the uncollected and deferred premiums outstanding at any time, and does not enter them on its books of account, except as actually received at the home office. The company did not include these items in its return to the collector of Internal Revenue for either of the years 1909 and 1910. Interest due, but unpaid, and interest accrued on the plaintiff's investments, are not entered in the plaintiff's books of account; nor did the plaintiff include those items in its returns of income for the years 1909 and 1910, made to the Collector of Internal Revenue."

The insurance departments of the different states require the return to be made on a cash basis, and this would seem to be the natural and proper method, since, when so made, nothing but actual receipts and expenditures are shown. Such a method is clear and exact, while on the revenue basis many items are necessarily open to more or less of speculation and uncertainty. Furthermore, the cash plan meets every requirement of the situation, and in a series of years would disclose and subject to taxation everything received by a company. The question for determination, however, is not which is the better method, but which does the statute require. That law provides that the tax is to be—

"one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amount received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed."

This language seems clearly to indicate that the net income, which is the measure of taxation, means what has actually been received,

and not that which, although due, has not been received, but its payment for some reason deferred or postponed. Furthermore, an examination of the act shows that the net income is to be ascertained by deducting from the gross income:

(1) "All the ordinary and necessary expenses *actually paid within the year* out of income in the maintenance and operation of its business and properties."

(2) "All losses *actually sustained within the year*," etc.; "also the sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds."

(3) "Interest *actually paid within the year* on its bonded and other indebtedness," etc., "and in the case of a bank, banking association or trust company, *all interest actually paid by it within the year on deposit*."

(4) "Also all sums paid by it *within the year* for taxes," etc.

(5) "All amounts received by it *within the year* as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed."

Since, then, the language of the act is explicit in permitting only such deductions from the gross income as were actually paid during the current year, it would be strange, indeed, if on the opposite side of the account the company were charged with what it had not received during the current year. No reason appears or has been suggested for so radical and unwarranted a departure. Furthermore, the word "income" means, as already shown, that which has come in, and not that which might have come in, but did not. If expenditures means what has been paid out, or outgoes, then income means what has come in, or receipts. The matter, however, does not rest entirely upon arbitrary statement, since there are a number of cases which throw light upon the question.

In *United States v. Schillinger*, 14 Blatchf. 71, Fed. Cas. No. 16,228, it is held:

"That in the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time."

In *United States v. Indianapolis & St. Louis R. R. Co.*, 113 U. S. 711, 5 Sup. Ct. 716, 28 L. Ed. 1140, it was held that a tax of $2\frac{1}{2}$ per centum directed to be "levied and collected" for and during the year 1871, on the amount of all interest or coupons paid on bonds of certain corporations, "whenever and wherever the same shall be payable," did not cover interest earned during the year 1871, but payable thereafter. To the same effect is *Railroad Co. v. United States*, 101 U. S. 543, 550, 25 L. Ed. 1068.

In *People v. San Francisco Savings Union*, 72 Cal. 199, 13 Pac. 498, it was held that interest accrued but not payable, and interest accrued but not paid, secured by mortgages drawing interest, are not "surplus profits." The court said:

"Under these definitions, it is not easy to comprehend how profits or surplus profits can consist of earnings never yet received. The term imports an excess of receipts over expenditures, and without receipts there cannot properly be said to be profits. Money earned as interest, however well secured, or certain to be eventually paid, cannot, in fact, be distributed as dividends

to stockholders, and does not constitute surplus profits within the meaning of the statute."

It seems almost to border upon absurdity to speak of income as including that which has not been received, and which in the ordinary uncertainties of business may never be received. How can it be affirmed of unpaid interest that it will ever be paid, or, if so, when? The same is true of uncollected and deferred premiums. It is manifestly impossible to tell when, if ever, they will be paid. The policy holder is under no legal liability to pay them. He may neglect or refuse to pay them, and thereby lapse his policy. But that is all; he cannot be sued for them; they are not debts. The company, therefore, properly refuses to treat such unpaid items as receipts. They are neither receipts nor income until paid. My conclusion is that the act contemplates that the required statement shall be made upon a cash basis; that is, upon a basis of money actually received and expenditures actually paid during the current year. Such a method, and such only, is fair to both parties, and it was substantially so admitted at the argument, on behalf of the government.

[5] The fourth and last point for consideration is whether expenditures for replacing furniture, etc., should be considered as an investment or an expense. The statement of the case concerning this item is comparatively short, and may well be given in its entirety:

"In 1909 the plaintiff expended \$1,213 for ordinary renewals of office furniture; in 1910 the plaintiff expended \$1,379 for ordinary renewals of office furniture, \$1,808 for ordinary renewals of attendants' uniforms, door mats, window shades, awnings, small hardware, oils, and other articles of like character; also the sum of \$2,244 for ordinary renewals of electrical equipment, consisting of lamps, alterations of fixtures, shades, meters, fans, plugs, wiring, etc. These expenditures were no greater than the average of similar expenditures for other years, and did not exceed 5 per cent. of the cost of all the plaintiff's existing furniture and equipment similar to the articles detailed. None of the items mentioned are considered in the plaintiff's books or statements as assets, because of their rapid depreciation. The insurance departments of the several states refused to allow them as an asset. They are not permanent benefits, but simply replacements on account of wear and tear to the home office equipment. In its returns, the plaintiff claimed a deduction from income on account of these expenses. The Commissioner amended the plaintiff's returns, so as to exclude that. The result was an increase of additional tax on plaintiff by the sum of \$66.46."

The statement of facts of itself practically settles the question. The statute permits a deduction from the gross income of the corporation, among other items, of "all the ordinary and necessary expenses actually paid within the year, out of income in the maintenance and operation of the business and properties," and also "a reasonable allowance for depreciation of property, if any." The foregoing extract from the statement of the case shows that the articles mentioned are of a perishable and transient nature, and may not properly be denominated "assets." It also shows that the various insurance departments of the several states refuse to allow them as assets. Probably, if any of the items specifically mentioned

could be considered of a permanent character, it would be that of office furniture; but of this the stipulation says that it was for "ordinary renewals." The amount expended therefor was practically the same for the years 1909 and 1910. Hence the expression "ordinary renewals" may fairly be taken to mean annual renewals; while of all the items it is said "they are not permanent benefits, but simply replacements on account of wear and tear," and, again, that the expenditures were "no greater than the average of similar expenditures for other years." The items are small, and should properly be charged to maintenance; they apparently did no more than maintain in proper condition and repair the ordinary equipment of office furniture and supplies.

In *Grant v. Hartford & N. H. R. R. Co.*, 93 U. S. 225, at page 227 (23 L. Ed. 878), Mr. Justice Bradley, in construing the Internal Revenue Act of 1864 (13 Stat. 284), says:

"The object of the law was to impose a tax on net income or profits only, and that cannot be regarded as net income or profits which is required and expended to keep the property up in the usual condition proper for operation. Such expenditure is properly classed with repairs, which are a part of the current expenses."

It was admitted at the trial by counsel for the government that under a more recent ruling of the Internal Revenue Commissioner such items are now allowed to be deducted from the gross income of the corporation. But, however that may be, it seems clear, from the character, kind, and amount of expenditure, that they afford a proper ground of deduction; and it is so determined.

Counsel for the respective parties entered into a supplemental stipulation fixing the amount for which the plaintiff would be entitled to judgment. As to each item which should be found in its favor, the stipulation follows:

"It is agreed that, if the court finds for the plaintiff on any of the following items, the amount for which plaintiff will be entitled to judgment as to each item shall be the sum stated opposite the item, with interest from January 6, 1912.

"(1) If the court finds that so-called dividends are not 'income * * * received,' plaintiff will be entitled to judgment:

| | |
|--|-------------|
| (a) For dividends allowed in reduction of renewal premiums.. | \$35,605.43 |
| (b) For dividends applied to purchase additional insurance or to shorten endowment term..... | 13,880.34 |
| | <hr/> |
| | \$49,485.77 |

"(2) If the court finds that the increase in reserve for so-called 'supplementary policy contracts' is a part of the 'net addition required by law to be made to reserve funds,' plaintiff will be entitled to judgment for \$5,357.99.

"(3) If the court finds that the plaintiff's returns were correctly made upon a 'cash' basis, plaintiff will be entitled to judgment by reason thereof:

| | |
|--|-------------|
| (a) For deferred premiums (Agreed Facts, paragraph 14).... | \$ 1,499.69 |
| (b) For interest due or accrued, but uncollected (Agreed Facts, paragraph 15)..... | 3,041.94 |
| (c) For matured endowment policies..... | 49.02 |
| | <hr/> |
| | \$ 4,590.65 |

"(4) If the court finds that plaintiff's expenditures for furniture, etc., were ordinary and necessary expenses, plaintiff will be entitled to judgment by reason thereof for \$66.46."

The items having all been found in favor of the plaintiff, judgment will accordingly be entered thereon, pursuant to the above stipulation, in favor of the plaintiff and against the defendant, upon the first item for \$49,485.77, upon the second item for \$5,357.99, upon the third item for \$4,590.65, and upon the fourth item for \$66.46, with interest upon each item from January 6, 1910.

WASHINGTON, P. & C. RY. CO. v. MAGRUDER et al.

(District Court, D. Maryland. May 29, 1912.)

1. CONSTITUTIONAL LAW (§ 251*)—VESTED RIGHTS UNDER FEDERAL CONSTITUTION—FIFTH AMENDMENT.

Const. Amend. 5, is a limitation upon the federal government and has no reference to state action.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727; Dec. Dig. § 251.*]

2. CARRIERS (§ 12*)—STATE REGULATION OF CHARGES—VALIDITY OF STATUTE.

The provision of Act Md. April 11, 1910 (Laws 1910, c. 200), relating to the Washington, Potomac & Chesapeake Railroad Company, that "the freight charged for hauling articles of freight over said railroad, whether in bulk or parcels, shall in no case be greater than fifty per cent. above the published schedule of the Pennsylvania Railroad Company for hauling freight, either in bulk, or parcels for the same distance in the state of Maryland," must be held to mean the published schedule of the Pennsylvania in force at the time the act was passed, and as so construed is valid on its face; the question whether or not it is unconstitutional as confiscatory being one of fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

3. CONSTITUTIONAL LAW (§ 297*)—RAILROADS (§ 6*)—STATE REGULATION—CONSTITUTIONALITY OF STATUTE.

Complainant railroad company owned and operated a railroad in Maryland 21 miles long and owned no other property. Its road was operated independently and not as a part of any system. It operated one mixed train per day each way over its line, and such service from a public standpoint was inconvenient and inadequate; but the gross earnings of the company were barely sufficient to pay operating expenses under economical management. By Act Md. April 11, 1910 (Laws 1910, c. 200), the state Legislature required complainant to run two trains per day each way under penalty of not less than \$50 for each day it refused to comply with such requirement. A compliance with the act would have cost complainant several thousand dollars per year. *Held*, that such act was unconstitutional and void as depriving complainant of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297;* Railroads, Cent. Dig. § 7; Dec. Dig. § 6.*]

4. RAILROADS (§ 6*)—STATE REGULATIONS—CONSTITUTIONALITY OF STATUTE.

Although a state is given power by its Constitution to amend or repeal the charter of railroad companies and may under its police powers reg-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ulate their business, it cannot so exercise either power as to deprive a company of its property without compensation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 7; Dec. Dig. § 6.*]

5. CONSTITUTIONAL LAW (§ 241*)—EQUAL PROTECTION OF LAWS—EXCESSIVE PENALTIES.

A state statute undertaking to regulate the business of a railroad company, which fixes penalties for disobedience of its provisions so excessive as to effectually prevent the company from resorting to the courts to test its validity, is unconstitutional as depriving the company of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701; Dec. Dig. § 241.*]

In Equity. Suit by the Washington, Potomac & Chesapeake Railway Company against W. Hampton Magruder, State's Attorney for Prince Georges County, Robert C. Combs, State's Attorney for St. Marys County, and Ferdinand C. Cooksey, State's Attorney for Charles County, Maryland. On final hearing. Decree for complainant.

J. Kemp Bartlett and Edgar Allan Poe, of Baltimore, Md., for complainant.

L. Allison Wilmer, of La Plata, Md., for defendants.

ROSE, District Judge. Complainant is a Maryland corporation. Defendants are the state's attorneys for the counties of Prince Georges, St. Marys, and Charles. The controversy turns upon the validity of an act of assembly of Maryland approved April 11, 1910 (Laws 1910, c. 200). It requires the Washington, Potomac & Chesapeake Railroad Company "or any other Railroad Company by whatsoever name it may operate * * * which may operate the track and rolling stock of the said Washington, Potomac & Chesapeake Railroad Company" to "operate two accommodation trains daily each way (Sunday excepted) over its railroad tracks from Mechanicsville in St. Marys county to Brandywine in Prince Georges county. The first train to leave Mechanicsville in St. Marys county each morning for Brandywine so as to connect with trains of the Philadelphia, Baltimore & Washington Railroad Company, going north and south, and thence leaving Brandywine station not later than 9:30 a. m., and then to leave Mechanicsville not later than 12:30 p. m., so as to reach Brandywine station in time to connect with the trains of the Philadelphia, Baltimore & Washington Railroad Company in the afternoon going north and south, and thence returning to Mechanicsville not later than 8 p. m. each day."

Another section of the act provides:

"That the freight charged for hauling articles of freight over said railroad, either in bulk or parcels, shall in no case be greater than fifty per cent. above the published schedule of the Pennsylvania Railroad Company for hauling freight either in bulk or parcels for the same distance in the state of Maryland."

Failure to comply with either of the above requirements was made a misdemeanor which "shall be punished by a fine of *not less than*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fifty dollars for each day" upon which accommodation trains are not operated as required by the act, and by a fine "*not exceeding* fifty dollars for each freight charge made in excess of the freight charge permitted" by the act. "Said fine or fines to be recovered as other fines are now recovered in the state of Maryland against corporations."

The act by its terms was to go into effect on the 1st of June, 1910. Three days before that date the bill of complaint was filed. By it it is alleged that the provisions of the act are confiscatory and deprive the complainant of its property without just compensation or due process of law, and deny to it the equal protection of the law in violation of the fifth and fourteenth amendments of the Constitution of the United States.

The bill further alleged that the penalties imposed by the act "will become so onerous and enormous before an opportunity is given to the complainant to test the constitutionality or validity of the said act as to intimidate the complainant * * * from resorting to the courts for said purpose," and it is "thereby precluded from the opportunity of access to the courts to test the validity thereof or to receive for its rights and property the protection of the law," whereby it was said the complainant is "denied equal protection of the law and its property is liable to be taken without compensation or due process of law."

The bill set up still another ground for relief. The complainant said it was not named in the act by its corporate title. The only corporation therein mentioned was one which had formerly owned the road but had ceased to do so before the act was passed. The complainant alleged that so much of the act as declared that it should be applicable to any railroad which might operate the property formerly owned by the corporation named in it was null and void under the Constitution of Maryland, because the title of the act made no reference to this extension of its scope.

Upon the filing of the bill motions for a temporary restraining order and for a preliminary injunction were made. The former was denied. An early date was set for the hearing of the latter. The respondents at first filed a plea to the jurisdiction. This they afterwards withdrew. There never has been a hearing upon the motion for a preliminary injunction.

On the 29th of June, 1910, respondents in a petition set forth that the issues of fact and law raised by the bill were important and difficult. They needed time in which to prepare their case. They said that, as such application was made by them, they thought it only reasonable for the protection of the complainant that a preliminary injunction should be at once issued. Accordingly, on the 6th of July, 1910, the complainant's motion for such injunction was granted.

Section 17 of the "act to create a commerce court," etc. (Act June 18, 1910, c. 309, 36 Stat. 557), which requires that applications for preliminary injunctions to restrain the enforcement of state statutes must be heard by the three judges, did not go into effect until August 18, 1910.

The complainant began taking testimony October 31, 1910. It fin-

ished January 4, 1911. Respondents examined their first witness November 15, 1911. The case was set for final hearing by the court at the call of the equity docket, and such hearing was had on the 1st of May, 1912. The slow progress of the cause has in large part been due to the fact that the respondents are such solely because they are the prosecuting officers of the state for the counties in which the complainant's railroad is.

The laws of the state do not contemplate proceedings of this character. They consequently fail to put at the command of the state's attorneys any funds or machinery for preparing for the defense of such cases. Reference is made to the delay merely because some explanation is due as to the circumstances under which by an order of this court and without an actual hearing the enforcement of an act of the General Assembly of Maryland has been restrained for nearly two years.

[1] There is in this case no diversity of citizenship. It is in this court because, and solely because, it arises under the Constitution of the United States. The allegation of the complainant that the act, so far as it is applicable to it, is in contravention of the Constitution of Maryland, need not be considered. Complainant may, if it is so advised, make that contention in the courts of Maryland. The objection that the act or any of its provisions is in conflict with the fifth amendment is without merit. That amendment is a limitation upon the federal government. It has no reference to state action. *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97.

The question to be determined is whether the act tries to do what the fourteenth amendment says no state may do, viz., deprive the complainant of its liberty or property without due process of law, or deny to the complainant the equal protection of the laws.

[2] The complainant is by the act required to do one thing. It is forbidden to do another. It must run two accommodation trains a day. It must not charge for hauling freight more than 50 per cent. above the published schedules of the Pennsylvania Railroad Company for hauling freight for the same distance in Maryland. Does either the requirement or the prohibition transgress the limits prescribed by the fourteenth amendment? It will be more convenient to consider the prohibition first.

In the argument at bar both parties apparently assumed that the second section of the act was to be construed as if it read that the rates charged by the complainant should not exceed by more than 50 per cent. "the published schedules of the Pennsylvania Railroad Company" *in force at the time said charge shall be made* "for hauling freight for the same distance in the state of Maryland." The words in italics, of course, are not in the act. If the provision is to be construed as if they were contained in it, there cannot be two opinions as to its invalidity. No authority is needed to demonstrate that the Legislature of Maryland cannot delegate to the Pennsylvania Railroad Company the right to fix the freight rates which another company may charge. Such a method of determining the price which the complainant may lawfully ask for the transportation it has to sell

would lack all those requirements of notice, opportunity to be heard, etc., which are of the essence of due process of law. But is such a construction one which must necessarily be put upon the provision in question? Would it not be quite as permissible to assume that it simply means that the complainant may not exceed by more than 50 per cent. the freight rates of the Pennsylvania Railroad Company shown in its published schedules *in force at the time of the passage of the act*? This construction would seemingly do less violence to the natural import of the words used by the Legislature than will the other. The requirement so interpreted does not necessarily impair any constitutional right of the complainant. The Legislature might have itself framed a schedule of freight rates which the complainant might not lawfully exceed. If those rates had been in themselves reasonable, it would have been immaterial what data the introducer of the bill or the legislative committee to whom it was referred had used in making up that schedule. There could have been no possible legal objection to the use for such purpose of the published rates of the Pennsylvania Railroad Company. The Legislature had precisely the same right to fix the maximum rates by reference to some existing schedule as it would have had to have copied the schedule into the act in full. No delegation of legislative power would have been involved either way.

Congress may not empower a state Legislature to create offenses against the United States or to fix their punishment. Congress may lawfully declare the criminal law of a state as it exists at the time Congress speaks shall be the law of the United States in force in particular portions of the territory of the United States subject to the latter's exclusive criminal jurisdiction. U. S. Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1145 [U. S. Comp. St. Supp. 1911, p. 1675]) § 289; *United States v. Press Pub. Co.*, 219 U. S. 1, 31 Sup. Ct. 212, 55 L. Ed. 65, 21 Ann. Cas. 942.

The courts are bound to presume that the Legislature did not seek to do an unconstitutional thing. If the words of an act can reasonably be understood in a sense which will avoid any conflict with the Constitution, they must receive that construction.

The provision of the act fixing the maximum freight rates which may be lawfully charged by the complainant is therefore valid on its face. If the rates so fixed are in fact confiscatory, the complainant may be entitled to legal relief against them.

The bill of complaint makes a general charge that such rates are confiscatory, or at all events it uses language from which such a charge may be not unreasonably inferred. It does not allege any facts upon which such charge is based. It offered no testimony to show that the rates fixed by the act were confiscatory or even unreasonable. It is quite possible that it did not do so solely because it, as well as the respondents, assumed that the act meant something other than I have been constrained to find it does mean. Under such circumstances it would not befit a court of equity to preclude the complainant from subsequently raising the question of the reasonableness

of the rates either in this court or before any other tribunal having jurisdiction of such controversy.

Relief to the complainant in this case against the enforcement of so much of the act as fixes the freight rates which it may charge at not exceeding 50 per cent. above the rates charged by the Pennsylvania Railroad Company for the same distance in Maryland, as shown by the published schedules of that railroad company in force April 11, 1910, would be refused without prejudice to the right of the complainant to raise the question of the reasonableness of those rates in any subsequent proceeding, were it not for the injustice which might then result to the complainant from the enforcement of the penal provisions of the statute. These provisions will be further alluded to and discussed in another connection. It is sufficient to say here that all parties assumed that the act meant something which the court has been forced to hold that it does not mean. If it meant what the parties believed it to mean, it was unconstitutional. Complainant was in that event fully entitled to seek relief from the courts.

Another construction has been put upon it. So construed it may be valid. In the two years in which this litigation has lasted the complainant may have frequently disobeyed it. The accumulated penalties which might be exacted of the complainant would be ruinous. Such a way of penalizing resort to the courts in doubtful cases is a denial of the equal protection of the laws. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

[3] The more serious controversy relates to the validity of so much of the act as requires the complainant to operate not less than two accommodation trains each way each day upon a schedule which will insure connections between such trains and the trains run by the Philadelphia, Baltimore & Washington Railroad Company upon its Pope's Creek branch. A somewhat full statement of the facts will make it easier to understand the position of the parties with reference to this portion of the dispute.

The complainant's railroad is 21 miles long. It runs from Brandywine, in Prince Georges county, to Mechanicsville, in St. Marys county, a distance of 21 miles. Mechanicsville is a hamlet of about a dozen houses. It was not deliberately chosen as a railroad terminus. The charter of the present complainant, as did that of each of its two or more predecessors, fixed Point Lookout at the mouth of the Potomac as its southern and eastern terminus. It may be assumed that the road stopped at Mechanicsville because the money available for building it gave out about the time its construction reached that point. The country through which it runs is thinly settled. Mechanicsville is as large as any place along its line, if not larger. A well-informed witness estimates that the total population which lives at any point within two miles of the railroad on either side does not exceed 3,000. It is not a growing community. Charles county, in which the greater part of its line lies, had fewer inhabitants in 1910 than it had when the first census was taken 120 years earlier. Whether the community has scant railroad facilities because it is thinly peo-

pled, or whether it is so thinly peopled because its railroad facilities are so scant, is not a question for the courts. It is thinly peopled; its railroad accommodations are scant. The only rail connection the complainant's road has is at Brandywine. There it joins the Pope's Creek branch of the Philadelphia, Baltimore & Washington Railroad Company. The last-named company is a subsidiary of the Pennsylvania Railroad Company. Its line forms a part of the Pennsylvania system. Brandywine is a little less than 51 miles from Baltimore, a little more than 40 miles from Washington. Mechanicsville is only 21 miles from Brandywine. No point on complainant's road is therefore more than 72 miles from Baltimore or 62 from Washington. Nevertheless the train schedule on the road is such that any one who wishes to go from any of its stations to Washington or Baltimore for any purpose which requires him to be in either of the cities during any part of the ordinary business day must be away from his home for very nearly 48 hours. There is only one train a day each way. It is made up of freight and passenger cars. West bound it leaves Mechanicsville at 2:30 in the afternoon. It connects with the Pennsylvania's north-bound train which passes Brandywine at 4:56. A passenger bound for Washington will reach his destination at 6:25, for Baltimore at 6:50—in each case after the close of business hours. The one east-bound train on the complainant's road leaves Brandywine after the arrival of the Pennsylvania train which is scheduled to reach that point at 9:16 a. m. In order to make that connection, a passenger would have to leave Baltimore at 7:30 in the morning, Washington at 7:45. That is, a country merchant from Mechanicsville who has business in Baltimore gets there after business hours at night. He cannot get home the next day unless he leaves before business hours the next morning. If he does not he must wait over until the morning of the third day. He will then get back home at about noon, or nearly 46 hours after he left it.

The Legislature has sought to remedy this state of things by the provision now under consideration. It requires that the west-bound train shall leave Mechanicsville each morning in time to connect with trains going north and south at Brandywine. To make that connection the train must reach Brandywine as early as 6:34; that is, it must leave Mechanicsville about 5 a. m. A passenger who took this train would get to Baltimore at 8:30 a. m., to Washington at 8:20. The act also requires that the complainant shall run an east-bound train reaching Mechanicsville not later than 8 p. m. This last-mentioned train would connect at Brandywine with the Pennsylvania train, the passengers on which left Baltimore at 4:35 and Washington at 5:03. With such a schedule in force a resident of Mechanicsville or its neighborhood could leave that station at 5 in the morning, and get back at 8 at night, having spent practically all the business day in either Baltimore or Washington. Moreover, these trains would enable persons living along the line of complainant's road to go by rail to La Plata, the county seat of Charles county, spend most of the day there, and return to their homes the same night.

This early morning and late afternoon train service was to be in

addition to that already maintained by the complainant. Conditions would have been little better had it been merely substituted for that service. A combination freight and passenger train such as complainant has been operating could not have made the connections required by the act and at the same time have served the public convenience. When freight cars are to be picked up or dropped off, it takes from two to three hours to make the run between Brandywine and Mechanicsville. To make sure that such a train would reach Brandywine on time to connect with the train passing there at 6:34 in the morning, it would have to start not later than 3:30. Such a train could not count on getting back to Mechanicsville before 9:30 at night.

If the convenience which the Legislature thought the public should have was to be provided, it was requisite to require at least the train service called for by the act. It is natural that the community through which the complainant's road runs should want the service the Legislature has said it should have. There is no question that a requirement that such service shall be furnished is reasonable and even modest if looked at solely from the standpoint of the public convenience and without consideration to the effect compliance with it will have upon the complainant. The latter says that compliance spells ruin to it. It claims that the road without the added service barely pays its operating expenses. A sufficient margin is not left to keep up the roadbed to a reasonable standard of safety and efficiency. It asserts that obedience to the act means an increase of some thousands of dollars a year in its cost of operation, while its receipts will be but little augmented. That is to say, according to it the capital invested in the road has long been used in the service of the public without any compensation to those who furnished it, and that if the train service required by the Legislature is provided the complainant will have to pay out some thousands of dollars a year more than it takes in.

How far are these contentions sustained by the testimony in the record? The road was built a number of years ago. It has been through at least two foreclosures. The record contains what purports to be a statement in some detail of its receipts and disbursements since July 1, 1900, a date which was apparently shortly after the sale made under the first of these foreclosures. At that sale the road was bought by one Henry W. Watson, a citizen of Pennsylvania. He paid something over \$90,000 for it. As authorized by the Maryland law, he caused it to be incorporated as the Washington, Potomac & Chesapeake Railroad Company. In compliance with those laws he had 208 shares of its capital stock issued to the state of Maryland, thus giving the state the same proportion of the new company's capital which it held of the old. The new company issued bonds to him for the amount of \$100,000. It will be recalled that it has been already stated that the original charter of the road called for it to run to Point Lookout. It was therefore, when he bought it, an unfinished road. The Maryland Code gives to one who purchases such a road at a judicial sale 10 years to complete it. The Washington, Potomac & Chesapeake Railroad Company had a life of a little less than 10 years. The road was still unfinished when that period approached

its end. In order to avoid a forfeiture of its charter, a new foreclosure was necessary. During its existence that company had paid its operating expenses. Watson, who owned all the bonds issued by it and all the stock, except that held by the state of Maryland and the few shares he kept in the names of the company's directors, was its president. As such he did some work for it. His salary was nominally \$3,600 a year. No dividends were ever paid on its stock, no interest on its bonds. Only a portion of his salary was ever paid. His total receipts from the road for his personal uses did not average over \$1,000 a year. As the interest on the bonds had never been paid, they were in default, and Watson therefore caused the trustee under the mortgage securing them to institute in this court proceedings for the sale of the property. Such sale was had. Watson again became the purchaser. On the 14th of March, 1910, he caused the complainant to be incorporated by the same name as its predecessor, except that it is called "railway," while its forerunner was styled "railroad." It is not necessary in this case further to discriminate between the two companies. They can be more conveniently dealt with as if they were one.

There is no direct evidence as to the present value of the property of complainant used in the service of the public. It says that it never has been able to earn anything on the capital invested, and that therefore it makes no difference whether that capital be much or little. It contends that if it complies with the new act of Assembly it will have to pay out every year to operate and maintain the road more than it will receive from it.

If it is right, the amount of its investment is immaterial. There is evidence that Watson paid something over \$90,000 for it 12 years ago. That was at the rate of about \$4,500 a mile. The court may perhaps take judicial notice of the fact that it would be almost, if not altogether, impossible to reproduce any kind of standard gauge railroad in Maryland equipped with 56-pound rails for less than that sum per mile. It is true that between 1900 and 1910 the physical condition of the railroad deteriorated. That was not because its revenues had been diverted to other purposes, but because what was left of its gross income after paying its operating expenses was not sufficient properly to maintain its tracks and roadbed. Recently the need for extensive replacements of rails and reconstruction of culverts, etc., became imperative if trains were to be run at all. The complainant had no funds with which to do this work. The \$12,000 needed was borrowed from Watson or upon his credit.

Respondents suggest that the financial condition of the complainant may not have been and may not be quite as bad as it says it was and is. They intimate that Watson, the owner, or one Early, complainant's manager and man of all work, may have gotten more out of the property than these gentlemen admit. No evidence has been offered to sustain these charges or innuendoes. They must be treated as unfounded.

For the purposes of this case it may be assumed that the burden of proving not only that the complainant spent its revenues upon the

operation and maintenance of its road, but that such expenditures were made with reasonable intelligence and economy, rests upon it. This burden appears to have been sustained. The overhead expenditures for salary and management seem to have been kept within a narrow compass. It is not necessary to consider whether the president's nominal salary of \$3,600 per annum was or was not excessive. It never was paid. The only other person who received anything for discharging any administrative or clerical duties was Early. He was general manager; he was sole bookkeeper; he made out all the reports required by the Interstate Commerce Commission; he was the conductor of the only train operated by the railroad. With reference to shipments made from stations at which complainant did not maintain a regular station agent, he performed the duties of such agent. He acted as express agent. For his services in all these capacities he received from \$1,500 to \$1,600 a year. The other employes of the complainant were the necessary train crew and the track repair gang. The sums paid its engineer, fireman, brakeman, etc., appear to be moderate when compared with the average wages paid by railroad companies to persons filling like positions, as those average wages are shown in the volume of statistics published annually by the Interstate Commerce Commission.

There is no serious controversy as to any of the matters of fact thus far spoken of, if there be any controversy at all. Such difference as there is between the parties is as to the extra cost which running an additional train each day would entail upon the complainant. The latter says it will add nearly \$1,000 a month to the expense of operating the road. The respondents say that the additional expense would be confined to the cost of the additional coal, oil, and waste consumed, plus some slight additional wear and tear on the roadbed and rolling stock. They seem to think that \$200 a month would cover this expenditure. They contend that the increased receipts resulting from supplying this additional train service would offset a large part, if not all, of this added outlay. Complainant says that experience has shown that the additional number of passengers who would use the road if a train were added would be small. It shows that during the three summer months of each of the years 1906 and 1907 it did operate the train now required by the act in controversy. During the corresponding months of 1908 and 1909 it ran only one train a day each way. During these three months of the earlier two years it carried in the aggregate 7,633 passengers; in the later two years 7,462. The taking off of the additional train reduced the aggregate number of passengers using the road by 171, or a little over 2 per cent. The trifling effect of the increased accommodation in augmenting the use made of the road for passenger travel is shown by the fact that each of the periods for which the comparison was made included about 156 secular days. The total difference in the number of passengers carried when there were two trains and when there was one was, as we have seen, only 171. The added number of passengers who used the road as a result of doubling the number of trains was about one a day.

It may well be that passenger travel upon the road has been from

other causes tending to increase, and that this tendency to some degree offset the reduction resulting from the withdrawal of the extra train; but in any event the evidence does not indicate that the complainant would get much more revenue if it ran the train the Legislature says it shall run.

The difference between the complainant's and the respondents' estimates of what the gross increase of cost of operating an additional train will be turns on whether the complainant will be able to run such additional train without employing an extra train crew. Complainant says it cannot. It suggests, if it does not say, that if it could do so it would put on the extra train and take its chances of being able in some way to pay for it. Until some four years ago it did run two trains a day each way during the summer months. It says they never paid, but that to run them did not then cost what it would now cost. At that time it was possible to operate both the trains with a single crew. It contends that after the going into effect in March, 1908, of the act of Congress limiting the hours of service of railroad employes it found that to run two trains it would have to employ a second train crew or else violate the law. The cost of a second crew would have been prohibitory. Since that time it has therefore operated only one train a day each way.

Respondents say that the act in question (chapter 2939, Second Session Fifty-Ninth Congress, 34 Statutes at Large, 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), has nothing to do with the matter. They base their contention upon several grounds. They say the complainant is a purely intrastate railroad and that the act has no application to it. The complainant's railroad lies wholly within the state of Maryland. It is, however, engaged in interstate commerce, as some of the exhibits filed by the respondents show. Cars come to it on through bills of lading from places outside the state of Maryland. It receives shipments of freight on through bills of lading to be carried to places beyond the state. Passengers travel over it on through tickets to and from places beyond the bounds of Maryland.

The purpose of the act is to promote the safety of interstate commerce. It is at least possible that, so long as complainant's road handles passengers or freight in transportation between places in Maryland and places outside of Maryland, it must conform, in the operation of the trains by which such passengers and freight are transported, to the provisions of the act. *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; *Southern Railway Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; *Northern Pacific R. R. v. Washington*, 222 U. S. 375, 32 Sup. Ct. 160, 56 L. Ed. 237; *United States v. St. Louis Southwestern Ry. Co. of Texas* (D. C.) 189 Fed. 954.

The respondents say that, if the act applies, one crew may run both trains without violating any of its provisions, even if it be assumed that the crew will be on duty, within the meaning of the act, for all the time which will elapse from their taking charge of the train in the morning at Mechanicsville until their leaving the train at that place at night. They say the train is to leave Mechanicsville about 5

o'clock in the morning and is to get back there about 8 at night, which is a period of only 15 hours. Complainant says that, in order to start the train at 5 o'clock, some of the employés must come on duty as early as 4, others not later than 4:30; that after the train reaches Mechanicsville at night some of them must necessarily remain on duty for some length of time. Not infrequently there would be delays. That is to say, every day some of the crew would be on duty for more than 16 hours, and when things went a little wrong all of them would be.

The act contains a proviso that its provisions shall not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay is the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal and which could not have been foreseen. It has been held, however, that that proviso does not exempt a railroad company for liability for delays resulting from things of common occurrence, such as hot boxes, engines getting out of order, coal being bad, etc. *United States v. Kansas City Southern Ry. Co.* (D. C.) 189 Fed. 471; *United States v. Denver & Rio Grande Southern Ry. Co.*, 197 Fed. 629, decided May 1, 1912, in the U. S. District Court for New Mexico.

Respondents say that, conceding all this, still the schedule will not require the men to be 16 hours on duty in the aggregate in 24. The train crew will apparently have nothing particular to do for some hours each day while the train is waiting at either Brandywine or Mechanicsville. It may be that some of such intervals of rest will be long enough, and that they can be used by the men in such manner as to make it clear that they should not be counted as time on duty. *United States v. Atchison, Topeka & Santa Fé Ry. Co.*, 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361; *United States v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 197 Fed. 624, District Court of the United States for the Eastern District of Washington.

It is not expedient, perhaps not proper, collaterally to pass on questions of so much nicety and importance as are suggested by these contentions of the respondents. It is not necessary so to do. Whether lawful or not, one train crew can hardly be expected to work day in and day out every secular day in the year for such number of hours. If such schedules are to be maintained, in the end the complainant will doubtless have to provide a very nearly complete duplicate crew. The additional cost of such train service under such conditions would be not less than \$500 a month or \$6,000 a year. The necessary operating and maintenance expenses of the complainant would by approximately that amount exceed its gross revenue.

Reduced to its simplest terms, the problem presented for solution in this case may be stated thus: A railroad company is the sole owner of its own road. It owns nothing else. The road is not a part of any larger system either through stock ownership, lease, or otherwise. All the company's revenue comes from the earnings of the road. Its gross receipts barely equal the sums necessarily expended for operation and maintenance. The facilities which it furnishes for passenger service are, from the public standpoint, inadequate and inconvenient.

The Legislature requires it to add to these facilities. The expense of maintaining such additional service would exceed by a number of thousands of dollars a year all the added revenue which would be earned by them. If the company obeys, it will every year spend some thousands of dollars more than it earns. The Legislature says that, if it does not obey, it shall be fined \$50 a day for every day during which those facilities are withheld. Is the act valid?

[4] Complainant's charter is by the Constitution of the state subject to legislative alteration or repeal. This power of repeal is absolute. *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

The General Assembly of Maryland might have said to the complainant: "We want you to run two trains a day each way. If you do not do it your charter rights are at an end." Had that been said, the complainant would have had to run the trains or to submit to a forfeiture of its charter rights. Such forfeiture, however, would have left unimpaired its title to its property as distinguished from its franchises. *Greenwood v. Freight Company*, 105 U. S. 13, 26 L. Ed. 961.

But the Legislature has not required or permitted the complainant to choose between obedience and forfeiture. It is not a question of the mere phraseology of the act. Any form of words from which it could have been gathered that the Legislature intended that the trains shall run or the franchises end would have been sufficient. But there is nothing in the statute to suggest that such alternative was in the legislative mind at all. The act assumes that the complainant can obey if it will, and that therefore it shall be made to obey if it will not. The courts cannot hold that the act means something which it neither says nor implies.

Being a public service corporation, it may not voluntarily dissolve. Acts of 1908, c. 240, § 51. It may not save its property for its stockholders by yielding up its legal life.

The Legislature might have required the complainant to run each way each day at least one passenger train to which no freight cars should be attached. *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

The power so to legislate may be based upon the right of the Legislature to require the complainant to do what by its charter it undertook to do, or upon the right of the Legislature to amend the complainant's charter, or upon an exercise by the Legislature of the police power for the protection of the safety and the promotion of the reasonable comfort of travelers upon complainant's road, or it may rest upon any two of such rights or all of them. Apparently, however, the Legislature had no objection to the kind of train which had been in use upon complainant's road. In that respect this case is distinguishable from the *Missouri Pacific Railroad Company v. Kansas*, *supra*.

In view of the purpose for which the complainant was chartered, it cannot be questioned that the requirement that two trains a day should be operated each way would be an amendment germane to the original purpose of the corporate grant.

Moreover, in view of the inconvenience and loss of time which complainant's present schedule causes to persons traveling on its road, the Legislature would have had the right, in the exercise of its power of regulation of public service corporations and independent of its reserved power of charter amendment, to require the complainant to run two trains unless such requirement in effect amounted to the confiscation of complainant's property.

While, as has been said, the right of charter repeal is absolute, there are limits upon the power of amendment. There is nothing illogical in this distinction. Indeed, the limitation upon the power of amendment necessarily follows from the restriction upon the effect of the repeal.

The Legislature may for any reason or none repeal a charter. As such repeal, however, does not and cannot take from the corporation its property, other than its franchises, it follows that such taking cannot be accomplished under the guise of a charter amendment. Neither under the exercise of the police power or any other ostensible justification can the property of a corporation be taken from it without compensation. *Missouri Pacific Ry. v. Nebraska*, 217 U. S. 206, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989.

It is true that the Legislature has the right to require that a public service corporation shall furnish a needed and reasonable facility in spite of the fact that the furnishing of such facility will cost the corporation more than it will bring in. *Missouri Pacific Ry. v. Kansas*, supra; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398.

In each of the above cases, however, the corporation concerned operated a great system of railroads. In neither did it claim that, if the increased accommodation was furnished, its total gross income from all sources would be less than its necessary expenses of operation and maintenance without making any return whatever upon the capital invested. Such is complainant's claim. The evidence sustains it. To hold that the Legislature may not by penal sanctions compel a corporation to use up its capital in the public service is not to restrict any exercise of legislative power which can in the end be effective. In the long run all attempts to secure for the public so costly a facility must prove futile no matter what the courts do or leave undone. If that facility cannot be furnished otherwise than by the expenditure of the capital invested, sooner or later the exhaustion of the corporation's capital will make it impossible for the corporation to render any service whatsoever.

As has already been said, the Legislature may at any time repeal the complainant's charter conditionally or unconditionally. If conditionally, the complainant must comply with the condition or yield up its charter. When it loses its charter it will still retain its property other than its franchises. If legislation of the character of that under consideration can be upheld, a public service corporation may be forced first to consume all its property and then have its charter taken away in the end.

[5] The act, moreover, is open to further fatal objection. As did the statute declared invalid in *Ex parte Young*, supra, it in effect seeks to deny to complainant all opportunity for judicial review of the reasonableness of its provisions. Complainant promptly sought the interposition of this court. The slowness with which the case has progressed to final hearing has been due in large part to the fact that the Legislature has not furnished the state officers, who are the respondents here, with the facilities, pecuniary and other, which they needed in order to present their case with reasonable speed. Whatever the cause of the delay, however, the fact remains that if the act be valid, and if the injunction be dissolved, the complainant is liable to penalties which by this time will aggregate quite \$30,000, or about one-third of what the evidence indicates complainant's road is worth.

In *Missouri Pacific Railway Co. v. Kansas*, supra, there was no attempt upon the part of the state to close the doors of the courts to the corporation. The right to seek judicial review was expressly accorded to it. In the event that the decision was against it, no penalties beyond payment of the costs of the litigation were apparently imposed upon it.

The power of the courts to declare invalid an act of the Legislature is one which should never be exercised in doubtful cases. The policy or the wisdom of the statute is something with which the courts have no concern. Even when its validity is assailed because it is said to take away property without due process of law, or to deny to the complainant the equal protection of the laws, it perhaps should not be stricken down unless what it does or attempts to do is something which the average fair-minded and disinterested man, whether lawyer or layman, would, if he knew the facts, feel to be unfair and unjust.

I am constrained to believe that such men would feel that to fine a corporation heavily for not spending more money in serving the public than the public will pay for all the services rendered by the corporation is neither fair nor just. Fortunately the consequences of holding the act unconstitutional are not so serious as they once might have been. It may well be that the complainant can reasonably be required to do more for the public either by giving the public lower rates or better service. If so, it is no longer necessary to wait for another session of the Legislature. The Public Service Commission of the state has ample power to deal with all such questions so far as they relate solely to intrastate traffic.

Subject to final review by the courts, if that review be properly sought, the Commission may make such orders and regulations as to it seems wise and just.

For the reasons already stated, the preliminary injunction will be made permanent.

In view of the fact that the respondents have no other interest in the matter than that resulting from their duty to enforce the criminal laws of the state, no decree for costs will be made against them.

MILLER v. UHLMAN et al.

(District Court, D. Oregon. June 3, 1912.)

No. 3,571.

1. REFORMATION OF INSTRUMENTS (§ 45*)—SUIT IN EQUITY—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* insufficient to sustain the burden of proof resting on a complainant to establish mistake or fraud which would entitle him to a reformation of contracts by the terms of which he bound himself jointly with a tenant to sell and deliver to defendants a stated quantity of hops each year for five years, to be raised on the leased land of which complainant was owner.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

Reformation of instruments as dependent on mutuality of mistake, see note to American Ass'n v. Williams, 93 C. C. A. 10.]

2. EQUITY (§ 199*)—CROSS-BILL—JURISDICTION OF SUBJECT-MATTER.

In a suit by the owner of land which he had leased for a term of 10 years to reform certain contracts by which he had bound himself jointly with his tenant to sell and deliver a stated quantity of hops each year for five years, where it appeared that advances by the purchasers were made to complainant to be disbursed by him to aid the tenant in raising and harvesting the hops, a portion of which he retained and applied on rentals and other indebtedness due from the tenant to him, a cross-bill by the tenant for an accounting in respect to such advances is germane to the bill, and the court may retain jurisdiction to determine the damages sustained by the tenant by reason of an alleged wrongful ouster from the leased premises.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 463, 464; Dec. Dig. § 199.*]

3. LANDLORD AND TENANT (§ 132*)—WRONGFUL DISPOSSESSION OF TENANT.

A Chinese tenant of a farm under a lease for 10 years which contained no provision for forfeiture for nonpayment of rent, nor for termination by notice, but who was forced by a series of annoyances and intimidations to leave the premises pursuant to a notice to quit, *held* to have been wrongfully ousted, and to be entitled to recover the damages thereby sustained.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 460-464, 467-469; Dec. Dig. § 132.*]

In Equity. Suit by Nicholas Miller against William Uhlman, William J. Wanmaker, Ferdinand Goebel, and J. M. Kaufman, partners under the firm name of S. & F. Uhlman, and Chin Toy. On final hearing, on bill and cross-bill by Chin Toy. Decree for cross-complainant.

This is a suit instituted by Nicholas Miller against William Uhlman, William J. Wanmaker, Ferdinand Goebel, and J. M. Kaufman, copartners in business under the firm name of S. & F. Uhlman, and Chin Toy, a Chinaman, praying for a decree reforming four certain hop contracts, the same having been entered into on February 24, 1908, between the complainant and Chin Toy, designated in the contracts as "seller," and S. & F. Uhlman, designated as "buyer," whereby the former agreed to produce on certain premises and to sell, and the latter agreed to buy, 30,000 pounds of hops for each of the years specified in the respective contracts, namely, 1909, 1910, 1911, and 1912, at the stipulated price of 11 cents per pound. Among other things, it is stip-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ulated that the buyer shall advance to the seller, as part payment under the contract for each year, \$200 on or about February 24th, \$250 on or about May 1st, and \$1,350 on or about September 1st, or so much thereof as is actually required for cultivating, picking, drying, and baling purposes, the balance of the payments to be made upon the delivery of the hops. Previous to the execution of these contracts, namely, on March 8, 1905, Miller, by an indenture of lease duly executed, leased to Toy, the Chinaman, the lands and premises upon which the hops were to be grown for the term of 10 years beginning April 1, 1905, at a rental of \$210 for the first year, and \$259, payable half-yearly, for each and every year thereafter. By a stipulation in the lease, it is provided that Toy will erect on said premises two substantial houses for drying hops, and a house for storing the same. The buildings, by another stipulation, are to be delivered up by Toy to Miller at the termination of the lease. One Charles B. Young guaranteed the faithful performance of the terms of the lease on the part of Toy. Complainant alleges, in effect, that during the negotiations between M. H. Gilbertson, who was the recognized agent for S. & F. Uhlman, and Toy for the production and sale of the hops, Gilbertson requested that the complainant, Miller, should become disbursing agent under the contracts, and should receive and handle all the moneys for the Chinaman, to ward against any misapplication of the funds by him, and that thereupon it was agreed between the parties, including Toy, that Miller should be the disbursing agent of the defendants S. & F. Uhlman, and should receive and handle the money for Toy, and see to the proper application of the same towards the cultivation and harvesting of said hops, for which service Miller was to receive as his remuneration one cent per pound which was included in the contract price for the hops; that Gilbertson fraudulently represented to Miller, for the purpose of inducing him to sign said hop contracts, that such signing by him jointly with Toy would be necessary to entitle him to receive, as such disbursing agent, his one cent per pound for the hops produced and sold, and positively assured Miller that his character in regard to said contracts was that of agent, and not as a contractor respecting the hops; that, as further inducement for Miller to sign such hop contracts, Gilbertson represented that it was necessary for him so to do in order to release his rights against the hop crops for the rental stipulated to be paid by Toy to Miller under the lease for the premises upon which the hops were to be grown, and thereby render the said hops free from incumbrance to the buyer; that at the time of the execution of the hop contracts Toy gave Miller a writing whereby, in consideration of services rendered and to be rendered in connection with the hop contracts, he agreed to pay to Miller one cent per pound for each pound of hops delivered under such contracts. It is further alleged that said contracts were never read over to or by Miller, and that Gilbertson and Benedict, another agent for S. & F. Uhlman, positively assured Miller that by signing said contracts he was signing to constitute himself disbursing agent only, and would not thereby render himself in any manner responsible as principal for the production and sale of the hops along with Toy, and that Miller, relying upon said representations, and without reading the contracts, was deceived and overreached by them, and induced to execute the said contracts in tenor as set out in the bill.

Prior to the commencement of this suit, S. & F. Uhlman instituted an action against Miller for the recovery of damages for his refusal to make delivery of the hops grown on the premises designated in the year 1909 in accordance with the terms of the hop contract pertaining to that year. The prayer is for a decree permanently enjoining further prosecution of this action, as well as a reformation of the said hop contracts. The defendants S. & F. Uhlman controvert the allegations of the bill, and by a cross-bill set up the execution of said hop contracts by Miller, the advancement to him of the moneys as stipulated for the production of the 1909 hop crop, and \$100 additional, and the further performance of the terms of said contract on their part in all respects. They also allege a breach of the contract on the part of Miller in his refusal to deliver the hops as stipulated to be delivered for that year, namely, 30,000 pounds, for which damages in the sum of \$6,100

are claimed and demanded. General damages in the sum of \$4,500 are likewise demanded for a breach and refusal on the part of Miller to perform the contracts for the delivery of hops in the years 1910, 1911, and 1912. Chin Toy has also interposed a cross-bill, complaining of Miller, in that he has violated his contract of leasing with Toy and wrongfully ousted him from the premises, and he seeks an accounting with Miller for moneys received by the latter under the terms and stipulations of the hop contracts and from other sources, and not paid to Toy, and for damages for a breach of the said contract of leasing, whereby Toy was ousted. On the issues thus presented, the cause was submitted to the court under the evidence for determination upon the merits.

Carson & Brown, of Salem, Or., for complainant.

Teal, Minor & Winfree, of Portland, Or., for S. & F. Uhlman.

John H. Woodward, Jerry E. Bronaugh, and Loyal H. McCarthy, all of Portland, Or., for Chin Toy.

WOLVERTON, District Judge (after stating the facts as above). [1] From the testimony it would seem that Chin Toy first broached the subject of a contract respecting the production and sale of the hops from the premises held under lease by him from Miller to George H. Benedict, agent of S. & F. Uhlman, along with Gilbertson, who informed him (Toy) that he should have the owner of the premises sign with him. Toy, having indicated that Miller would sign with him, was told to bring Miller over to Aurora to see Gilbertson, and make the necessary arrangements. Miller relates that Gilbertson wrote him to come over to Aurora, and that he went in response thereto. On his arrival, a conversation occurred between him and Gilbertson, as follows:

"He said, if I would act as agent between him and the Chinaman, he would give the Chinaman 10 cents a pound for his hops, although he said he had made contracts for 9½ of my neighbor Mr. Sears, and I told him that I did not care to do it, and he said he would not give the money any other way to the Chinaman, that he would make a contract with him to raise the hops for 10 cents a pound, and that he would give me 1 cent, and that I could make what he owed me in a few years out of it in that way. Well, we talked it over, and I agreed to act as agent in that way, and in a day or two he told me to come down to Portland, and that they would try and arrange it, and I did, and they made an arrangement with the Chinaman."

On being asked what was said and done in Benedict's office in Portland, before signing the contracts, Miller says:

"I asked Mr. Gilbertson what he wanted me to do, and he said he wanted me to release the lien that I had on the crop to make it possible for them to get the crop from the Chinaman, and by my signing the contract that the money would go through my hands as their agent, that any money that was over and above what was furnished the Chinaman would be to my credit, and that I could get some of my indebtedness in that way. If I did not sign the lease, that they could not give the Chinaman a contract for 10 cents a pound, and, if I would sign it, that I would protect them from the Chinaman. * * * The Chinaman was to get 10 cents a pound, and Mr. Gilbertson said they would give 11 cents, and that I would get 1 cent for acting as agent between them. * * * Eleven cents was given in order that there would be an opportunity to give me 1 cent for my services as agent."

Being asked who was to pay the one cent, he further testifies that:

"Chin Toy or the hops, the quantity of hops. I was to get 1 cent. They fixed it so that I should get 1 cent, and they got the Chinaman to pay that

when the hops would be received. I was to get 1 cent, and the Chinaman 10 cents."

Miller testifies that his duties were to be "to receive the money and disburse it for producing the hop crop and to protect them, and to see that the Chinaman used the money for raising the hops." He further relates that in signing the contracts he never inspected them; that Benedict read the matter pertaining to the price they were to pay and the time they would receive the hops, and then called for Miller's signature; that he (Miller) raised a question as to his responsibility for the production of the quantity stipulated, and that Benedict replied that:

"It was only a form that they had printed, that the company had printed, and that it was more red tape than anything else, and that I would not be responsible for that at all. I asked him why he described my farm, and he said it was necessary to do that because the hop yard had not been platted and that they could not separate the hop yard, and that they had to take the whole farm in order to have the hop yard correctly mapped out, or something to that effect."

Witness further says:

"I was signing the lien that I had away, as I was told that they could not make a contract if I did not sign away the mortgage that I had on the crop, and by signing it I would allow the Chinaman an opportunity of giving them the hops. * * * I did not read them [the contracts] at all, and I had no glasses at the time. Even if I had, I could not have read the print—what was printed in it. He called it red tape. He only read the part in regard to when he would give the money to produce the crop, so much in February and so much in May, I think it was, and so much in the fall to pick them. It was understood right along that I was not held responsible for the Chinaman at all, that I was only to be between them and the Chinaman to protect them. Mr. Benedict himself laughed at the idea that I was to be responsible, living in Woodburn. He said: 'How could we hold you responsible? You are not living there at all.' * * * Gilbertson said the same thing. Mr. Gilbertson seemed to be the principal man that was contracting. Mr. Benedict was the man, they said, who wrote those contracts. I thought there would be one contract, and when they signed them there was five of them, and I signed them after he said finally that it was the purpose to place me in position that I would not take any advantage of the Chinaman when he had the crop ready to receive, because I held a mortgage, and they said, of course, it would always be possible, if the Chinaman did not treat me right, that I might crowd him. And that was understood at Aurora, with Mr. Gilbertson and myself, that they were working as they claimed for my interest as he was owing me, and that I could get some of my money out of the Chinaman year by year."

Along with this is a supposed admission of Gilbertson to the effect that it was thoroughly understood that all the money to be advanced by S. & F. Uhlman was to pass through the hands of Miller.

Such is the evidence, together with proper inferences to be drawn from the way in which the negotiations were consummated and the manner of observing the supposed stipulations of the parties, upon which the complainant relies for relief, in reforming the hop contracts.

As against this testimony, both Benedict and Gilbertson testify positively and unreservedly that such was not the understanding and purpose of the parties in executing the contract; that the understanding was none other than such as is expressed in detail in the writings

themselves. Although Miller saw Gilbertson at Aurora, and had some discussion about the matter, the final consummation of the contracts took place in Portland, at the office of Benedict and Gilbertson, in the presence of Miller, Benedict, Gilbertson, Toy, and another Chinaman. Benedict says that, after the papers were prepared, Miller made some sort of objection to signing, but that he was told, if he did not sign then, that the deal would not be made. Thereupon a discussion was held between Miller and Toy with reference to what Toy would pay Miller, and, it being agreed between them that Toy should pay one cent per pound upon all hops delivered under the contracts, Miller signed the contracts without further question. Benedict further says that they gave Miller the contract to read, and there was some discussion about his responsibility, which he refused to assume unless the Chinaman would pay him the one cent per pound commission. Witness flatly denies that there was any arrangement entertained or entered into to the effect that Miller was to act as the agent for S. & F. Uhlman in disbursing the moneys to be paid to Toy for producing the hops, or that Miller was so to act as the agent of the buyers, or as their agent in any respect. He relates, further, that it was understood from the beginning that they were to pay Toy 11 cents per pound, and not 10 cents, as claimed by Miller, and that the 1 cent per pound was to be paid by the Chinaman out of his receipts, and not by the buyers, as compensation to Miller over and above what Toy was getting. Gilbertson corroborates Benedict in every respect. Aside from this, Miller, in effect, admitted to Mr. Woodward, attorney for Toy, that he and Toy had entered into a contract with S. & F. Uhlman for the delivery of 30,000 pounds of hops for five years consecutively.

The question presented at this point is purely one of fact, namely, whether complainant has made out a case for the reformation of these contracts. The burden of proof is with him, and, further, he is required to substantiate his contention by clear and convincing testimony, so that it may appear to a moral certainty that he is right in his position. At the outset the contracts stand against the complainant. Presumptively they were fairly executed, and truly represent the ultimate agreement of the parties. This Miller must impeach before he can establish his contention. He would avoid them on the ground of mistake on his part, coupled with fraud on the part of Benedict and Gilbertson in misleading him into the belief that he was signing contracts of entirely different import, his understanding being that he was entering into contracts to become a disbursing agent only for S. & F. Uhlman, from whom he was to receive his pay, and not a joint contractor with the Chinaman, receiving from the latter a consideration for the liability he was assuming. The two theories are very wide apart, and it seems hardly possible that there could have been any mistake about the effect of the transaction. Beyond the fact that Miller is contradicted by two witnesses is the fact attending the transaction of Toy giving to Miller directly a stipulation to pay him 1 cent per pound for each pound of hops delivered, in consideration

of services rendered and to be rendered in connection with the hop contracts, from which the clear inference is that Toy was to receive the 11 cents per pound, and that out of it he, not S. & F. Uhlman, was to pay Miller. The relations of Toy to Miller in previous business transactions have a bearing upon the question. Toy was a renter from Miller, and was obligated to pay him the stipulated rentals. Toy was also supposed to be indebted to Miller, and the latter held a chattel mortgage as security, so it was to his interest that Toy should be able to dispose of his hops, and at the same time that Miller should be put into a position to handle the proceeds. He would thus be the better enabled to obtain both his rentals and the debt due him from Toy. Miller's management of the moneys paid to him indicated a purpose of securing himself rather than of acting merely as disbursing agent for the buyers, for he withheld advances from Toy when they were needed for cultivation and for meeting other expenses in producing the crops.

The evidence, taken all together, with the circumstances and conditions attending the transaction and the manner in which Miller treated the contractual relations, indicates to my mind quite clearly that the contracts themselves voice the real understanding between the parties. At any rate, it is beyond cavil that Miller has failed to make out his contention by a preponderance of evidence so as to entitle him to a reformation of the contracts. The preponderance is clearly the other way, and hence he cannot recover upon his theory of the case. I have cited no authorities, because the facts determine the controversy.

S. & F. Uhlman interposed a cross-bill along with their answer, setting up a breach on the part of Miller of the contract for the year 1909, in failure to deliver the 30,000 pounds of hops stipulated for in the contract, and praying damages therefor. Although a breach is suggested, and a tender alleged of the balance due on the contract price of the hops, the controversy pertaining thereto, if it was ever intended to be insisted upon, seems to have been lost sight of. At least, it is not now seriously pressed by either party. The bill of complaint should therefore be dismissed, and the defendants S. & F. Uhlman remitted to their action at law touching any damages they may have suffered by reason of the alleged breach.

[2] This brings us to the cross-bill of Chin Toy. It is urged that this bill should be dismissed, because, first, it is not germane to the main suit, and, second, it is not based upon equitable grounds. The cardinal purpose of the main suit is to reform the hop contracts. Whether the hop contracts are to be reformed or not, there is involved a fiduciary relationship between Miller and Toy, because the money advanced for the growing of the hops was to pass through Miller's hands, and the final payment for the crop was to be made to him, so that he, in a sense, became the financial agent for Toy in relation to these hop contracts. Miller as complainant has also set up the lease between himself and Toy, and claims that Toy abandoned it. This Toy denies, and alleges that he was wrongfully ousted from the premises covered by the lease. Thus is injected into the record the controversy about the lease. Toy's cross-bill sets forth the mat-

ters proper for an accounting between him and Miller, which appeals to the jurisdiction of equity, and the matter alleged touching the lease is responsive to the bill of complaint, so that the cause asserted by the cross-bill would seem to be both germane to the principal case and equitable in its nature. True, the question of damages arising from a wrongful ouster of Toy from his lease is properly the subject for an action at law, but the court of equity having jurisdiction for the accounting will retain jurisdiction to determine the amount of damages resulting from the ouster, especially as the accounting involves the rentals growing out of the leasing.

Complainant Miller, answering Toy's demand for an accounting, sets out by an exhibit designated "A" an account for rent claimed to be due upon the lease. He claims credit for the rent beginning with the execution of the lease and extending to April 1, 1909, aggregating with interest charges \$1,301.56. Against this he gives Toy credit for payment by cash, \$209.50, leaving a balance due Miller of \$1,092.06. Exhibit B is a statement of the general account between Miller and Toy. The statement is really divided into four distinct statements or sections. The first runs from March 31, 1906, to and inclusive of November 24th, last item appearing. By this account Miller charges Toy in the aggregate of the items set out with \$2,689.42, and credits him with \$2,125, leaving a balance due Miller of \$564.42. The second statement comprises two items of charge against Toy, namely, September 1, 1907, \$500, and December 31st checks \$295, aggregating \$795. Against this there is no credit. The third statement begins with April 6, 1908, and ends with December, within which time Toy is charged with \$2,031.23, and is given credit for \$2,677.50, showing a balance in his favor in the sum of \$646.27. The fourth simply consists of a charge for \$100, money advanced March 27, 1909. Against this there is no credit. Miller's balance of claim in the accounting against Toy, after deducting the credit of \$646.27, is \$1,905.21.

A great deal of testimony has been taken respecting these accounts; the many items thereof having been gone into with infinite detail. In the course of Miller's examination as a witness in his own behalf, a receipt signed by him for the sum of \$396.50, bearing date March 13, 1907, was introduced, which purports to be "in full of all claims and rent due April 1st/07, except potato a/c." Miller afterwards explains that this receipt did not include the notes. But in this he is evidently mistaken. The notes given by Toy to Miller prior to the date of this receipt were one for \$700, of date April 17, 1906, and one for \$220, of date November 17, 1906. On December 7, 1908, Miller rendered a statement to Toy of the latter's indebtedness to him, aggregating \$1,449.23, in which the item of the \$700 note does not appear. Toy testifies that he paid the \$220 note, in which testimony I think him worthy of credit. This receipt, therefore, affords a landmark along the way, and one that must be relied upon. It disposes of the rent account falling due April 1, 1907, and all items prior thereto, and the entire first section of statement "B" of Miller's account. The parties must start even again from the date

of April 1, 1907, except that Toy owed Miller for 45 sacks of potatoes, which the evidence shows were worth \$1 per sack. The section of the account (Exhibit B), pertaining to 1907, consists of the two items only as above indicated. The note, however, was given for future advances, and the \$295 represents such advances. Both the note and these advances are charged to Toy, which, of course, is faulty bookkeeping. Miller, however, did some work for Toy, which he says amounted to \$265.95, and besides he furnished Toy with some kiln cloth and paid insurance on the hops, which, together with the labor account and checks, amounted to \$581. This therefore is the correct amount with which Toy should be charged in account for the year 1907. This year was an unprofitable one for Toy, as the hop crop molded on the vines, and but few hops were gathered. The section of the account (Exhibit B) comprising the year 1908, counsel for Toy admit is not open to criticism. For this year Toy is entitled to a credit balance of \$646.27. For the year 1909 the charge of \$100 against Toy is unjust, as the funds were expended in cultivation of the crop that year, of which Miller got the benefit.

Now, to return to the rent account. Toy paid the rent falling due September 1, 1907. This is evidenced by a deposit tag showing the amount deposited to the credit of Miller in the Bank of Woodburn. This would leave due Miller all the rent for 1908 and the half yearly rent due April 1, 1909, amounting to \$388.50. On or about February 26, 1909, Miller served upon Chin Toy a notice to quit and vacate the premises held under the lease, which notice purports to have been given and served for the reason that Toy failed to pay the rent due and unpaid on September 1, 1908, specified as \$259. Toy left the premises on April 5, 1909; the half yearly rent having accrued. Toy is therefore properly chargeable with that item. So that, summing up, Chin Toy, in account with Miller, should be charged:

| | |
|----------------------------|-----------------|
| With balance for 1907..... | \$581.00 |
| With rent unpaid..... | 388.50 |
| Total | <u>\$969.50</u> |

On the other side he is entitled to credit:

| | |
|---|-----------------|
| By balance for the year 1908..... | 646.27 |
| Leaving due Miller on the final accounting..... | <u>\$322.23</u> |

To which should be added the value of the

| | |
|---|-----------------|
| 45 sacks of potatoes, at \$1.00 per sack..... | <u>45.00</u> |
| Making a total of..... | <u>\$367.23</u> |

[3] Further than this Chin Toy claims damages by reason of having been ousted from the premises held under the lease and forced to abandon the lease. Respecting this issue, the first matter to be determined is whether Toy was wrongfully ousted. About the issue there need be but little said. That notice to quit bearing date February 26, 1909, was served upon Toy, is admitted, and that Toy aban-

doned the premises in response thereto is a fact hardly to be disputed. Toy relates that Miller's son asked him to give him half of the farm, meaning the hop fields, and Toy refused, and he assigns that as a reason for a good deal of his trouble with Miller. Tom Miller's son, at one time, Toy says, "tried to shoot the fence up, which scared Toy. It is evident that Toy suffered great annoyance at the hands of Miller in the way of withholding the advances made on the hop contracts, when Toy needed them for paying expenses of cultivation. The last instance which is definite and specific is, when S. & F. Uhlman made the first advance payment of \$200 for the year 1909, Miller withheld this from Toy when he needed it badly, and in the end Toy was able to obtain only \$100, after an action had been threatened. Following these differences, Miller served upon Toy the notice to quit for nonpayment of the rent for 1908, and Toy was forced, as he thought, to surrender the premises and give up his lease. Miller seeks to ameliorate the effect of the notice by saying he did not mean to force Toy off the place. His language is:

"I gave him notice. I thought it might keep him quiet so he would not bother me so much, and afterward I gave him the money, and treated him as I always had. I waived that notice. I do not know whether he understood it or not, but I waived it. I did not want him to bother me, and I thought it might keep him quiet."

By reference to the lease, it will be seen that there is no stipulation for forfeiture for nonpayment of rent, and the lease gave no authority for serving the notice to quit. The notice, however, had its effect, and Toy quit the premises, not to return. I am convinced that it was the deliberate purpose of Miller to force Toy to leave the premises and abandon his lease, and that Toy was forced to leave by a series of annoyances and intimidations. The Chinaman, being naturally timid, was so wrought upon that he was afraid to continue in the possession to which he was rightfully entitled.

Damages are claimed for the value of the unexpired term of the lease. From the proofs it cannot be seriously urged that the unexpired term has any value. A number of witnesses have testified that it costs from 10 to 11 cents per pound to produce hops and put them in the bale ready for market, and some say this is so exclusive of the rent charges. I am surprised at the testimony, as it seems strange that growers are willing to enter into contracts for the production of hops at from 9 to 11 cents per pound when they cannot be grown at a profit at those figures; but, notwithstanding, the absolute weight of the testimony is that way. Considering this testimony, along with the uncertainty of the crops, I cannot say that the unexpired term is of any certain value whatever. However, it has been shown very clearly that Toy expended \$1,820 for hophouses and buildings, which are annexed to the soil and have become permanent improvements. These revert under the lease to the owner of the land, and become his property. Toy has had the use of these houses for four years of his term, but is being deprived of their use for six years. It is equitable that he should recover from Miller the relative expenditure according to the length of the remainder of

the term, which is six-tenths of the whole, or \$1,092. Deducting therefrom the amount due Miller on the accounting, namely, \$367.-23, leaves Toy entitled to recovery against Miller in the sum of \$724.-77, and such will be the decree of the court. Miller must be taxed with the costs of the suit.

EMERY, BIRD, THAYER REALTY CO. v. UNITED STATES.

(District Court, W. D. Missouri, W. D. July 27, 1912.)

No. 3,821.

1. INTERNAL REVENUE (§ 38*)—RECOVERY OF TAXES PAID.

Under Act Cong. March 3, 1887, c. 359, 24 St. 505 (U. S. Comp. St. 1901, p. 752), as amended by Act March 3, 1911, c. 231, subc. 2, § 24, par. 20, and subc. 14, § 297, par. 7, 36 Stat. 1087, 1168 (U. S. Comp. St. Supp. 1911, pp. 138, 245), authorizing suits in the district court against the United States founded on any law of Congress, a suit to recover taxes alleged to have been wrongfully assessed and collected under the Corporation Tax Law may be brought directly against the United States, instead of being brought against the collector of internal revenue.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. § 38.*]

2. INTERNAL REVENUE (§ 9*)—CORPORATION EXCISE TAX—LIABILITY.

Under Corporation Tax Law (Act August 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]) § 38, imposing a tax on every corporation organized for profit and having a capital stock represented by shares with respect to the carrying on or doing business by the corporation, a corporation to be subject to the tax must be organized for the purpose of doing business, and, in addition, must be actually engaged in that business.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

3. INTERNAL REVENUE (§ 9*)—CORPORATION EXCISE TAX—LIABILITY.

Under Corporation Tax Law (Act August 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]) § 38, providing that every corporation organized for profit and having a capital stock represented by shares shall be subject to a special excise tax with respect to the carrying on or doing business by the corporation, a corporation, organized solely for the purpose of taking over and holding the real estate and leasehold interests owned by a dry goods corporation, leasing such property to the dry goods corporation, collecting the rents and distributing them among its stockholders, and which has actually executed a long term lease of such property to the dry goods corporation and surrendered the management and control thereof, is not subject to the tax, although it was organized under a provision of law relative to the organization of business and manufacturing corporations for profit, since, even though a corporation be deemed to have organized for business purposes, if it abstains from doing business, it is not subject to the tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

4. INTERNAL REVENUE (§ 6*)—DIRECT TAX—CORPORATIONS.

Where property owned by a corporation could not be directly taxed if owned by an individual, it cannot be so taxed solely by virtue of its corporate ownership.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 7; Dec. Dig. § 6.*]

*For other cases see same topic & § NUMBER in Dec. & AN. Digs. 1907 to date, & Rep'r Indexes

5. INTERNAL REVENUE (§ 6*)—DIRECT TAX—RENTS AND INCOME.

Taxes on real estate being direct taxes, taxes on the rents or income thereof are also direct taxes.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 7; Dec. Dig. § 6.*]

In Equity. Suit by the Emery, Bird, Thayer Realty Company against the United States of America. Judgment for plaintiff.

This is a suit by plaintiff against the United States under the act of Congress approved March 3, 1887, commonly known as the "Tucker Act," to recover certain sums paid by plaintiff, under protest, to C. G. Burton, collector of the Sixth internal revenue collection district of Missouri, at Kansas City, assessed under the corporations special excise tax law, approved August 5, 1909. The defendant contests the suit upon the grounds: First, because the cause of action arises out of the administration of the internal revenue laws of the United States, and this court is without jurisdiction to consider the subject-matter thereof; that plaintiff has brought this suit against the wrong party, and should have brought it against the collector of internal revenue for the Sixth district for Missouri; second, because, in any event, the plaintiff is a corporation organized for profit, and is doing business in the corporate capacity within the true intent and meaning of the act of August 5, 1909, and hence is liable for the tax assessed and collected.

The specific findings of fact and conclusions of law required by statute to be set forth are as follows:

Findings of Fact.

Plaintiff is a corporation organized on the 14th day of January, 1908, under the laws of the state of Missouri in such cases made and provided, and having its principal office and place of business and residence at Kansas City, in the county of Jackson, and state of Missouri, in the Western Division of the Western District of Missouri.

The purposes for which plaintiff was organized, as set forth in its articles of association are as follows, to wit:

"Seventh. That the purposes for which this corporation is formed are the following, to wit:

"(1) To acquire and hold the title to lots 'H,' 'I,' 'J,' and 'K' in block twenty-three (23) in McGee's addition to the city of Kansas (now Kansas City), Missouri, and to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following described real estate situate in Kansas City, Missouri, to wit: The south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to the city of Kansas (now Kansas City); also all of lots numbered forty-eight (48), forty-seven (47) seventy-six (76), seventy-seven (77) and seventy-eight (78) in said addition, except that portion of said lots forty-seven (47), forty-eight (48) and forty-nine (49) heretofore condemned for the purpose of widening Walnut street. Also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78); running thence north on a line parallel to the west line of Grand avenue in said city one hundred and twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet more or less to the east line of said lot numbered forty-nine (49); thence south on a line parallel to the east line of Walnut street in said city one hundred twenty-eight (128) feet more or less to the southeast corner of said lot numbered forty-seven (47); thence east sixteen and one-half (16½) feet more or less to the place of beginning. Said last mentioned strip of land having formerly been the south one hundred twenty-eight (128) feet of the alley running north and south through the block in said Swope's addition, bounded on the north by Tenth street, on the east by Grand avenue, on the south by Eleventh street and on the west by Walnut street, said portion of said alley comprised in the boundaries of said strip aforesaid having been by the order and decree of the county court of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said Jackson county, made and entered May 6th, 1889, vacated as such. Said leasehold interest being the unexpired term of a lease of said last described premises from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, Jr., and Lawrence Minot, trustees of the Boston Ground Rent Trust to the Merchants' Building Association, a corporation, said lease being dated the 11th day of April, 1890, and recorded on the 22d day of April, 1890, in the office of the recorder of deeds of Jackson county, at Kansas City, Missouri, in book B 423 at pages 184 and following, together with all the buildings and improvements situated upon all of said real estate and constituting a part thereof. And also to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following described real estate situated in Kansas City, Jackson county, Missouri, to wit: Lot numbered seventy-five (75) in Swope's addition to the city of Kansas (now Kansas City) Missouri. Said leasehold interest being the unexpired term of a lease of said last described premises from Mary S. Dickerson to said Emery, Bird, Thayer Dry Goods Company dated the first day of March, 1905, and recorded on the 4th day of March, 1905, in said office of the recorder of deeds of said Jackson county, Missouri, at Kansas City, in book B 961 at page 22, as amended by an agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 14th day of March, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in book B 1107 at page 301, and as again amended and extended by another agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 10th day of April, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in book B 1154 at page 66. And also to acquire and hold the leasehold interest of said Emery, Bird, Thayer Dry Goods Company in said last described real estate under and by virtue of a certain other lease thereof to it from said Mary S. Dickerson dated the 7th day of October, 1907, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in book B 1108 at page 450.

"(2) To carry out and perform all the terms, provisions, covenants and agreements contained in said leases mentioned in paragraph '1' aforesaid, to be kept, carried out and performed by the lessee and, its successors and assigns, and for this purpose to make such contracts, to do such acts and incur such indebtedness as may be necessary and proper therefor; to enforce the performance of all the terms, provisions, covenants and agreements of said leases to be kept, carried out and performed by the lessors therein and their successors and assigns, and for this purpose to make such contracts, to do such acts and institute and prosecute such suits as may be necessary and proper therefor.

"(3) To lease the property described in paragraph '1' aforesaid and every part thereof to the Emery, Bird, Thayer Dry Goods Company for such time, upon such terms and for such rental as may be from time to time mutually agreed upon, provided, however, that any such lease shall be made upon such terms and for such rentals as will produce for the benefit of the stockholders of this corporation a net dividend upon the entire capital stock of this corporation of at least six per cent. per annum, free and clear of all costs, charges and expenses of every kind whatsoever.

"(4) To sell, assign, transfer and convey the property described in paragraph '1' as aforesaid, and every and any part thereof, at such times, to such persons and on such terms and at such prices as may be from time to time determined by an affirmative vote of not less than two-thirds of the entire capital stock of this corporation, cast at a stockholders' meeting legally held."

At the time of the organization and incorporation of plaintiff, as aforesaid, a certain other corporation, to wit, Emery, Bird, Thayer Dry Goods Company, was the owner of and in possession of the real estate, leasehold interests, buildings, and improvements and all the property, described in said articles of association of plaintiff, and set out as aforesaid. Said Emery, Bird, Thayer Dry Goods Company was and still is a corporation organized under the laws of the state of Missouri, and having its office and principal

place of business at said Kansas City, Mo., and engaged in the business of buying and selling goods, wares, and merchandise in its department store in said Kansas City, and at the time of the incorporation of plaintiff was using and occupying said property for the purposes of its said business.

On the 1st day of February, 1908, said Emery, Bird, Thayer Dry Goods Company, in consideration of the sum of \$1 and other valuable considerations to it paid by plaintiff herein, granted, bargained, and sold, conveyed, and confirmed unto the plaintiff herein all its said property, real estate, buildings, and improvements, above described, by a warranty deed, a copy of which is annexed to and filed with the plaintiff's petition and marked "Exhibit B." After the execution of said warranty deed and conveyance to plaintiff of said property by said Emery, Bird, Thayer Dry Goods Company, as aforesaid, and on, to wit, the 1st day of February, 1908, plaintiff demised and let all of said property, real estate, and improvements unto said Emery, Bird, Thayer Dry Goods Company for a term of twenty-five (25) years, beginning on the 1st day of January, 1908, and ending on the 1st day of January, 1933, at and for the annual rental of \$108,000, payable in equal quarterly installments on or before the 1st days of January, April, July, and October of each and every year of said term, and for the further consideration of the promise and agreement of said Emery, Bird, Thayer Dry Goods Company to pay all the taxes on all of said premises during the continuation of said lease, also to keep all the buildings on said premises fully insured in good and solvent insurance companies for the use and benefit of the plaintiff and in its name and also to pay all the rentals and charges falling due on leasehold premises, aforesaid, and to keep and perform all the obligations and conditions contained in said original leases of said premises to be kept and performed by the lessee therein and to save harmless plaintiff from all rentals, charges, and obligations of said original leases, a copy of which lease is annexed to and filed with plaintiff's petition, and marked "Exhibit C."

Upon the execution of said lease, said Emery, Bird, Thayer Dry Goods Company in pursuance thereof and thereunder entered into the possession of all of said premises so leased to it by plaintiff, and continuously since that time hitherto has been and still is in exclusive possession thereof, performing all the terms and obligations of said lease. Said leasehold interest under said lease from John Quincy Adams et al., trustees of the Boston Ground Rent Trust, to the Merchants' Building Association, mentioned in said articles of association of plaintiff, was and is the unexpired portion of the term of 99 years, beginning on the 1st day of April, 1890, as set forth in said lease, a copy of which is annexed to and filed with plaintiff's petition, and marked "Exhibit D." Said leasehold interest, under said lease from Mary S. Dickerson, dated March 1, 1905, mentioned in said articles of association and under the agreements of modification and extension thereof, mentioned therein, was and is the unexpired portion of the term of 15 years expiring on the 1st day of March, 1920, as appears from copies of said lease, agreement of modification, and agreement of extension thereof, attached to and filed with plaintiff's petition and marked, respectively, "Exhibit E," "F," and "G." Said leasehold under the lease of said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, mentioned in said articles of association under a lease dated the 7th day of October, 1907, is for a term of 69 years, beginning on the 1st day of March, 1920, and expiring on the 1st day of March, 1989, as appears from a copy of said lease, annexed to and filed with plaintiff's petition, and marked "Exhibit E."

On the 26th day of February, 1910, one C. G. Burton, the collector of United States internal revenue for the Sixth district of the state of Missouri, claiming to act under section 38 of the act of Congress entitled "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," approved on the 5th day of August, 1909, and claiming that plaintiff was required under the terms of said act to make return of its income for the year 1909, under the penalties in said act provided for its failure therein so to do, required plaintiff to make the

return as required by said act and in the form provided therefor. Plaintiff did on said 26th day of February, 1910, under protest, make such return showing its total income for the year 1909 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of \$108,000, as aforesaid. By the terms of said protest, plaintiff claimed that it was under no legal obligation whatever to make such return or any return whatever of its net annual income for the year 1909 or to furnish any of the information called for in such return. Plaintiff further claimed in said protest that its entire income was derived solely from the rents of land and real estate belonging to it, and that for that specific reason, in addition to other reasons, it was not required to make any return of its said income and in said protest. Plaintiff further claimed that said section 38 of said act of Congress (Act Aug. 5, 1909, c. 6, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, 946]) was unconstitutional and void, and that its return was made under protest and solely for the purpose of avoiding the penalties or attempted enforcement of the penalties mentioned in said act. A copy of said protest is attached to and filed with plaintiff's petition and marked "Exhibit I." The only income of plaintiff for the year 1909 was said sum of \$108,000 paid to it by said Emery, Bird, Thayer Dry Goods Company as rental of the property, above described, in accordance with the terms of said lease from it to said Dry Goods Company.

On the 6th day of May, 1910, said C. G. Burton, collector as aforesaid, served upon the plaintiff notice of and demand for taxes assessed against it on its said income, a copy of which notice and demand is annexed to and filed with plaintiff's petition and marked "Exhibit J." By said notice and demand said collector notified plaintiff that it had been assessed upon its said return for the year 1909 a tax under said act of Congress in the sum of \$1,030, and that said tax would become due and payable on or before the 30th day of June, 1910, and that, unless the same were paid, it would become his duty to collect the same with a penalty of 5 per centum additional and interest at the rate of 1 per centum per month. On the 28th day of June, 1910, plaintiff paid to said collector the sum of \$1,030 in payment of said tax, and paid the same under protest and unwillingly and because of requirement and demand of said collector aforesaid, and to prevent proceedings to compel the payment thereof, together with interest and penalties, as set forth in said demand of said collector made on said 6th day of May, 1910, as aforesaid, and, at the time of said payment notified said collector that it intended to sue for the money thereby paid, that said protest was in writing, and a copy thereof is annexed to and filed with the petition of plaintiff, and marked "Exhibit E."

On the 21st day of February, 1911, said C. G. Burton, collector as aforesaid, claiming to act under said section 38 of said act of Congress, and claiming that plaintiff was required under the terms of said act to make return of its income for the year 1910 under the penalties therein provided for its failure therein so to do, required plaintiff to make a return as required by said act and in the form provided therefor. On the 21st day of February, 1911, plaintiff did under protest make such return showing its total income for the year 1910 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of \$108,000, as aforesaid; that by its said protest plaintiff claimed that it was under no legal obligation whatever to make such return or any return whatever of its net annual income for said year 1910, or to furnish any of the information called for in such return, and further claimed that its entire income was derived solely from the rents of land and real estate belonging to it, and for that specific reason, in addition to other reasons, it was not required to make any return of its said income, and further claimed that said section of said act of Congress was unconstitutional and void, and that its said return was made unwillingly and under protest and solely for the purpose of avoiding the penalties or attempted enforcement of the penalties mentioned in said section 38 of said act of Congress, that said protest was in writing, and a copy thereof is annexed to and filed with plaintiff's petition, and marked "Exhibit L." The only income of plaintiff during said year 1910 was said sum of \$108,000 re-

ceived by it as rental from said Emery, Bird, Thayer Dry Goods Company under said lease to said Dry Goods Company as aforesaid.

On the ——— day of March, 1911, said C. G. Burton, collector, as aforesaid, served upon plaintiff a certain notice of and demand for taxes assessed upon its said return, and thereby notified plaintiff that a special excise tax under the provision of said section 38 of said act of Congress, amounting to \$1,030, had been assessed against it by the commissioner of internal revenue and transmitted to him for collection, and that said tax was due and payable on or before the 30th day of June, 1911, a copy of which said notice and demand is annexed to and filed with plaintiff's petition and marked "Exhibit M." On the 16th day of June, 1911, plaintiff paid to said collector said sum of \$1,030 in payment of said tax, and paid the same under protest, and only because of the requirement of said collector and to prevent proceedings to compel collection together with interest and penalties as provided in said act. At the time of said payment, plaintiff delivered to said collector its written notice of protest to the effect that said payment was unwillingly made and under protest, and that said tax was illegal, invalid, and improperly assessed, and that said payment was made under protest, and only because of the requirements of said collector and to prevent proceedings to compel the payment thereof together with interest and penalties, and notified said collector that it intended to sue for the money thereby paid, a copy of which said notice of protest is annexed to and filed with said plaintiff's petition, and marked "Exhibit N."

After the payment of said two sums of \$1,030 each aggregating the sum of \$2,060, as aforesaid, to said collector of internal revenue of the United States for the Sixth district of Missouri, said collector paid the same over to the United States, the defendants in this suit, who have since retained, and are now retaining the same. Said payments were made by plaintiff unwillingly and on compulsion and under duress for the purpose of avoiding the penalties provided by said act of Congress for a failure to pay the same, and also for the purpose of preventing said collector from taking steps to collect the same together with interest and penalties, as provided in said act of Congress, and from proceeding against plaintiff and its property and levying upon its property, and to prevent the collection by said collector as he was then and there threatening to do.

Plaintiff was not, at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress, and was not, as a matter of fact, engaged in or doing any business in said years 1909, 1910, and 1911, or any of them, and during said years did not in fact act in any corporate capacity, except to hold the usual meetings of its stockholders for the election of directors and the usual meetings of its directors for the election of its officers and for the receipt of the rentals reserved under said lease from it to said Emery, Bird, Thayer Dry Goods Company of the property aforesaid, to wit, said sum of \$108,000 yearly and the distribution of such rentals as dividends to its stockholders in accordance with its said articles of association. On the 30th day of June, 1911, plaintiff filed with said C. G. Burton, collector as aforesaid, in the form required and provided by law, and in accordance with the regulations of the Secretary of the Treasury in such cases made and provided, its claim for the refund and repayment of said taxes paid by it as aforesaid, which said claim was by said collector transmitted and submitted to the commissioner of internal revenue, and thereupon and thereby plaintiff appealed to said commissioner of internal revenue for a refund and repayment to it of said sum of \$2,060, claimed by it to have been illegally and wrongfully collected from it as aforesaid. On the ——— day of July, 1911, said collector refused and rejected said claim and every part thereof, and refused to refund said sum of \$2,060, or any part thereof, to plaintiff. Plaintiff's suit herein was filed on the 10th day of February, 1912, and due service thereof had upon the United States district attorney within and for the Western district of Missouri, and upon the Attorney General of the United States, as provided in the acts of Congress in such cases made and provided.

This suit is brought under the provisions of the act of Congress approved March 3, 1887 (chapter 359, 24 Statutes at Large, p. 505), commonly called the "Tucker Act," as amended by the provisions of chapter 231, subc. 2, § 24, par. 20, and subchapter 14, § 297, par. 7, of the act of Congress entitled "An act to codify, revise and amend the laws relating to the judiciary" approved March 3, 1911 (36 Statutes at Large, pages 1087, 1168); that this suit is brought by the plaintiff against the United States of America, and not against the collector of internal revenue.

Conclusions of Law.

Plaintiff was not at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation required by the said act of Congress to make return of its income under said act of Congress, and was not and is not liable to be assessed or compelled to pay said tax so assessed upon and levied against it during said years or any of them. Plaintiff was not during the years 1909, 1910, and 1911, or any of them, and is not now, doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress. Taxes for the years 1909 and 1910 were illegally assessed against and levied upon plaintiff, and it is entitled to recover the same in this suit.

Smart & Strother, of Kansas City, Mo., for plaintiff.
Leslie J. Lyons, U. S. Atty., of Kansas City, Mo.

VAN VALKENBURGH, District Judge (after stating the facts as above.) Briefly recapitulated, the questions presented are these: First. Can the plaintiff bring suit to recover taxes, alleged to have been wrongfully assessed and collected under the Corporation Tax Law, directly against the United States under the Tucker Act, other requirements of law having been complied with, or is its remedy against the Collector of Internal Revenue by whom the assessment and collection were made? Second. The Emery, Bird, Thayer Dry Goods Company, a business corporation of Kansas City, Mo., originally was the owner of and was in possession of the real estate, leasehold interests, buildings, and improvements upon and in which its business was conducted. On or about February 1, 1908, 18 months before the passage of the Corporation Excise Tax Law, it was decided by its stockholders and officers to transfer these holdings to a corporation to be organized under the laws of the state of Missouri as the Emery, Bird, Thayer Realty Company, the plaintiff in this action. This corporation was organized for the specific purpose of holding such real estate and leasehold interests, buildings, and improvements and of leasing the same to the Emery, Bird, Thayer Dry Goods Company, and no other, for a long period, the latter company under the lease to have the entire management and assume all responsibilities respecting such properties. The stockholders of the plaintiff company were to be and are substantially identical with those of the Emery, Bird, Thayer Dry Goods Company; the only exceptions being members of the families of two of the officers of the Dry Goods Company. The Realty Company thus holding the title was to retain the single duty of collecting the rentals under this lease, and pay the same as dividends to the stockholders. It also possesses under the lease the general power to enforce the terms of that lease and protect its title to the property. When the lease expires, if no renewal thereof is made,

it may, upon a sufficient vote of the stockholders, dispose of the properties, and presumably distribute the proceeds to the stockholders. This would amount to a liquidation of the affairs of the corporation, because no other powers to do business are granted by the charter. Under such circumstances, is it a corporation doing business within the meaning of the act of August 5 1909, and subject to the excise tax therein provided?

[1] 1. The first question is no longer an open one in this jurisdiction. The precise question was before the Court of Appeals for this circuit in *Christie-Street Commission Co. v. United States*, 136 Fed. 326, 69 C. C. A. 464. It was there held:

"A claim to recover back internal revenue taxes illegally exacted under a misconstruction of the war revenue law of 1898 is a claim founded upon a law of Congress, within the meaning of the act of March 3, 1887, and it may be enforced by an action directly against the United States under that act, after it has been presented to the commissioner of internal revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort."

In the opinion Judge Sanborn said:

"The acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the king can do no wrong. There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. There is no reason why a government should not submit its controversies with its subjects to adjudication, or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs as universally as individuals. The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view."

All the decisions of the Supreme Court of the United States now urged by counsel for the government, which have any bearing upon the matter in dispute, were urged upon the attention of the Circuit Court of Appeals by the writer of this opinion, then counsel for the United States, and received full consideration. To seek a decision in conflict with the doctrine announced in *Christie-Street Commission Co. v. United States*, *supra*, is to ask this court to disregard the deliberate judgment of a superior court of controlling authority. Apart from all other considerations, such a policy would lead to instability and endless confusion, and is indefensible from every point of view. Furthermore, the doctrine announced in that case commends itself to my judgment. I am unable to perceive either justice or advantage in the procedure upon which the government insists.

[2, 3] 2. It remains to be considered whether the plaintiff is a corporation by a proper construction of the act made subject to pay annually a special excise tax. Section 38 provides:

"That every corporation * * * organized for profit and having a capital stock represented by shares * * * organized under the laws of the

United States or of any state or territory of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year."

Subject to exceptions enumerated:

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, * * * received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property."

This act has been exhaustively and minutely considered and construed by the Supreme Court of the United States in the cases of *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, *Eliot v. Freeman*, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424, and *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428. In the case first cited it was held that the tax is imposed upon the doing of business of the character described; that it is business done in a corporate capacity which is the subject-matter of the tax imposed in the act under consideration; that the requirement to pay such taxes involves the exercise of the privilege, to wit, that of doing business in such corporate capacity; that, therefore, the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable. *Thomas v. United States*, 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481. On page 171 of 220 U. S., on page 357 of 31 Sup. Ct., 55 L. Ed. 389, Ann. Cas. 1912B, 1312, it was said:

"We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

We gather from this that the corporation subject to the tax must be organized for the purpose of doing business, and, in addition thereto, must be actually engaged in such activities. The case of *Eliot v. Freeman* involved joint-stock companies not organized under the laws of the state. For this reason, it was held that the law did not apply.

A more specific consideration of the act, as applied to a subject such as is now before us, is disclosed in the case of *Zonne v. Minneapolis Syndicate*. There the corporation, as was admitted by the pleadings, was originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor. Subsequently it demised and let all of the tracts belonging to it to three trustees for the term of 130 years, at an annual rental of \$61,000, to be paid by said lessees to said corporation. At that time the corporation caused its articles of incorporation, which had theretofore been those of a corporation organized

for profit, to be so amended as to show that the sole purpose of the corporation should be to hold the title to the property subject to the lease aforesaid, and, for the convenience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrued under this lease, and the proceeds of any disposition of the land. Its sole function then was to collect the rents and distribute them as dividends to its stockholders, and ultimately to dispose of the property and distribute the proceeds. This is what is actually done by the plaintiff corporation in this case. Defendant contends that because its articles of incorporation, which were originally those of a corporation organized for profit, have not been amended, as was done in the *Zonne Case*, it necessarily remains a corporation organized for and engaged in business, and is therefore subject to the tax. In the *Minneapolis Syndicate Case* the court said:

"As we have construed the Corporation Tax Law (*Flint v. Stone Tracy Co.*, supra, at page 107 of 220 U. S., at page 342 of 31 Sup. Ct., 55 L. Ed. 389, Ann. Cas. 1912B, 1312), it provides for an excise upon the carrying on or doing of business in a corporate capacity. * * * The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property. Its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909." *Zonne v. Minneapolis Syndicate*, supra, at pages 190, 191, of 220 U. S., at page 362 of 31 Sup. Ct., 55 L. Ed. 428.

The only difference between that case and the case at bar which could possibly militate to the disadvantage of the plaintiff herein is that here there has been no act of reorganization of the corporation by the terms of which it has disqualified itself from any activity in respect to the property. But by its lease it has done so as effectively as did the Minneapolis Syndicate. There the property was leased to trustees at a fixed sum and for a long period. In each case the lessor has wholly parted with the control and management of the property; provided, of course, the terms of the lease are observed. In the Minneapolis case the corporation was originally engaged in the business of letting stores and offices in a building owned by it, but indiscriminately to various tenants after the usual manner of renting such a property. Here, the corporation was specifically organized for the purpose merely of holding the title to the property, and of renting it to a specific tenant. I am of opinion that this does not disclose an organization for business purposes as contemplated by the act. True, the corporation was organized under the chapter relating to business and manufacturing corporations, but that is because this is the only chapter applicable to such a corporate existence. Its purposes may well

satisfy the requirements of the Missouri statute, without bringing them within the purview of the act of Congress. The power of ultimate sale and distribution of proceeds is alike in both cases, as is the express or implied power as title holder to enforce the provisions of the lease.

I cannot believe that the act of reorganization and amendment of charter was controlling in the *Zonne* Case. It was present, and was recited as adding additional force to the construction there adopted. But, as we have seen, two things must concur to render a corporation subject to this tax. It must be organized for the purpose of doing business, and it must be actually engaged in that business. The Minneapolis Syndicate after the demise of the property to the trustees—a single tenant—was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property. In this case the Realty Company was organized to do no more than this, and, in any event, it is not actively engaged in doing more. Under the terms of this charter reorganization is unnecessary, and, if effected, would only tend to emphasize a situation already existing. As stated by the learned district attorney in his brief, "plaintiff has arranged its matters in such a satisfactory and convenient manner as to relieve it during the period of this present lease from actively participating in the management of the property in question and from being annoyed with the usual inconveniences and problems that are involved in the management and control of property generally." It has, in fact, parted entirely with the management and control of this property during the life of the lease. Its charter gives it no power to acquire other property, nor to deal in property generally. It gives it no power to lease to any one but this single tenant, nor to engage in the business of leasing property generally. It gives it no power to operate upon the expiration of this lease, in default of a renewal, but simply to dispose of the property by sale and distribute the proceeds. And even though a corporation be deemed to have been organized for business purposes, if it abstains from doing business, it is not subject to the tax. This entire transaction was completed long prior to the enactment of this excise tax law. Its object was not to defraud the government of revenue. The Emery, Bird, Thayer Dry Goods Company, a corporation, pays excise taxes upon the net income of its business. The government is not defrauded of its revenue. The net income of the Dry Goods Company is entitled to credit for all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals required to be made as a condition to the continued use or possession of property. If the title were held otherwise, the Dry Goods Company, which is the only active business corporation, would be entitled to such a deduction. This is evidently an arrangement merely for the sake of convenience in order that the capital of the dry goods corporation may not be withdrawn from its business operations and invested in lands, leasehold interests, and appurtenant buildings. The stockholders of the Dry Goods Company really own this property.

For convenience they hold it through this corporate agency. The rental paid is the income or return upon this investment.

[4] Held in the names of the individuals, the property could not be directly taxed; held in the corporate name it is taxed, if at all, only by virtue of the form of its ownership. This cannot be done.

[5] Taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; s. c., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108. The language in these opinions "was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualifications of excise duty." *Flint v. Stone Tracy Co.*, supra, at page 149 of 220 U. S., at page 348 of 31 Sup. Ct., 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

I am unable to distinguish this case in principle from that of *Zonne v. Minneapolis Syndicate*, supra, and it follows that the finding and judgment must be for the plaintiff.

DRAINAGE DIST. NO. 19, CALDWELL COUNTY, MO., v. CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Missouri, W. D. July 27, 1912.)

No. 3,783.

1. REMOVAL OF CAUSES (§ 9*)—SUITS—DRAINAGE PROCEEDINGS.

A proceeding under Rev. St. Mo. 1909, § 5592, authorizing any person whose lands are affected by a proposed drain to file exceptions to assessments for benefits, and requiring the county court to hear testimony on the questions made by the exceptions, and authorizing an appeal from an order of the court, is a suit in the county court, vested by Const. Mo. art. 6, § 36, with judicial power, within the removal statute providing that the subject of removal is any suit of a civil nature pending in a state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 27; Dec. Dig. § 9.*]

2. REMOVAL OF CAUSES (§ 48*)—SEPARABLE CONTROVERSIES—ASSESSMENTS IN DRAINAGE DISTRICTS.

Under Rev. St. Mo. 1909, § 5583 et seq., providing for the establishment of drainage districts and the assessment of benefits, assessments for benefits by a drainage district are separable controversies, and a nonresident owner may remove to the federal court the controversy involving the assessments of benefits to his land.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 94; Dec. Dig. § 48.*]

Separable controversy as ground for removal of cause to federal courts, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155; *Pollitz v. Wabash R. Co.*, 100 C. C. A. 4.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. REMOVAL OF CAUSES (§ 102*)—REMAND—DOUBTFUL CASES.

A motion to remand to a state court will be denied in case the question of the jurisdiction of the federal court is doubtful.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. § 102.*]

Proceedings by Drainage District No. 19, Caldwell County, Missouri, for assessment of benefits. Motion to remand the proceedings as affecting the Chicago, Milwaukee & St. Paul Railway Company denied.

This case was removed to this court from the county court of Caldwell county. It involves a proceeding for the construction of a drainage ditch in Caldwell and Livingston counties, Mo., and the assessment of benefits and damages incidental thereto. The following are the material facts involved:

The original proceeding was brought under article 4, c. 41, R. S. Mo. 1909, vol. 2, p. 1780. It is instituted by petition, signed by one or more land-owners, filed with the clerk of the county court. The court then appoints three resident freeholders, as viewers or commissioners, and a competent civil engineer to assist them, to view the line of the proposed ditch or improvement, and report by actual view of the premises, along and adjacent thereto, whether the proposed improvement is necessary, practicable, and would be of public utility or conducive to the public health, convenience, or welfare, and, if so, the best route for the proposed drain. Upon the filing of this report, it is the duty of the court or the clerk thereof, in vacation, to fix the time of the hearing of the petition and the report of the viewers, and to give notice thereof by publication.

Any person interested in the land that will be affected by the proposed improvement may file with the county clerk, on or before the day set for the hearing, a written remonstrance against or objection to the same, as located, setting forth his grievance, which shall be heard and determined by the court. If the court find in favor of making the improvement, the lands thereafter found to be benefited thereby shall constitute a drainage district, which shall be designated by number, and shall be a body corporate capable of suing and being sued.

Upon such finding in favor of the improvement, the county court shall make an order reappointing the formerly appointed viewers and civil engineer, directing them to go upon the land described, establish the precise location thereof, mark the intersections and boundaries of lands, determine the dimensions and form of the proposed ditch, estimate the cost, and make a report, profile, and plat of the same; also, a schedule of all lots and lands, and of public and corporate roads that will be benefited, damaged, or condemned by or for the improvement, and the damage or benefit to each tract of 40 acres or less, and make separate estimates of the cost of location and construction, and apportion the same to each tract in proportion to the benefits or damages that may result to each; also, specify the time and manner in which the improvement shall be made and completed.

Such viewers shall have the power to condemn the right of way for the ditch or other improvement; and, when damages are allowed persons, their benefits, if benefited, shall be taken into consideration, and their assessment for benefits shall be reduced by the amount of their damages; and, if not benefited, they shall be allowed and paid compensation for their damages.

Upon the filing of the report of the viewers, the county clerk shall immediately set the hearing of the same for some day of the next regular term of the county court. He shall thereupon issue, in the name of the state, a notice, directed, by name, to every person returned by the engineer and viewers as the owner of every lot or parcel of land affected by the proposed improvement or of any interest therein; and also to all others who it may in any manner be ascertained own or have any interest in such land.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The court shall then first determine whether notice has been given, and, if, so, it shall examine the report of the engineer and viewers, and if it appears to the court that the estimates of the cost of location and construction and of damages and benefits to each tract are correct, and that the apportionment is in proportion to the benefits and damages to each tract, and is in all things fair and just, it shall approve and confirm the same. Otherwise, it may amend the report upon the evidence so as to make the apportionments fair and just in proportion to the benefits and damages, and may order a change in location and dimensions, provided the parties interested shall convey or cause to be conveyed to the drainage district a right of way upon the route selected by the court.

All lands benefited thereby shall be assessed for the construction thereof whether the improvement passes through said land or not. No assessment shall be made upon any other principle than that of such benefits derived, upon the basis of benefits accorded by reason of the construction of the improvement and of giving an outlet for drainage.

Any person whose lands are affected by the proposed improvements may, on or before the day set for the hearing by the court, file exceptions to the apportionments made by, and to the action of, the viewers upon any claim for compensation or damages. The county court may hear testimony and examine witnesses upon all questions made by such exceptions, and for that purpose may compel the attendance of persons as witnesses and the production of other evidence, and its decision upon each of the exceptions shall be entered of record. Any person may appeal from the order of the court, and upon such appeal there may be determined either or both of the following questions: First, whether compensation has been allowed for property appropriated; and, second, whether proper damages have been allowed for property prejudicially affected by the improvements. Upon perfecting such appeal, and giving bond, a transcript of the proceedings before the county court relating to the land of appellant and involved in the appeal shall be duly certified and filed, together with all original papers relating to the proceedings, in the office of the clerk of the circuit court, within 30 days after filing said bond. It is expressly provided that nothing in section 5592 authorizing such appeal shall be so construed as to authorize any appellant to stay the proceedings in the county court, or to prevent progress in the work of constructing such public ditches, drains, or water courses, or other work or improvement; but said county court may proceed with said work, and any subsequent proceedings in the circuit court shall affect only the rights and interest of the appellant in property located in such drainage district.

The clerk of the circuit court shall docket said appeal, styling the appellant the plaintiff and the drainage district the defendant, and the cause shall stand for trial and be tried as other appeal cases are tried in the circuit court. After the trial and judgment in the circuit court, the clerk of that court shall retain the transcript of the proceedings in the county court and retransmit to the county clerk all of the original papers filed in his office by the county clerk, together with a transcript of the proceedings had in the circuit court, including a certified copy of the finding or verdict, and the judgment of the said court; the clerk of the circuit court shall also certify an itemized statement of the cost accruing on the appeal. After a transcript of the proceedings had in the circuit court is filed in the office of the county clerk, the county court shall cause such entries to be made on its record as may be necessary to give effect to the judgment of the circuit court.

In this case it appears that the proceedings had progressed to the point where the second set of viewers or commissioners had made their report, the day for the hearing of the same had been set, and due notice thereof had been given. At this point the railway company filed with the county court its application for removal, which was refused. Thereupon the applicant caused a transcript of the proceedings to be filed in this court, as provided by law. The drainage district then filed its motion to remand, and contends: First, that this proceeding is not a suit within the meaning of the removal statute; second, that it does not present a separate con-

troversy within the meaning of the removal statute. In its petition for removal the defendant alleges that benefits amounting to \$617.50 have been illegally, wrongfully, and improperly assessed against it, and that the drainage district proposes to construct a ditch along and across the right of way and roadbed of petitioner, to its damage in the sum of \$17,490.

L. R. Kautz, of Kingston, Mo., and Paul D. Kitt, of Chillicothe, Mo., for complainant.

Fred S. Hudson, of Chillicothe, Mo., for defendant.

VAN VALKENBURGH, District Judge (after stating the facts as above). The matters here presented are difficult and perplexing. Nevertheless, they involve important rights and interests, and address themselves to the thoughtful consideration of the court. Similar questions have heretofore been before the national courts, in this and other jurisdictions, and have been variously decided, according to the facts and the local laws specifically involved. This case must be determined upon its own facts and the special statute under which it arises, in accordance with principles now fairly well established.

In *Re City of Chicago* (C. C.) 64 Fed. 897, proceedings were instituted by the city for making an improvement, pursuant to article 9 of the act of the Revised Statutes of Illinois relating to cities and villages. This act provides that the council shall order a petition filed in the county court to assess the cost, after an improvement has been ordered, and estimates of the cost have been made and approved. Thereupon the county court appoints three commissioners, who are to ascertain and report (1) the amount of benefits to the city, and (2) an assessment of the balance of cost against such parcels of land as they shall find benefited in the proportion in which they will be severally benefited. They are to give to owners affected notice by mail and publication, and any person interested may file objections. All owners who do not object are defaulted, and assessments confirmed against the lots. When the report comes up for hearing, evidence may be introduced by objectors and by the city, and the hearing must be conducted as in other cases at law; and a jury determines whether the premises of objectors are assessed more or less than their proportionate share of the cost, and what amount they should be assessed. The court may at any time before final judgment modify, alter, change, annul, or confirm any assessment returned, or cause any such assessment to be recast by the same commissioners, or may appoint other commissioners for the purpose, and may take any proceedings which may be necessary to make a true and just assessment. One judgment is entered for all assessments, but it has the effect of a several judgment as to each parcel assessed; and, in case of appeal or writ of error by an objector, the judgment is not invalidated, and is not delayed, except as to his assessment. The petition for removal to the Circuit Court for the Northern District of Illinois was presented when the matter was before the county court on the commissioners' report, assessing benefits against a great number of parcels, with numerous owners (including this objector's land), and covering such area as the commissioners deemed subject to benefits, and not being confined

to abutting property. The order thereupon names only the objector and his parcel of land, evidently intending to retain in the county court the other assessments.

Judge Seaman there held that:

"Assessment proceedings for municipal improvement, being an exercise of the taxing power and an administrative act, do not constitute a 'suit,' within the provisions for removal of suits to federal courts, though they are conducted under judicial forms by a court of general judicial powers."

Also, that:

"There is not a separable controversy, as required by the removal statute, in an assessment proceeding for municipal improvements, where the court which conducts it determines the district on which the assessment shall be laid, and therefore who shall be parties, and in a single judgment each piece of property is assessed for an amount bearing the same proportion to the full amount to be collected that its benefits bear to the full amount of benefits."

He holds that the "ascertainment of the amount of compensation therefore becomes a judicial inquiry when carried to a state court by an appeal from the award of commissioners," and quotes from Cooley on Taxation in distinguishing between the exercise of the taxing power and that of eminent domain. The proceeding before the county court was held to be entirely an administrative proceeding, and therefore not cognizable by the federal court—a court not contemplated by the Legislature for participation in the assessment.

In *Re Jarnecke Ditch* (C. C.) 69 Fed. 161, the petition was filed originally in the circuit court of the county—a court of general jurisdiction with broad judicial functions. After a filing of petition by landowners, and the location of route and ascertainment of costs by drainage commissioners, and the filing of their report in the circuit court, any landowners opposed to the drain might file remonstrances putting in issue the questions whether the drain will promote public health or be of public utility; whether the scheme is practicable, and can be accomplished for the aggregate amount of benefits assessed; and whether the assessment of benefits to the lands of the remonstrant is too large. Each remonstrant is entitled to file a separate remonstrance, and to have a separate trial thereof, in which the only parties actually concerned in the litigation are the petitioners as plaintiffs and himself as defendant. Judge Baker said:

"This controversy, if tried in the state court, is one triable by and between these parties, and possesses all the characteristics of a civil suit. The petition, report, and remonstrance represent controversies involving the several issues or questions above stated. The taking of land for a drain, and the fixing of a charge upon other lands for its construction, involve rights of property or claims thereto capable of pecuniary estimation, which are the subject of litigation presented by the petition, report, and remonstrances. Such litigation constitutes a suit within the meaning of the removal act. The term 'suit,'" said Mr. Chief Justice Marshall in *Weston v. City Council*, 2 Pet. 449, 464, 7 L. Ed. 481, 'is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice which the law affords him. The modes of proceeding may be various; but, if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.' And in *Upshur County v. Rich*, 135 U. S. 467-477, 10 Sup. Ct. 651,

34 L. Ed. 196, it is said: "The principle to be deduced from these cases is that a proceeding not in a court of justice, but carried on by the executive officers in the exercise of their property functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in character, and cannot in any just sense be called a suit; and that an appeal in such a case to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion, and value, is not a suit, but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on one side or the other."

He further holds, however, that in such a proceeding in the case before him there is no separable controversy which will authorize a removal by some of the remonstrants, who are citizens of other states, for all the parties to the proceedings are inseparably interested in the main issue, namely, the right of the petitioners to have the drain established; to which issue the question as to the amount of benefits assessed to each remonstrant is merely incidental. The learned judge says further:

"The proceeding does not involve the mere exercise of the taxing power of the state. It is in the nature of the exercise of the power of eminent domain, and contemplates the taking of land whereon to construct the drain, as well as the assessment of benefits on the remaining lands, whereby to pay for its establishment and construction. In this particular it differs from a proceeding solely for the purpose of raising money by the exercise of the taxing power to aid in the construction of a public improvement. This differentiates the present case from that of *In re City of Chicago* [C. C.] 64 Fed. 897, and other cases of like character, which hold that a proceeding solely for the purpose of raising money by the exercise of the taxing power for the construction of a public improvement is not a suit, although such proceedings may be conducted in a court of general jurisdiction."

After holding that a separable controversy was not presented, for the reasons above stated, this suggestion is added:

"Whether a removal could be had if the sole issue presented by the remonstrants was the amount of the assessments, it is not necessary to determine."

In *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, the Supreme Court of the United States, speaking through Mr. Justice Bradley, held that, in a proceeding under the then charter of Kansas City for the widening of a street, the controversy was separable and might be removed by the defendant railroad company. The learned Justice said:

"What, then, is the relation in which the railway company, as an appellant, stands towards the city of Kansas in this litigation? Clearly, it has two distinct issues, or grounds of controversy: First, the value of its property taken for the street; secondly, the amount of benefit which the widening of the street will create to its remaining property, not so taken. It may have a third issue, and, judging from the course of the argument, it has a third issue, still more important to it than either of the others, to wit, the right of a city to open a street at all across its depot grounds. Now this controversy involving these three issues is a distinct controversy between the company and the city. It may be settled in the same trial with the other appeals, and by a single jury; but the controversy is a distinct and separate one, and is capable of being tried distinctly and sep-

arately from the others. If the state circuit court had equity powers, it might direct a separate issue for the trial of this controversy by itself. It might try the other appeals without a jury (the parties waiving a jury), and try this controversy by a jury.

"If this view of the subject is correct, we see no difficulty in removing the controversy between the city of Kansas and the railway company for trial in the Circuit Court of the United States. The proceedings for widening the street, pending in the state court, may have to await the decision of the case in the federal court; and the result of those proceedings may be materially affected by the decision of that case; but that consideration does not affect the separate and distinct character of the controversy between the city and the railway company."

This case was decided before the construction of this charter provision by the Supreme Court of Missouri. Immediately thereafter, in *Holden v. Gill*, 84 Mo. 248, the latter court held that a proceeding of condemnation in Kansas City, under its city charter, presented a case of an indivisible unit, and not a separate controversy between the city and any given defendant. In view of this construction, placed upon these charter provisions relating to condemnation, Judge Phillips held, in *Kansas City v. Hennegan* (C. C.) 152 Fed. 249, that such a case is not removable to the federal court.

[1] The removal statute provides that the subject of removal is any suit of a civil nature at law or in equity pending in any state court. Did this proceeding, at the time the petition for removal was filed, respond to this definition?

The Constitution of Missouri, art. 6, § 1, provides:

"The judicial power of the state, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts."

Section 36 provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By this section judicial power is vested in the county courts. *Benton County et al. v. Morgan et al.*, 163 Mo. 661, 64 S. W. 119.

After the second report of the viewers assessing and apportioning benefits and damages, section 5592, Revised Statutes Missouri 1909, vol. 2, p. 1786, provides:

"Any person whose lands are affected by the proposed improvements may, on or before the day set for the hearing by the court, file exceptions to the apportionments made by, and to the action of, the viewers upon any claim for compensation or damages. The county court may hear testimony and examine witnesses upon all questions made by such exceptions, and for that purpose may compel the attendance of persons as witnesses and the production of other evidence, and its decision upon each of the exceptions shall be entered of record; if the exceptions be sustained, the cost of hearing the same shall be paid as other location expenses are paid, and, if the same be overruled, such cost shall be taxed against the person filing the exceptions."

By the Constitution the county court was already a state court of record with judicial functions. By this act the Legislature specifically invested it with judicial powers in connection with this class of cases. To adapt the language of the Supreme Court of the United States in *Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239-251, 25 Sup. Ct. 251, 49 L. Ed. 462, this was a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Missouri, as ordained by its Constitution, and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record. In *re City of Chicago* (C. C.) 64 Fed. 897, is distinguished because here these are not mere assessment proceedings for municipal improvements, an exercise of the taxing power, and an administrative act. The county court is a court of the state, and the proceeding is a suit within the meaning of the removal act and the reasoning of the authoritative cases herein above referred to.

[2] If this be true, is the controversy a separable one? I am constrained to hold that it is. It will be recalled that under the act a hearing takes place before the county court upon the first report of the viewers or commissioners to determine whether the improvement is necessary for sanitary or agricultural purposes, or would be of public utility, or conducive to the public health, convenience, or welfare; in other words, the right of the petitioners to have the drain established. When this has been judicially determined by the county court, the second set of viewers are appointed to make report, upon which, and the remonstrances thereto, are made up the issues relating to assessments, benefits, damages, and compensation to and for the property appropriated or affected. It was at this point that the defendant railroad company seasonably asserted its right of removal. Its action was in strict compliance with the removal statute, provided the right of removal exists. The question of the right of the petitioners to have the drain established having already been disposed of, the objection to the separable nature of the controversy advanced by Judge Baker in *Re Jarnecke Ditch*, supra, is removed.

It should be noted in passing that by section 5583 it is provided that, upon the filing of the first report of the commissioners, and the hearing of remonstrances thereto:

"If the court shall find in favor of making the improvement, the lands which, as hereinafter provided, it may be found will be thereby benefited, shall, for the purpose of this article, constitute a drainage district, which shall be designated by number. Such district shall be a body corporate and possess the usual powers of a corporation for public purposes, and shall be capable of suing and being sued, of holding such real and personal property as may be at any time either donated to or acquired by it, in accordance with the provisions of this article."

From this point on the controversy is no longer between petitioners and other individuals, but between the drainage district, a corporation capable of suing and being sued, and acquiring property, real and personal, for the purposes of its creation and each individual affected. That controversy now relates solely to the taking or damaging of property and the benefits, damages, and compensation to be assessed

and paid. These are matters entirely between the district and each individual landowner, as we have already seen from the Pacific Railroad Removal Cases, and other cases cited. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. This is necessarily so, unless the laws of this state affecting real property, as construed by the highest courts of the state, provide otherwise.

Reference has already been made to the holding of the Supreme Court of Missouri in *Holden v. Gill*, with reference to condemnations under the charter of Kansas City; but that case was founded upon the peculiar wording of the charter provision, as is disclosed by an examination of the opinion. Therein it is said:

"Section 6 provides for an appeal by the city, or any party aggrieved, to the circuit court of Jackson county, which thereupon becomes possessed of the cause and tries it de novo. * * *

"It is but one cause, although in the proceeding each of a hundred parties has a distinct assessment for the compensation he may be entitled to, or the charge for benefits for which his property is liable. There is but one jury, one verdict, and one judgment. * * *

"An appeal from the circuit to the Supreme Court brings up the same cause that was tried in the circuit court, and a reversal of the judgment is a reversal of it as an entirety. * * *

"If, on the other hand, on a retrial the damages assessed to the appellant for taking his property, or the assessment against it for benefits, should be less than were allowed in the circuit court, the result would be to take from other property holders an amount in excess of that required to pay for the condemned property. It was evidently for this reason that, in the charter, provision was made for a trial de novo, on appeal to the circuit court. If not to meet this difficulty, why not let the verdict taken on the trial before the mayor stand, as to all those who were satisfied with that verdict, without regard to the result of the trial in the circuit court, on appeal taken by others?"

It is urged by the drainage district here, as by the city there, that as the result of a separate trial and appeal the apportionment between the various parties interested would be disturbed, and injustice and inequality would result. But the drainage law, in its own scheme, makes provision for just such a disturbance, if it be one. And in this respect the procedure under this drainage act is differentiated from that under the Kansas City charter, and therefore from the reasoning of the Supreme Court of Missouri in *Holden v. Gill*. This leaves the doctrine announced by Mr. Justice Bradley in the Pacific Railroad Removal Cases unimpaired and unaffected by state authority.

Section 5592 provides:

"Any person whose lands are affected by the proposed improvements may, on or before the day set for the hearing by the court, file exceptions to the apportionments made by, and to the action of, the viewers upon any claim for compensation or damages. The county court may hear testimony and examine witnesses upon all questions made by such exceptions, and for that purpose may compel the attendance of persons as witnesses and the production of other evidence, and its decision upon each of the exceptions shall be entered of record; if the exceptions be sustained, the cost of hearing the same shall be paid as other location expenses are paid, and, if the same be overruled, such cost shall be taxed against the person filing the exceptions. Any person may appeal from the order of the court, and upon such appeal, there may be determined either or both of the following questions: First, whether compensation has been allowed for property appropriated; and second, whether proper damages have been allowed

for property prejudicially affected by the improvements. * * * Provided, that nothing in this section shall be so construed as to authorize any appellant to stay the proceedings in the county court, or to prevent progress in the work of constructing such public ditches, drains or water courses, or other work or improvement; but said county court may proceed with said work, and any subsequent proceedings in the circuit court shall affect only the rights and interest of the appellant in property located in such drainage district."

Section 5593:

"The clerk of the circuit court shall docket said appeal, styling the appellant the plaintiff and the drainage district the defendant, and the cause shall stand for trial and be tried as other appeal cases are tried in the circuit court. After the trial and judgment in the circuit court, the clerk of that court shall retain the transcript of the proceedings in the county court and retransmit to the county clerk all of the original papers filed in his office by the county clerk, together with a transcript of the proceedings had in the circuit court, including a certified copy of the finding or verdict, and the judgment of the said court; the clerk of the circuit court shall also certify an itemized statement of the cost accruing on the appeal, and costs shall be paid as hereinbefore provided. After a transcript of the proceedings had in the circuit court is filed in the office of the county clerk, the county court *shall cause such entries to be made on its record as may be necessary to give effect to the judgment of the circuit court.*"

It thus appears that at this point of the controversy the drainage district, a corporation, which may sue and be sued, and acquire lands for drainage purposes, becomes the real party on one side of the controversy; on the other is that particular remonstrant, and he alone. The issue is as to the matter of damages and compensation for land appropriated or damaged in the exercise of eminent domain. No other party, in a legal sense, is concerned in this controversy. The Legislature saw fit to permit the improvement to proceed, to allow this individual matter to be litigated on appeal in the circuit court, and to give the appellant the benefit of any judgment he may obtain, no matter what its effect may be upon the drainage district, the other parties to the original proceeding, the apportionment of benefits and damages, or the cost of the improvement. If these matters can be adjusted, under the law, in a proceeding entirely within the state court, it is difficult to perceive why they may not be equally well adjusted at the end of this proceeding, which merely vouchsafes to the nonresident petitioner his guaranteed right to have his case tried in the tribunal of his choice.

Nor is it to be conceded that the law does not contemplate and provide for just such a situation. As we have seen, section 5583 provides for the creation of the district as a body corporate, possessing the usual powers of a corporation for public purposes, and capable of suing and being sued. Section 5593 provides for the conducting of this appeal in the names of the real and sole parties in interest. Section 5594 provides that those who have failed to file written exceptions to the award made by the viewers, as provided by section 5592, shall be deemed to have acquiesced in such award. Section 5603 empowers the county court, if prayed for in the petition, to issue bonds, and sell the same to meet the expenses of locating and constructing any ditch

or improvement under the provisions of this article. Section 5598 says:

"In lieu of bonds, the county court may issue warrants on the ditching districts payable for ditch assessment and all other demands against the ditching district, such warrants drawing interest at the rate of six per cent. per annum, and of such denominations as will be convenient to pay the said assessments and demands against the lands for the proposed improvements."

Section 5599, entitled "Assessment for construction, how made—to constitute lien—delinquent tax, how collected," contains this provision:

"All costs except of construction and collection of delinquent assessments or installments, and except those taxable to the petitioners, remonstrators or appellants, shall be paid out of the county treasury, and be refunded to the county out of the first money received upon assessments, or from sales of bonds issued under the provisions of this article. After such costs are refunded, such damages, if any, as have been paid to landowners and others by the county shall be next refunded to the county."

Section 5593 provides:

"After a transcript of the proceedings (on appeal) had in the circuit court is filed in the office of the county clerk, the county court shall cause such entries to be made on its record as may be necessary to give effect to the judgment of the circuit court."

The drainage district is a body corporate, for public purposes, with revenues and resources to meet the purposes of its organization; and incidental to these purposes is the duty to pay the compensation and damages for lands taken awarded by any court having jurisdiction to determine them. No reason appears why the judgment of this court, upon this issue, may not be certified and filed with the county court in like manner as the proceedings incidental to an appeal to the circuit court, where the same individual matter is disposed of and to the same effect.

But even though the law be incomplete and imperfect in this regard, does it follow that a nonresident owner of property sought to be appropriated can thereby be prevented from removing his case into a tribunal contemplated by the Constitution of the United States to have his rights in the premises determined? The courts have uniformly held otherwise. *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co. et al.* (C. C.) 119 Fed. 209-215; *Powers v. Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

Counsel for the drainage district in their brief, without conceding the point, nevertheless entertain the consideration that the controversy might be separable after appeal taken to the circuit court; that it was not so at this stage; and that the action of the petitioner for removal was premature in any event. This argument is partially disposed of by the conclusion reached that the county court is not merely a board of commissioners for award and apportionment, but a court of the state, entertaining a suit within the meaning of the removal act. Besides, the separable nature of the controversy, made apparent by the nature of the appeal, and the parties and issues designated in the circuit court, relates back to the time when and the court in which the controversy,

in its present form, arose; that is, to the county court immediately upon the filing of the second report of the commissioners. The case is separable in the appellate court because it was separable in the court from which the appeal was taken. The petitioner would not have conformed to the requirements of the removal act if it had not filed its petition for removal when it did.

As stated at the outset, this question is attended by difficulties. It is a perplexing one, and we must concede that it is not entirely free from doubt; feeling, as we must, that it is highly desirable that matters of this nature should, so far as possible, be dealt with in the courts of the state especially designated and more conveniently adapted to handle such proceedings.

[3] Under such conditions, counsel for the drainage district state the rule to be:

"That when the jurisdiction of the federal court in a removal case is doubtful, the cause should be remanded."

This principle was originally announced because of former provisions of the law under which an order sustaining a motion to remand was a final adjudication which could be immediately reviewed by the Supreme Court. This is no longer true, and the present rule is the reverse of that stated by counsel. *Boatmen's Bank v. Fritzlen*, 135 Fed. 650-654, 68 C. C. A. 288.

Because of the fact that my judgment strongly approves the conclusion here reached, because, also, of the importance of the question and interests involved, and the desirability of a speedy review by a higher court, if such be desired, I am constrained to hold that the motion to remand must be overruled.

KEATLEY v. GRAND FRATERNITY.

(District Court, D. Delaware. January 24, 1912.)

No. 5.

1. INSURANCE (§ 723*)—FRATERNAL INSURANCE—APPLICATION—MISSTATEMENTS—CONCEALMENTS.

An applicant for a certificate of beneficial membership in a fraternal order who warranted every statement in the application, and agreed that in case any answer was not true, or in case of any concealment, the certificate should be void, to the question, "When and for what complaint did you last consult a physician? Give particulars with name and address of physician," truthfully answered, "Indigestion. 1909. April. Dr. Kelley. 9th & West Wil. Del." About a month previously he had consulted a physician who had treated him for cystitis. It was not shown that the applicant fraudulently omitted to state that fact, or that he had not wholly recovered from that ailment before making the application. *Held*, that the applicant made no misstatement within the meaning of the warranty or condition of the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

2. INSURANCE (§ 723*)—FRATERNAL INSURANCE—APPLICATION—QUESTIONS—ANSWERS—CONSTRUCTION.

Questions in an application for a certificate of beneficial insurance in a fraternal order, "What is your daily practice in regard to the use of wines, spirits, or malt liquors?" and "What has been your practice in the past?" must be construed together, and the questions so construed call for the applicant's daily use of intoxicants, and a statement that it had not been his daily practice to use intoxicants was not shown to be false by mere proof that he had been strongly addicted to intoxicants and indulged therein at frequent and regular intervals.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

3. INSURANCE (§ 723*)—FRATERNAL INSURANCE—APPLICATION—IRRESPONSIVE ANSWERS—EFFECT.

A fraternal order issuing a certificate subject to forfeiture for misstatements or concealments in the application may not take advantage of a merely irresponsible answer to a question in the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

4. INSURANCE (§ 723*)—FRATERNAL INSURANCE—MISSTATEMENTS IN APPLICATION—CONCEALMENTS—FORFEITURE.

A fraternal organization existing under the laws of Pennsylvania is governed by Pa. Act June 23, 1885 (P. L. 134), providing that no misrepresentation or untrue statement in an application made in good faith shall effect a forfeiture, unless such misrepresentation or untrue statement relates to a matter material to the risk; and a certificate may not be forfeited for misrepresentation or untrue statement in the application, though there is a warranty of the truth of the representation or statement, provided the representation or statement is made in good faith, and does not relate to a matter material to the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

5. INSURANCE (§ 815*)—FRATERNAL INSURANCE—BREACH OF WARRANTY—PLEADINGS.

Where in an action on a fraternal benefit certificate a plea alleged that it was warranted that the certificate should be void if the applicant made any misstatement or concealment in the application, and that in the application the applicant in response to the question "Have you ever been subject to, or had, or now have any of the following disorders or diseases: 'Piles,' 'Bladder, gravel or kidney diseases,' answered 'No,'" and further alleged that prior to the application he had been afflicted with diabetes, cystitis and piles, all of which he knew, and that the order was misled and the certificate void, a replication consisting of a special traverse in the inducement of which it was averred that at and prior to the time of the application there was in effect a statute preventing a forfeiture unless a misrepresentation made in good faith related to some matter material to the risk and that the applicant at the time of making the application had not had any serious ailment, and the answer was made in good faith, was not objectionable as argumentative or double, and was good on demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.*]

6. INSURANCE (§ 815*)—FRATERNAL INSURANCE—BREACH OF WARRANTY—PLEADINGS.

Where a plea alleged that the applicant in response to the question in his application, "Has your weight recently increased or diminished; if so, why?" answered "No," and further alleged that for a long time prior to the application and continuing until that time he had been falling off in weight, which was known to him, and that by reason thereof the order

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was deceived and the certificate void, a replication consisting of a special traverse in the inducement of which it was averred that a statute prevented a forfeiture for a misrepresentation made in good faith, unless the same related to a matter material to the risk, and further averred that the applicant at the time of the application had been and was in good health, and his weight was that which it normally was at that time of the year and there had been no marked change in his weight indicating impairment of health, and that his answer was made in good faith, was good on demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1996–1998; Dec. Dig. § 815.*]

At Law. Action by Mary C. Keatley against the Grand Fraternity. Demurrers to pleas sustained, and to replications overruled

See, also, 198 Fed. 272.

John Biggs and Armon D. Chaytor, Jr., both of Wilmington, Del., for plaintiff.

Leonard E. Wales, of Wilmington, Del., for defendant.

BRADFORD, District Judge. [1] The questions now for determination arise on demurrer to certain pleas and replications in an action of covenant brought by Mary C. Keatley, widow of William J. Keatley, against The Grand Fraternity, a fraternal organization and a corporation of Pennsylvania, on a certificate of beneficial membership under seal issued by the defendant to him, to recover damages for the nonpayment of the sum of \$3,000, being the amount alleged to have become payable to the plaintiff as a death benefit under the certificate of membership, and to remain wholly unpaid. It appears from the facts admitted on demurrer that Keatley made written application to the defendant June 24, 1909, for beneficial membership, and that on or about July 1, 1909, the sealed certificate of membership in question was issued to him, whereby it was certified that he was a beneficial member and entitled to all and every right, option and benefit given and granted in, to and by its constitution and by-laws, under a death certificate in the above-mentioned sum, payable to the plaintiff in manner and as prescribed in and by such constitution and by-laws, upon satisfactory proof of Keatley's death during the continuance in full force of such certificate of membership. The declaration contains three counts, and the defendant has filed ten pleas, each of which is interposed to all of the counts. The plaintiff has demurred to the third, fifth, seventh and tenth pleas. She has filed replications to the fourth and sixth pleas, in their application to the second count, and to the eighth and ninth pleas in their application to the third count. To these four replications the defendant has demurred. There has been joinder in all the demurrers. The third plea sets forth in substance, among other things, that Keatley in and by his application for membership promised and agreed for himself and his beneficiary or beneficiaries that each and every statement and answer in the application should be deemed a warranty; that in case any statement or answer should not be absolutely true in every respect, or in case of any misstatement or misleading statement, or omission or concealment of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fact by or on his behalf, the benefit certificate issued upon such application should be absolutely void; that the application contained the following question: "When, and for what complaint, did you last consult a physician? Give particulars, with name and address of physician"; that Keatley made answer to these questions as follows: "Indigestion. 1909. April. Dr. Kelly, 9th & West, Wil. Del."; that this statement or answer was not then and there absolutely true in every respect, and that Keatley did thereby omit and conceal from the defendant the fact that about one month prior to the date last mentioned he had been afflicted with and was subject to and infected with a certain other and more serious complaint, to wit, cystitis, for which he had consulted a physician and received treatment, and from which complaint, as the defendant was informed and believed and therefore averred, Keatley had not reasonably had time to recover before making his application, all of which was unknown to the defendant at the time of receiving his application and delivering the certificate of membership; and that by reason of the premises the defendant was deceived and misled and the death benefit certificate thereafter issued to him was rendered void. To the third plea there is a general demurrer. Keatley was asked when he last consulted a physician, and said it was in April, 1909. There is nothing in the plea showing or tending to show that the answer was not absolutely correct. He was asked for what complaint he consulted a physician, and he said it was indigestion. The truthfulness of this reply is wholly unchallenged by the plea. He was asked to give the name and address of such physician, and he replied Dr. Kelly, 9th & West, Wilmington, Delaware. The plea contains nothing to impeach this statement. He truthfully and directly answered all he was required to reply to. There was no misstatement or misleading statement. Nor was there any omission or concealment of fact within the meaning of the conditions of the application. He did not conceal or omit to state any fact which the questions addressed to him called for. Furthermore, while it is stated that he had previously been afflicted with cystitis, it is not alleged that he fraudulently omitted to state the fact, nor is it even stated that Keatley had not wholly recovered from that ailment before making his application. It is merely alleged that as the defendant is informed and believes, and therefore avers, Keatley "had not reasonably had time to recover." Keatley in truthfully and directly answering the questions put to him observed good faith and fully performed his duty. To hold otherwise would be practically to decide that although the defendant was at liberty fully to interrogate him touching all matters material to the risk and had formulated in the application the questions it desired answered, and although he answered in good faith and truthfully all questions addressed to him, yet the death benefit should be forfeited if he failed to mention some matters that in the judgment, not of himself, but of physicians or experts, might have a bearing upon the risk assumed. Such surely is not law. In *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 72 Fed. 413, 435, 19 C. C. A. 286, 308, 38 L. R. A. 33, 70, the circuit court of appeals for the sixth circuit well said:

"The subject of life insurance is always present for physical examination by medical experts of the insurer, who often acquire, by lung and heart tests, and by chemical analysis of bodily excretions, a more intimate knowledge of the bodily condition of the applicant than he has himself. Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which the insurer deems of importance in estimating the risk. * * * When the applicant has fully and truthfully answered all these questions, he may rightfully assume that the range of the examination has covered all matters within ordinary human experience deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality, not inquired about, and to volunteer them. He can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent."

The demurrer to this plea must be sustained.

[2, 3] The fifth plea sets forth in substance, among other things, that Keatley's application for membership contained a promise, agreement and warranty on his part substantially the same as alleged in the third plea; that in the application he also declared that "his personal habits were clearly, distinctly and truthfully set forth in the questions and answers therein contained"; that the application contained the following questions: "What is your daily practice in regard to the use of wines, spirits or malt liquors?" "What has been your practice in the past?"; that Keatley said "No" to each of these questions; that he for a long time prior to and at the time of making the application had been and was strongly addicted to the use of wines, spirits or malt liquors and indulged therein at frequent and regular intervals, all of which was unknown to the defendant at the time of receiving his application and delivering the certificate of membership, and that by reason of his above "answers" and "omission and concealment of fact" the defendant was deceived and misled and the death benefit certificate thereafter issued to him was rendered void. To the fifth plea there is a general demurrer. The two questions addressed to Keatley were, "What is your daily practice in regard to the use of wines, spirits or malt liquors?" and "What has been your practice in the past?" The latter question standing alone is wholly vague and indefinite; for the "practice in the past" would apply as well to tobacco as any other subject or subjects. The two questions must be read together in order to render the latter intelligible; and when this is done the latter on a reasonable construction may be read "What has been your daily practice in the past in regard to the use of wines, spirits or malt liquors?" It is obviously necessary to limit the "practice in the past" to wines, spirits or malt liquors through the adoption from the preceding question of the subject of the practice; and it is a natural and reasonable construction also to adopt the word "daily." Thus construed the inquiry was "What is and what in the past has been your daily practice in regard to the use of wines," etc. The latter question being fairly susceptible of two constructions, namely, that above mentioned, and one which would relate, not to daily, but only to general practice,

and the language being, not that of Keatley, but of the defendant, any doubt which may attach to the subject should, according to an elementary canon of construction, be resolved against the defendant and in favor of Keatley. He having thus been asked as to his then and previous daily practice in regard to the use of wines, etc., said "No" to each inquiry. I should have much difficulty in reaching a conclusion that "No" was an answer to either of the questions. If it was not, it cannot be said to be an untrue answer, nor an untrue statement, for that monosyllable seems to have no intelligible connection with either of the questions. But "No" was either responsive or irresponsible to the two questions. If it was irresponsible it is well settled that the defendant cannot now take advantage of the want of an answer to these questions or either of them. In *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644, the court through Mr. Justice Gray said:

"Where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial."

This proposition has been repeatedly recognized and enforced and is not open to question. If, then, "No" was not an answer to either of the questions no advantage can be derived by the defendant from the mere fact that they remained unanswered. If, on the other hand, "No" be treated as responsive to those questions, Keatley in making his application in substance averred that it was not then and had not in the past been his daily practice to use vinous, spirituous or malt liquors. There is nothing in the plea to show that such an averment was or would have been untrue. It does not allege that it was then or theretofore his daily practice so to indulge. It does state he then was and theretofore had been strongly addicted to the use of wines, spirits or malt liquors, and indulged therein at frequent and regular intervals. But this is very different from a statement of daily practice, as to which alone he was interrogated in the two questions. Having been asked only as to his daily practice, and having, on the assumption that "No" was responsive, fully answered the questions, there was certainly, in the absence of fraud, no "omission or concealment of fact" in not volunteering something he had not been asked about. Further, the plea does not allege that he fraudulently or wrongfully omitted to state, or concealed, that he was and had been strongly addicted to the use of wines, spirits or malt liquors and indulged therein at frequent and regular intervals, or even that he drank to excess, or how often he drank, or that his indulgence in wines, spirits or malt liquors had injuriously affected his health, or in any manner was material to the insurance risk. I can perceive no ground on which the fifth plea can be supported, and therefore the demurrer to that plea must be sustained.

The seventh plea is substantially similar to the third, and the same considerations which require the demurrer to that plea to be sustained necessitate a like disposition of the demurrer to the seventh plea.

So, the tenth plea is substantially similar to the fifth, and the demurrer to it must be sustained for the same reasons.

[4,5] As before stated, the defendant has demurred to the replications to the fourth and sixth pleas in their application to the second count, and to the replications to the eighth and ninth pleas in their application to the third count. The fourth plea sets forth in substance, among other things, that it was expressly stipulated and warranted that the certificate of membership issued and delivered to Keatley should be absolutely void if he made any statement or answer in his application which was not absolutely true in every respect or in case there had been any misstatement or misleading statement or omission or concealment of fact by or on behalf of Keatley; that in the application for membership Keatley in response to the question, "Have you ever been subject to or had, or now have, any of the following disorders or diseases? (Answer 'Yes' or 'No' to each), inter alia, 'Piles,' 'Bladder, gravel or kidney disease?' answered 'No' to each;" that Keatley prior to the date of the application had been afflicted with and was subject to and infected with diabetes, cystitis and piles, all of which he knew, but which was unknown to and not discovered by the defendant at and prior to the time of receiving the application and of executing and delivering the certificate of membership; and that the defendant was misled and deceived in the premises whereby the certificate became and was absolutely void. The replication to this plea consists of a special traverse in the inducement of which it is averred that at and prior to the time Keatley made his application for membership there was in full force and effect a certain Pennsylvania statute, approved June 23, 1885 (P. L. 134), which provided, among other things, as follows:

"That hereafter whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

The replication further avers that at the time of making the application Keatley "had not nor had he had any serious disease, illness or ailment, or any disease, illness or ailment that was other than trivial and temporary in its nature and which did not affect his general health or the disclosure of which was material to the risk of insuring his life"; and that the answers which he made to the questions mentioned in the plea "were in good faith and without intention to mislead or deceive, without this that," etc. That the Pennsylvania statute is applicable to cases like the present there can be no question. And under its provisions there is no forfeiture by reason of a misrepresentation or untrue statement in an application for life insurance, even where there is a warranty of the truth of the representation or statement, if it be made "in good faith" and does not "relate to some matter material to the risk." The defendant assigns as grounds of demurrer argumentativeness, duplicity and the allegation of conclusions

of law. The objection of argumentativeness is palpably unsound, for the distinguishing feature of the inducement in a special traverse is precisely that quality. It is a qualified or argumentative denial of the allegations in the preceding pleading, the *absque hoc* clause, containing a direct traverse, being added in order to cure what would be objectionable argumentativeness in the inducement, if taken alone. Nor is the replication justly chargeable with duplicity. The fact that the plaintiff not only alleges that Keatley's answers were made in good faith but denies that he had any disease, illness or ailment, material to the insurance risk, cannot constitute duplicity. Whether Keatley did or did not observe good faith in giving the answers in question, and whether he had or had not any disease, illness or ailment material to the risk are not questions of law, but of fact for a jury. The position that the replication is objectionable for the allegation of a question of law is clearly untenable. The demurrer to the replication in question must, therefore, be overruled.

[6] The sixth plea alleges in substance, among other things, that Keatley in response to the question contained in his application for membership, "Has your weight recently increased or diminished? If so, why?" answered "No"; that in fact for a long time prior to the making of such application and continuing until such application Keatley had been falling off in weight, which was known to him but not known by the defendant at the time of receiving his application and of executing and delivering to him the certificate of membership; and that by reason of the premises the defendant was deceived and misled and the death benefit certificate issued to Keatley became void. The replication to this plea also consists of a special traverse in the inducement of which the above-mentioned Pennsylvania statute is set forth. It further avers that Keatley at the time of making his application had been and was in good health and his weight was "that which it normally was at that time of the year, and there was and had been no material or marked change in his weight, and no change in his weight which indicated an impairment of his health, and no change in his weight that was material to the risk of insuring his life," and his answers "to the questions in the said plea mentioned were in good faith and without intention to mislead or deceive, without this that" etc. The same principles and rules of pleading apply to this replication as to that to the fourth plea. It requires no independent discussion. The demurrer to the replication must be overruled. The replications to the eighth and ninth pleas present questions substantially similar to those raised by the replications to the fourth and sixth pleas respectively, and it is unnecessary to treat them separately from the latter. The demurrers to the replications to both the eighth and ninth pleas must be overruled.

KEATLEY v. GRAND FRATERNITY.

(District Court, D. Delaware. April 19, 1912.)

No. 5.

1. INSURANCE (§ 723*)—FRATERNAL INSURANCE—WARRANTIES—MISREPRESENTATIONS—EFFECT.

Under Act Pa. June 23, 1885 (P. L. 134), providing that, where an application for a life policy contains a warranty of the truth of the answers therein contained, no untrue statement or misrepresentation in the application made in good faith shall effect a forfeiture, unless the misrepresentation or untrue statement relates to a matter material to the risk, a breach of warranty of the truth of answers in an application does not work a forfeiture of the policy where the misrepresentation or untrue statement is made in good faith and does not relate to a matter material to the risk, but, to permit a recovery notwithstanding, a breach of warranty, good faith, and absence of materiality to the risk must co-exist.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

2. PLEADING (§ 205*)—FORM OF PLEADING—GENERAL DEMURRER.

A general demurrer does not challenge merely formal defects in the pleading, but only its substance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

3. INSURANCE (§ 723*)—FRATERNAL INSURANCE—APPLICATION—WARRANTIES—MISREPRESENTATIONS—"BROTHER."

An applicant for fraternal insurance declared that his personal and family history were clearly and truthfully set forth in the questions and answers in the application. It contained the following questions: "Brothers?" "Age of living?" "Age at death?" "Year of death?" "Specific cause of death?" "Duration of last illness?" The applicant answered only the first question, his answer being in the negative. He had a brother who had died prior to the application and the cause of his death was diabetes, and the applicant knew such fact. *Held*, that the question "Brothers?" applied to brothers living or dead, and was also applicable to one brother as well as several brothers, and his answer was a fraudulent concealment, misleading the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

For other definitions, see Words and Phrases, vol. 1, pp. 884, 885.]

4. INSURANCE (§ 724*)—FRATERNAL INSURANCE—APPLICATION—WARRANTIES—MISREPRESENTATIONS.

The fact that insurer did not require answers to the questions excepting the first did not show a waiver by it of its rights to full and truthful disclosures of the history of the family of the applicant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1837, 1866-1868; Dec. Dig. § 724.*]

At Law. Action by Mary C. Keatley against the Grand Fraternity. Demurrer to pleas overruled.

See, also, 198 Fed. 264.

John Biggs and Armon D. Chaytor, Jr., both of Wilmington, Del., for plaintiff.

Leonard E. Wales, of Wilmington, Del., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BRADFORD, District Judge. [1] The plaintiff has demurred generally to the seventeenth and eighteenth pleas, each of which is interposed to all the counts of the declaration. The seventeenth plea is to the effect that William J. Keatley, the husband of the plaintiff, in his application for beneficial membership in the Grand Fraternity declared that his personal and family history was clearly, distinctly and truthfully set forth in the questions and answers contained in the application; that the application expressly stipulated that "each and every statement and answer in this application shall be deemed a warranty on the faith of which I am admitted to beneficial membership in The Grand Fraternity" and that "in case any statement or answer shall not be absolutely true in every respect, or in case there has been any misstatement or misleading statement or omission or concealment of fact by or on my behalf, the benefit certificate or certificates issued hereon shall be absolutely void"; that Keatley in response to the following questions contained in the application, namely, "Brothers?," "Age if living," "State of health," "Age at death," "Year of death," "Specific cause of death," "Duration of last illness," "Previous health," answered as to "Brothers?" by using the figure or character "O," "thereby indicating naught"; that in fact Keatley had a brother who died some years prior to the making of the application, the specific cause of his death being diabetes, which at the time of making the application and answer thereto was known to Keatley but unknown to and not discovered by the defendant until after the delivery by it to him of the certificate of membership; that by reason of the "untrue and fraudulent statement or answer aforesaid, as well as the fraudulent omission and concealment of fact" on the part of Keatley the defendant was deceived and misled and the certificate thereafter issued to him became and was absolutely void. At and prior to the time Keatley made his application for membership there was in full force and effect a Pennsylvania statute approved June 23, 1885 (P. L. 134), providing, among other things:

"That hereafter whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

[2-4] Under and by virtue of the above statute no breach of warranty of the truth of answers contained in the application can work a forfeiture or be a ground of defense where the misrepresentation or untrue statement is made by the applicant in good faith and does not relate to some matter material to the risk. To permit a recovery notwithstanding a breach of warranty good faith and absence of materiality to the risk must coexist. If Keatley in his answer made a misrepresentation or untrue statement fraudulently or in bad faith, or if such misrepresentation or untrue statement related to a matter material to the risk the Pennsylvania statute has no application. The demurrer being general does not challenge merely formal defects in

the plea, but only its substance, and a vital point is whether the averments of the plea as admitted by the demurrer do not disclose a mala fide or fraudulent misstatement or concealment by the applicant in connection with the above-mentioned questions contained in the application. In it Keatley declared that "his personal and family history were clearly, distinctly and truthfully set forth in the questions and answers." The questions and his answer cannot be read wholly without reference to and independently of the above declaration. To the question "Brothers?" he made use of the figure or character "O," indicating, as is admitted, that he had no brothers. But while he had no brothers living at the time he made the application he had a brother who died several years before that time, and he had not forgotten that fact. It is claimed, however, on the part of the plaintiff that "Brothers?" standing alone meant brothers living at the time of making the application, and that he truthfully and correctly stated that he had no brothers then living. But immediately below the question "Brothers?" the applicant was called upon by the form of the application to state "Age if living" and shortly thereafter "Age at death," "Specific cause of death" and "Duration of last illness." That the subsequent inquiries show that the question "Brothers?" was applicable as well to deceased brothers as to brothers then living is too clear for discussion. Further, it is equally clear that the question "Brothers?" while plural in form was intended to apply as well to one as to several brothers. This is demonstrable from the above-quoted subsequent inquiries. The applicant made no answer to any of these inquiries save the first. If he had no brother living at the time and never had had one his answer to the first question would have been all that could have been required; for the subsequent inquiries above quoted were all predicated upon the then or previous existence of a brother or brothers. Having untruthfully answered in substance that he did not then have and had not theretofore had any brother or brothers, the defendant had no reason and it would have been absurd to require an answer to the subsequent inquiries touching brothers. It waived none of its rights by omitting to insist upon an answer to subsequent questions which by the applicant's answer to the first had become wholly irrelevant to the case. It is suggested by the plaintiff that the question "Brothers?" taken in and by itself might have been reasonably supposed to refer only to brothers then living, and that the applicant having answered it in accordance with that supposition was not obliged to change his answer upon noticing the following inquiries clearly relating to deceased brothers. But such omission to correct an untrue answer upon ascertaining immediately thereafter its incorrectness does not, in the judgment of this court, comport with the fair and honest dealing which the defendant had a right to expect from Keatley and upon which it had a right to rely. His uncorrected answer to the first question and omission to reply to the following inquiries constituted a fraudulent misstatement or concealment by him. The facts constituting the fraud are stated in the plea, and reference is made to the "untrue and

fraudulent statement or answer aforesaid, as well as the omission and concealment of fact" by Keatley, whereby "the defendant was deceived and misled." While formal objection might possibly be taken to the manner in which the facts constituting the fraud are characterized as fraudulent, the plea in substance sufficiently alleges fraudulent misstatement and concealment, and the demurrer being general must be overruled.

The eighteenth plea is similar in principle to the seventeenth, and reasons similar to those applicable to the seventeenth require that the demurrer to the eighteenth should be overruled.

COY v. TITLE GUARANTEE & TRUST CO. et al. (McMAHON,
Intervener).

(District Court, D. Oregon. July 8, 1912.)

No. 3,209.

1. RECEIVERS (§ 83*)—POWERS.

A receiver is but an arm of the court to take care of and administer the property, assets, and estate in suit, to do with it as the law may direct for the benefit of the parties concerned; and, while in theory he can do nothing without the court's order or sanction, he has, in matters of management and manner of disposition of the estate, a large discretion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 153; Dec. Dig. § 83.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5993-5997; vol. 8, pp. 7780, 7781.]

2. RECEIVERS (§ 90*)—POWERS—CONTRACTS.

A receiver cannot impair any valid contract subsisting when he was appointed under which rights and obligations have become fixed, but generally he is not bound by covenants of leases and executory contracts, and, subject to control by the court, he may abandon or repudiate them if in his opinion it would not be profitable or desirable to adopt and perform them.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 164-166; Dec. Dig. § 90.*]

3. LANDLORD AND TENANT (§ 112*)—ASSIGNMENT OF LEASE—ASSENT BY LANDLORD—WAIVER.

A landlord waives right to forfeit a lease for its assignment without his assent in writing, as required by the lease, by receiving rent from the assignee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

4. LANDLORD AND TENANT (§ 86*)—LEASES—OPTION TO RENEW.

Where a lease gave the tenant, a married woman, an option to renew for a fixed term, notice of her election to renew was not insufficient because signed by her husband where he acted as her manager, and the notice showed that she was the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270-275; Dec. Dig. § 86.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. LANDLORD AND TENANT (§ 86*)—LEASES—OPTION TO RENEW—NOTICE OF ELECTION—SUFFICIENCY.

Under a lease providing that the lessee should have the privilege of a renewal for a five-year period to be exercised by giving written notice to the receiver at least three months before expiration of the term, etc., a letter to the landlord's receiver, written by the lessee's husband, stating that, in accordance with such provision which he designated by paragraph and page number, he, as manager, applied for renewal of the lease, though informal, was sufficient notice.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 270-275; Dec. Dig. § 86.*]

6. LANDLORD AND TENANT (§ 101*)—LEASE—TERMINATION—GROUNDS—DAMAGE TO BUILDING.

That use of the basement of a building for bathhouse purposes for which it was rented caused damage to the building was insufficient cause for termination of the lease by the landlord, since the landlord is presumed to have foreseen the natural consequences to the building of such use, it appearing that the lessee attempted as far as possible to prevent the injury.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.*]

7. RECEIVERS (§ 90*)—LEASES—REFUSAL OF RENEWAL—PROPRIETY.

Though a lease gives the tenant a right to renewal for additional five-year period, the lessor's receiver is justified in refusing to grant the renewal, where it appears that it would be detrimental to the estate through injury to the building and through hindering a sale.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 164-166; Dec. Dig. § 90.*]

8. RECEIVERS (§ 90*)—EXECUTORY CONTRACTS—ABROGATION—DAMAGES—LIABILITY.

The general rule that a receiver in electing to abrogate an executory contract of the person or corporation of whose estate he is put in charge without rendering the estate liable to damages does not apply to refusal to renew a lease of premises for bathhouse, etc., purposes, where it appears that the tenant has incurred large expense in fitting up the premises in reliance upon his right to elect to renew, and where a part of the improvements were made without any notice or intimation by the receiver that he intended to refuse the renewal.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 164-166; Dec. Dig. § 90.*]

9. LANDLORD AND TENANT (§ 83*)—EXECUTORY CONTRACT TO RENEW LEASE—ABROGATION—DAMAGES—MEASURE.

Where a lessor's receiver abrogates an executory contract to renew a lease, the measure of any damages recoverable by the tenant against the estate is not liquidated damages stipulated in the lease to be paid on election of one of the parties to terminate the lease, since the receiver's authority to abrogate the lease arises independently of it; the proper measure being ascertained by considering the tenant's outlay for putting the premises in condition for occupancy, the time of occupancy lost to the tenant, and the expense attending an early change to other premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 263, 264, 266-269, 278, 295; Dec. Dig. § 83.*]

In Equity. Bill by N. Coy against the Title Guarantee & Trust Company and others; Myrtle McMahon intervening. Decree for intervenor.

See, also, 157 Fed. 794.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. H. Labbe and Malarkey, Seabrook & Stott, all of Portland, Or., for intervener.

William C. Bristol, of Portland, Or., for receiver.

WOLVERTON, District Judge. The facts out of which this controversy arises are, in brief, as follows:

A receiver was appointed in this court for the Title Guarantee & Trust Company on November 6, 1907. R. S. Howard, Jr., succeeded to the receivership January 21, 1908, and has since been and is now the duly qualified and acting receiver of all the property and effects of such company. The receivership carried with it certain subsidiary corporations, of which the Commercial Trust Company is one. After Howard's appointment as receiver, he became the president of the Commercial Trust Company, and has since acted in that capacity. He has, however, treated the property of the company as an asset of the Title Guarantee & Trust Company, and is proceeding to administer it in his capacity as receiver. A long time previous to the receivership, to wit, on October 12, 1905, the Commercial Trust Company executed a lease to one J. F. King to certain space in the basement of the building belonging to that company for the purposes of a bathhouse, barber shop, and bootblack stand for the term of five years beginning December 1, 1905, and ending November 30, 1910, at a monthly rental of \$75. The terms of the lease are, among other things, that the lessor doth lease and demise to the lessee the premises described, "together with a reasonable supply of steam heat, at such hours as the same can be conveniently delivered from the boilers of said company without additional cost or expense or interference with operation of the other portions of said building, or of the machinery therein; and reasonable supply of gas for lighting purposes only. Also such a supply of water from the well of said lessor on said premises as can be conveniently given by said lessor, as it shall determine, and not otherwise." It is covenanted by the lessee:

"That he will not suffer or commit any strip or waste of said premises, nor make, or suffer to be made, any alterations or additions to or upon the same; that he will place no signs upon the exterior of said building; that he will not assign this lease without the consent of the lessor, or those having its estate in the premises, having been first obtained in writing allowing the same."

And it is further stipulated:

"That the lessee shall have the privilege of renewing this lease for the period of five years, from the 30th day of November, 1910, upon such terms and conditions as may be agreed upon hereafter, which privilege shall be exercised by giving written notice to the lessor at least three months prior to the expiration of the term of this lease; provided, however, that no greater rental shall be demanded than is charged for like premises in the same vicinity. Provided always, and these presents are upon this condition, that the said lessor or the said lessee, or the successors or assigns of the said lessor, or the heirs, executor or assigns of the said lessee, may at any time cancel this lease on ninety days written notice of such cancellation, which said notice shall be given by the party desiring to cancel this lease to the other party thereto, and all right or interest of the said lessee to the said premises under or on account of said lease or occupation of the premises shall be determined and extinguished at the end of ninety days from such notice, it

being understood and agreed that at the expiration of said period of notice the said lessee shall peaceably and quietly deliver up said premises, in all respects as hereinbefore provided, and in such case the party giving such notice and desiring to cancel this lease shall pay to the other party thereto the sum of \$1,500 as liquidated damages."

On August 28, 1906, King assigned the lease to C. H. Reynolds, to which assignment the Commercial Trust Company assented, through John E. Aitchison, its president. On December 31, 1906, the Commercial Trust Company and Reynolds, in modification of the original lease, entered into an agreement as follows:

"The lessor agrees to pump out the swimming pool located in leased premises once each week if same does not interfere with operation of building, and if requested so to do by lessee if the lessor at the time requested has sufficient water in its own well for the purpose. The lessee has to give aid and assistance required by lessor in such pumping, and to furnish steam for purpose of heating water when it can do so without interfering with operation of building. The lessor agrees to furnish steam for heating and bath purposes, and water for shower baths and tub baths only for such time on Sundays as the lessee may at lessee's expense arrange with the engineer of the building as is now being done; provided, however, that said water shall be furnished only at lessor's convenience and without additional expense to it being occasioned thereby. The rental reserved to be paid during the said term, commencing with December 1, 1906, shall be ninety (\$90.00) dollars per month payable on the first day of each and every month from and after December 1, 1906."

On the same day Reynolds assigned an undivided one-half interest in the lease to Mrs. Myrtle McMahon, the Commercial Trust Company assenting thereto through C. B. Aitchison, secretary. On June 28, 1907, Reynolds and wife assigned, by an instrument denominated a bill of sale, the remaining one-half interest in the lease to Mrs. Myrtle McMahon. This was not formally assented to by the Commercial Trust Company. Notwithstanding the want of assent, the assignee continued to pay the monthly rental of \$90 as stipulated by the modification agreement, which was accepted by the Commercial Trust Company prior to the appointment of the receiver, and since by the receiver himself. On August 4, 1910, M. H. McMahon addressed a letter to "R. S. Howard, Jr., Receiver Commercial Trust Co.," as follows:

"Dear Sir: I desire to call your attention to the fact that the first five-year period of the 10-year lease entered into by and between your company and J. F. King on the 12th day of October, 1905, covering that portion of the basement now used as a bathhouse at 240 Washington St., and under which lease my wife is now the lessee, will expire on the 30th day of November, 1910.

"In accordance, therefore, with the provisions of said lease, and of paragraph number two on page number three therein, as manager, I hereby make application for a renewal of said lease for the remaining five years from the 30th day of November, 1910.

"I will thank you for an early reply in the premises, as I desire to know how to proceed as to future plans for improvements, etc., as per our conversation on the 2nd inst."

On September 1, 1910, Howard wrote Mrs. McMahon:

"Dear Madam: Referring to lease dated October 12th, 1905, between the Commercial Trust Company and J. F. King to basement in Commercial Build-

ing, this city, and assignment of said lease by J. F. King to C. H. Reynolds dated August 28, 1906, and a subsequent assignment of an undivided half interest in said lease by C. H. Reynolds to you under date of December 31, 1906. The undersigned declines to renew the lease upon the ground that you have failed to observe the terms and conditions of your lease and have so operated the premises leased you that the building has been damaged, and is continually being damaged, and the undersigned will not recognize any right in you to an extension.

"Further, no notice has been given of the desire for an extension in the manner contemplated by the terms of the lease, and within the time provided.

"Yours truly,

Commercial Trust Company,

"By R. S. Howard, Jr., President."

On the same day Mrs. McMahon served another notice on Howard to the effect that she desired and intended to exercise the privilege of renewing the lease for the period of five years.

At the expiration of the five-year term of the lease Howard, receiver of the Title Guarantee and Trust Company, caused the steam heat and water supply to the lessee to be entirely discontinued, and declined longer to recognize the lease. Whereupon Mrs. McMahon petitioned the court, by intervention in the main case of Coy v. Title Guarantee & Trust Co., praying an order and decree to the effect that the lease had been legally renewed for the term of five years, and requiring the Commercial Trust Company to perform the covenants thereof. By order of the court the petitioner was allowed to continue in the possession and use of the premises on condition that she pay to the clerk of the court the rental, to wit, \$90 per month, during the pendency of the controversy. Since that time the receiver, in construing the lease and the modification thereof, has furnished steam and lights for the baths of petitioner from 8 o'clock a. m. until 8:30 p. m. during week days, but none on Sundays and holidays, as had been done previously.

Much testimony has been taken, and the matter has been continued from time to time until the present. The theory upon which the petition was interposed and the intervention sought was and is that the petitioner was entitled as a matter of legal right to have the lease renewed for a second period of five years by reason of stipulation contained in the lease providing for such renewal. The receiver controverts the theory, and urges, that, a receiver having been appointed for the property and assets of the Commercial Trust Company, such receiver thenceforth was not bound as was the lessor for the performance of the terms of the lease, the contract being executory, but that it was incumbent upon him to subserve the best interest of the estate and all concerned, including the creditors. In other words, he insists that as receiver he was not bound, even though the lease so stipulated, to assent to its renewal, or to permit it to be renewed, if the new arrangement would prove burdensome to the estate, and an incumbrance in winding out the business pertaining thereto. As previously indicated, the Commercial Trust Company is a concern merely subsidiary to the Title Guarantee and Trust Company, and its property and assets were taken over by the receiver, upon his appointment by the

court, along with the property and assets of the latter company, so that both are being administered together under one receivership.

[1, 2] A receiver is but an arm of the court to take care of and administer the property, assets, and estate over which the court has assumed control for the time being, to do with it as the law may direct for the benefit of the parties concerned. In theory he can do nothing without the court's order or sanction. He nevertheless exercises, in matters of management and manner of disposition of the estate, a large discretion, which he needs must do, as the court cannot attend to details of administration. The court will act, and the receiver will exercise his discretion, at all times to best subserve the estate and those concerned in its due administration. The receiver may not impair, by any act on his part, any valid contract, subsisting at the time of his appointment, which fixes the obligations and determines the rights of the respective parties, but as a general rule, which is said to be well established, he is not bound by the covenants of leases and executory contracts of those over whose property he is appointed, and, subject to the control of the court, he may abandon or repudiate them if, in his opinion, it would not be profitable or desirable to adopt and perform them. 34 Cyc. 258, 259.

It was said by the Court of Appeals, 5th Circuit, in *General Electric Co. v. Whitney*, 74 Fed. 664, 667, 20 C. C. A. 674, 677, that:

"It was the duty of the receivers to use all reasonable efforts to carry out and perform the beneficial contract, and it was also their duty to refuse to adopt an executory contract which they found would prove so burdensome as to imperil the fund."

To the same purpose is *United States Trust Co. v. Wabash Railway*, 150 U. S. 287, 299, 14 Sup. Ct. 86, 90 (37 L. Ed. 1085); the court saying:

"The general rule applicable to this class of cases is undisputed that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts."

See, also, *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025; *Empire Distilling Co. v. McNulta*, 77 Fed. 700, 23 C. C. A. 415; *Central Trust Co. v. East Tennessee Land Co. et al.* (C. C.) 79 Fed. 19; *Ellis v. Boston, Hartford & Erie Railroad Co.*, 107 Mass. 1; *Commonwealth v. Franklin Insurance Co.*, 115 Mass. 278; *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599; *Scott v. Rainier Power & Railway Co.*, 13 Wash. 108, 42 Pac. 531.

[3] Some question has been made as to whether the lease has not been forfeited because the assignment of one half-interest therein by C. H. Reynolds to Myrtle McMahon was not assented to by the Commercial Trust Company in writing. The assignment is called a bill of sale, but nevertheless contains words of transfer and assignment of Reynolds' remaining one-half interest in the lease. It bears date June 28, 1907. The rent was regularly paid from that time on as before, and received by the Commercial Trust Company until the date

of the receivership, and subsequently by the receivers. I say this because it must be assumed, being the regular course in which the business was transacted, and there is no testimony to the contrary. In fact, it is not disputed that it was so paid. Such a course on the part of the lessor and its receivers was a recognition of the new relationship, and a waiver of express assent in writing to the assignment. Another irregularity is noted in the manner by which the Commercial Trust Company gave its assent to a previous assignment, the assent appearing to have been executed by C. B. Aitchison, secretary; it not having been shown that C. B. Aitchison was ever secretary of the company, but that John E. Aitchison was. The assignment was made December 31, 1906, and after so long a time I think it cannot be that the manner of executing such assent is fatal to the validity of the lease.

[4] It is urged with greater emphasis that the notice attempted to be given by Mrs. McMahon of her desire to renew the lease for another period of five years was insufficient for the purpose designed. It is stipulated that the privilege of renewal shall be exercised by giving written notice to the lessor at least three months prior to the expiration of the term of the lease. No particular form of notice is required, and no specific time is fixed in which the notice shall be served. The notice was by letter bearing date August 4, 1910, which must have been received by the receiver in due course. His stamp of the time it was received bears date August 3d, so either he or the writer made a mistake in the date. The principal objection to the notice is that it is signed by M. H. McMahon. McMahon, however, was the manager for his wife, and the notice shows that his wife was the lessee—that is, the owner of the term—and, of course, the person entitled to the renewal, if any one.

[5] I think the informality of the notice does not render it ineffectual or nugatory, and it must be held to be a sufficient notice of Mrs. McMahon's desire to exercise her privilege of renewal. No reply was made to the notice until September 1st, when the receiver wrote Mrs. McMahon declining to renew the lease, or to recognize any right on her part for an extension, upon the ground that she had failed to observe the conditions thereof, and had so operated the leased premises as to damage the building, and on the further ground that no notice had been given of her desire for an extension in the manner contemplated by the terms of the lease. Thereupon Mrs. McMahon served upon the receiver a more formal notice in the exercise of her privilege to renew. This notice, however, was too late, as it was not given three months prior to the expiration of the term, which was November 30, 1910. But, the former notice being sufficient, this latter notice was unnecessary.

[6] Nor was the damage which was being done to the building, although great, a sufficient cause for terminating the lease. When the Commercial Trust Company leased the premises for the purposes designated, it must be presumed to have anticipated the natural consequences to the building which would result from the stipulated use,

and, whether injury proved to be great or small, it could not afford justification for abrogation of the lease. The stipulation in the lease is that the lessee "will not suffer or commit any strip or waste of said premises," and it might be implied that he would not do any unnecessary damage to the building. In this regard the evidence satisfactorily shows that, when Mrs. McMahon's attention was called to the damage which her occupancy was doing to the building, she took immediate steps to prevent, as far as possible, the continuance of the injury. She tried faithfully, but was unable to succeed effectually.

The grounds assigned, therefore, by the receiver in reply to Mrs. McMahon's notice requesting the exercise of her privilege of renewal were not sufficient upon which to abrogate the lease or to refuse the renewal.

[7] But it is now insisted that the renewal should be denied and the lease abrogated because it has proven burdensome and greatly detrimental to the estate in the hands of the receiver, and will so continue as long as the present occupancy continues. It has been abundantly shown that the occupancy under the lease has resulted, by reason of the escape of steam and moisture from the bath or steamroom, as it is called, in great injury or damage to the building in which the baths are located, and especially to the rooms immediately above the baths. Other floors yet above are threatened with injury from the same source, and, if allowed to continue, many of the office rooms in the building will be rendered unfit for occupancy. And it is the opinion of experienced architects that the fault cannot be relieved against except through a large outlay in reconstructing the walls and ceiling of the baths. This renders but one reasonable verdict possible, when the best interest of the estate is consulted, which is that the occupancy of the premises for the purposes specified in the lease should be discontinued. It is highly cumbersome and burdensome to the estate, and, further, a renewal of the lease might extend the term far beyond the time for closing the receivership, and undoubtedly it would prove a hindrance to a sale and disposition of the building and property incumbered by it. The action of the receiver in declining to renew the lease is justified by the attending conditions, and should be approved. This renders it unnecessary to construe the terms of the lease as it relates to the time and manner of supplying steam and water for the lessee's use.

[8] It is next to be considered whether Mrs. McMahon is entitled to damages on account of the receiver's refusal to renew the lease according to the stipulations thereof, and, if so, what amount should be awarded her. The receiver, in making his election to abrogate the executory contracts of the person or corporation of whose estate he is put in charge, does so without subjecting the estate required for the satisfaction of existing claims of creditors to a charge for damages. *Wells v. Hartford Manilla Co.*, supra; *Scott v. Rainier Power & Railway Co.*, supra; *Central Trust Co. v. East Tennessee Land Co.*, supra; *Fidelity Safe-Deposit & Trust Co. v. Armstrong* (C. C.) 35 Fed. 567. Such appears to be the rule, although the action of the receiver

may entail a cause of action against the person or corporation whose estate he is administering as receiver. *Chemical National Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595. This is the general rule, but it cannot be said to be absolutely applicable in every case where the receiver abrogates an executory contract. In *Wells v. Hartford Manilla Co.*, *supra*, a well-considered case, the court says:

"We do not, however, wish to be understood as saying that there may not be frequent cases where the act of a receiver in not adopting an executory contract would entail such injury upon the other party to the contract, by reason of what he had already done under it, and relying upon the faith that it would be carried out, that a claim against the estate would, upon the principles of equity and good conscience which underlie receivership proceedings, be recognized and allowed."

In the case at bar the original lessee King, when he took the lease, was at the expense of some \$2,300 or \$2,400 to fit the premises for his use and purposes, and recently the present owner of the lease has been at considerable expense in re ceiling the steamroom, to prevent, if possible, the further escape of steam and moisture, to the detriment of the building. All this, we may assume, was in reliance upon the faithful observance of all the terms of the lease on the part of the lessor and its successors in interest. Of course, this anticipated a renewal if it should be desired and requested, and it may be that these improvements would not have been made except in anticipation that the lessee and his assigns would ultimately have the use for the full term of 10 years. When the ceiling was improved, Mrs. McMahon must be considered to have known that the receiver could terminate the lease if he found it burdensome to the estate, or refuse to renew it upon the same ground. The improvement was made, however, on the complaint of the receiver, and without notice or intimation on his part that he intended to abrogate the lease or refuse to permit the extension, and Mrs. McMahon endeavored, in the utmost good faith and by her best efforts, to check the continuance of damage to the building. Under such conditions, I think it inequitable and unjust that the petitioner should be turned away practically remediless. That she will have suffered damage by the refusal to renew the lease is without question. If she is relegated to an action against the Commercial Trust Company, and is required to depend upon that company surviving the receivership with a surplus, her relief is fanciful, and would probably prove illusory.

[9] The measure of her damages is not the liquidated damages stipulated for in the lease in case one party or the other desired to terminate it, because the lease is not being abrogated in pursuance of its terms, but by the receiver by virtue of his authority wholly aside from any stipulated conditions. The measure should rather be by consideration of the outlay of Mrs. McMahon and assignors for putting the premises in condition for occupancy as contemplated by the lease, the outlay incurred in the endeavor to prevent further injury to the main building from escaping steam and moisture, the time

of occupancy, or rather the time to be lost to the occupant, and the expense attending an early change to other premises.

I am impressed, therefore, that \$1,000 will be a fair measure of damages in favor of the petitioner, and that amount will be allowed her from the funds in the hands of the clerk of this court; the balance to be paid to the receiver. The petitioner will vacate the premises at the end of the time for which rent has been deposited with the clerk.

UNITED STATES v. BEATY et al.

(District Court, W. D. Virginia. August 9, 1912.)

Nos. 2,074-2,083.

1. EMINENT DOMAIN (§ 18*)—EXERCISE OF POWER BY UNITED STATES—ACT AUTHORIZING "PURCHASE" OF LAND.

Under the provisions of Army Appropriation Act March 3, 1911, c. 209, 36 Stat. 1037, 1049, making an appropriation "for the purchase of land accessible to the horse-raising section of the state of Virginia for the assembling, grazing and training of horses purchased for the mounted service," such land may be acquired by condemnation, as authorized by Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516), "in every case in which * * * any * * * officer of the government has been or hereafter shall be authorized to procure real estate for the erection of a public building or for other public uses"; the word "purchase" being used in the appropriation act in a broad sense (citing 7 Words and Phrases, 5853).

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 55, 87, 88; Dec. Dig. § 18.*]

Nature and extent of power of United States to condemn property for public use, see note to 70 C. C. A. 653.]

2. EMINENT DOMAIN (§ 209*)—CONDEMNATION PROCEEDINGS BY UNITED STATES—RIGHT TO TRIAL BY JURY.

The provision of Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), that the trial of issues of fact in the district courts in civil actions at law shall be by jury, does not apply to proceedings for condemnation of land for public use, brought under Act Aug. 1, 1888, c. 728, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2516); and where by the practice of the state, to which such proceedings are required by section 2 of the act to conform as near as may be, the compensation to be awarded to the landowners is determined by commissioners, whose award is reported to the court for confirmation, such practice may properly be followed by the federal court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 548; Dec. Dig. § 209.*]

3. WITNESSES (§ 74*)—COMPETENCY—CONDEMNATION PROCEEDINGS.

In condemnation proceedings under a procedure by which the compensation of the landowners is fixed by commissioners, whose award is reported to the court for confirmation, on the hearing of exceptions to their report, the commissioners are competent witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 188; Dec. Dig. § 74.*]

4. EVIDENCE (§ 142*)—CONDEMNATION PROCEEDINGS—EVIDENCE OF VALUE.

In proceedings by the United States to condemn land, testimony as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the price paid by the government for land purchased from other owners, forming part of the tract sought to be acquired, is not competent on the question of the compensation to be awarded a defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-423; Dec. Dig. § 142.*]

5. EMINENT DOMAIN (§ 238*)—COMPENSATION—WEIGHT TO BE GIVEN AWARD BY COMMISSIONERS.

The award of commissioners appointed to fix the compensation to which a landowner is entitled in condemnation proceedings, where the fairness of the commissioners is not impeached, should not be changed by the court, except on clear evidence of error or mistake.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619, 658, 659, 660, 666, 668, 669, 671, 673, 674, 687; Dec. Dig. § 238.*]

Condemnation proceedings by the United States against Paul Beaty and others, against William Brown and others, against Alma Jackson and others, against S. E. Macatee and others, against Lucretia Thompson and others, against Carrie P. Kuser and others, against Lucy E. Barber and others, against Ella S. Kenny and others, against Newton Garrett and others, and against Martha Pomeroy and others. On exceptions to awards of commissioners. Overruled, and awards confirmed.

Barnes Gillespie, U. S. Atty., of Tazewell, Va., and Downing & Weaver, of Front Royal, Va., for the United States.

O'Flaherty & Fulton, of Richmond, Va., and E. H. Jackson and S. Gardner Waller, both of Front Royal, Va., for defendants.

McDOWELL, District Judge. In the act of Congress of March 3, 1911 (36 Stat. 1037, 1049, c. 209), making appropriation for the support of the Army, is the following:

"* * * Including not to exceed two hundred thousand dollars for the purchase of land accessible to the horse-raising section of the state of Virginia, for the assembling, grazing, and training of horses purchased for the mounted service."

The act of August 1, 1888, to authorize condemnation of land for sites for public buildings and other purposes (25 Stat. 357, 6 Fed. Stats. Ann. 700, 703 [U. S. Comp. St. 1901, p. 2516]) reads as follows:

"That in every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so, and the United States Circuit or District Courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

"Sec. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

The Virginia statutes relating to the procedure for condemnation "in like causes" are found in Acts Va. 1902-04, p. 957 et seq. (Code 1904, § 1105f), Acts 1906, p. 452 et seq. (Supp. Code 1910, § 1105f), and in Code 1904, §§ 15a, 1105f (25). In brief the procedure, so far as here of interest, is as follows: Notice, of which publication is made, is given by the party proposing to condemn to the landowner that the court will be asked to appoint commissioners (five disinterested freeholders) to go upon the land, hear evidence, and thereafter report the compensation to be paid to the landowner. After the report is filed it is to be confirmed by the court unless good cause to the contrary be shown. If such cause is shown—if, for instance, the court, acting without a jury, on hearing the evidence, is of opinion that the amount awarded is excessive or inadequate—the report is set aside and other commissioners are appointed.

In these cases the Virginia procedure was followed. On the hearing of the petition for the appointment of commissioners the landowners demurred. So far as I can recall the point chiefly relied upon was that the appropriation act of 1911, *supra*, did not authorize condemnation. The contention was that acquirement on voluntary sale by the owner was alone authorized by that statute. The case of *Chappell v. U. S.*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, was not mentioned, and there was, I think, no contention that the act of 1888 did not authorize this court to follow the Virginia procedure, if the act of 1911 did not forbid condemnation. The demurrers were overruled. Commissioners (agreed upon by counsel) were appointed, and in due time their reports were filed. To these reports sundry of the landowners filed exceptions and prayed that the reports be not confirmed. A time for the hearing on the exceptions was fixed, and at Charlottesville, sitting without a jury, the court heard the evidence for both sides and took under advisement the questions on the merits. At this hearing the opinion in the *Chappell Case* was called to my attention, and two motions in behalf of the landowners were founded thereon. The first was in effect that these causes be dismissed; the theory being that the only permissible procedure in a condemnation by the federal government in a federal court in Virginia is to disregard the state law and proceed *ab initio* before a common-law jury. The second motion was in effect that the landowners be at least allowed a jury trial of the issue as to the adequacy of the amounts awarded by the commissioners. Both of these motions were overruled, and the evidence was heard by the court.

[1] 1. As briefly as possible I shall dispose of the contention founded on the use of the word "purchase" in the appropriation act of 1911. When used in a statute, the word "purchase" is frequently held to include any method of acquisition other than by descent. 7 Words and Phrases, 5853. To construe the word here to mean only acquisition by buying, we must assume that Congress had in mind the method of acquisition rather than the general purpose to acquire. The mere use of

the word "purchase"—which may have been used in its technical sense—is not to my mind a sufficient reason for such assumption. If, as we must, we give the members of Congress credit for a reasonable knowledge of human nature, they must be assumed to have known that to restrict acquirement to voluntary sales by the owners would most probably defeat the chief purpose for which the appropriation was made. However, it seems to me that the first section of the act of 1888, *supra*, makes further discussion unnecessary. The very purpose of that section was to authorize condemnation whenever, theretofore or thereafter, an act of Congress authorized land to be "procured" for public use. Surely no broader word than "procure" could have been used.

[2] 2. Passing for the present the motion to dismiss, the contention that the excepting landowners were entitled to have the question of the adequacy of the amounts awarded by the commissioners tried by a jury will first be considered. The wording of the second section of the act of 1888, *supra*, was taken from the Conformity Act of 1872 (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]). It is settled, of course, that this statute does not require a federal court to follow the state procedure, where to do so would defeat the purpose or impair the effect of any congressional statute. In following the state procedure in these cases, and hence in denying a trial by jury of the issue of fact raised as to the adequacy of the sums awarded, the purpose of section 566, Rev. Stats. (U. S. Comp. St. 1901, p. 461), was certainly defeated, if that statute was intended to apply to such cases. This statute was enacted originally by the first Congress in 1789. Act Sept. 24, 1789, c. 20, § 9, 1 Stat. p. 77. It reads:

"And the trial of issues of fact, in the District Courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."

The language of section 566, Rev. Stats., is the same, except that a further exception in bankruptcy proceedings is added. In view of what is said in the opinion in the Chappell Case, to which I shall advert later, it is with diffidence that I feel constrained to state that in my opinion this statute was not intended to apply to condemnation cases. It is to be noted that the statute does not read that all issues of fact in common-law causes shall be tried by jury. And this omission was doubtless intentional. Issues of fact in contempt cases, for instance, were certainly not intended to be included. It is also a fact that issues of fact as to jurisdiction are frequently and permissibly tried by the court without a jury. *Wetmore v. Rymer*, 169 U. S. 115, 121, 18 Sup. Ct. 293, 42 L. Ed. 682; *Globe Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 547, 23 Sup. Ct. 754, 47 L. Ed. 1171. Disbarment proceedings are not tried by jury. *Randall v. Brigham*, 7 Wall. 523, 530, 540, 19 L. Ed. 285. A motion to set aside a verdict as being contrary to the evidence raises an issue of fact, and many motions for continuance raise issues of fact; but such issues are never tried by jury. Issues of fact may arise in proceedings on habeas corpus, but no jury decides such issues. 9 Ency. Pl. & Pr. 1049.

We know, then, that it was not the intention to require that all is-

sues of fact in common-law causes be tried by the jury, and the conclusion which seems necessary is that the intention of Congress was that only those issues of fact which previous to 1789 had customarily and generally been tried by jury should thenceforth be so tried in the District Courts. So far as the authorities now accessible enable me to learn, it appears that prior to 1789 condemnations by common-law juries were certainly unusual and probably were unknown. In *Kohl v. U. S.*, 91 U. S. 367, 376 (23 L. Ed. 449), it is said:

*"The right of eminent domain always was a right at common law. * * * That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without jury."*

In 7 Ency. Pl. & Pr. 546, it is said:

"Where the Constitution is silent upon the question, the great weight of authority is that a common-law jury is not a matter of constitutional right, inasmuch as a well-settled practice existed both in England and in America, before the adoption of any of our Constitutions, of ascertaining the compensation by means of other agencies than a common-law jury."

In 2 Lewis Em. Dom. (3d Ed.) § 509 (311) it is said:

"In the absence of any express [constitutional] provision on the subject, the authorities almost uniformly hold that it [right to jury trial in condemnation cases] is not a matter of constitutional right. The line of reasoning upon which these decisions are based is that, before any of our Constitutions were adopted, it had been the practice in America and England to ascertain the compensation to be paid for property taken for public use by other agencies than a common-law jury, that this practice was well known to the framers of those Constitutions, and that presumably they did not intend by any general language employed to abrogate a practice so universal and of such long standing and against which no complaint existed."

It should here be noted that the Supreme Court has fully settled the proposition that the seventh amendment to the federal Constitution, in its preservation of the right of trial by jury, does not embrace condemnation cases. *Secombe v. Railroad Co.*, 23 Wall. 108, 118, 23 L. Ed. 67; *U. S. v. Jones*, 109 U. S. 513, 519, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Bauman v. Ross*, 167 U. S. 548, 593, 17 Sup. Ct. 966, 42 L. Ed. 270; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 569, 18 Sup. Ct. 445, 42 L. Ed. 853. The same reasoning which leads to the conclusion that the seventh amendment to the Constitution does not embrace condemnation cases inevitably leads to the conclusion that condemnation cases were not intended to be embraced within the statute providing for jury trials. The statute (1 Stat. 77 and 80) was enacted (on September 24, 1789) by the same Congress which (on September 29, 1789) proposed the adoption of the first ten amendments to the Constitution. Having full knowledge of the then long existing English and American practice of ascertaining damages in condemnation cases by other agencies than common-law juries, they presumably—

"did not intend by any general language employed to abrogate a practice so universal and of such long standing and against which no complaint existed."

In fact, the rulings of the Supreme Court to the effect that the Constitution does not preserve the right to have issues of fact in condem-

nation cases tried by jury drives us to the conclusion that section 566 does not give such right. The Congress of 1789 was assuredly providing for jury trials in exactly the same cases, and only in the same cases, as those in which the right of jury trial was to be safeguarded by the then proposed seventh amendment—common-law cases in which trial by jury had previously been the customary mode of trial. Issues of fact arising in contempt cases, in disbarment proceedings, on habeas corpus, and in sundry motions (and, by the same token, in condemnation cases) were not intended to be thenceforth tried by jury, because such had not theretofore been the usual method of trial of such issues. In *Black, Interp. Laws*, p. 233, it is said:

"Whether the statute affirms the rule of the common law on the same point, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law. 'The general rule in the exposition of all acts of Parliament is this: That in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare, and therefore in all general matters of law presumes the act did not intend to make any alteration, for if the Parliament had had that design, they would have expressed it in the act.'"

See, also, *Shaw v. Railroad Co.*, 101 U. S. 557, 565, 25 L. Ed. 892.

However, it is insisted that the case of *Chappell v. U. S.*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, requires that federal condemnation cases in the federal courts be tried before a jury. The Maryland statutory procedure for condemnation, which is analogous to the Virginia method, is stated in the opinion at pages 511, 512, of 160 U. S. (16 Sup. Ct. 401, 40 L. Ed. 510). In brief, a jury of 12 is formed, who act out of the presence of the court and return and file their inquisition or award. If the court approves the award, it is confirmed, or, if good cause therefor be shown, the award is set aside, and the court directs another inquisition. In trying the case the District Court of Maryland so far departed from the state practice as to have a jury of 12 men, from the regular panel, hear the evidence in court, under the supervision and direction of the judge. Practically the only concession, if any, made to the requirements of the state law, was that a panel of 20 veniremen was presented, and each side was allowed to strike off 4 names.

Chappell's contention in the Supreme Court is thus stated in the opinion (160 U. S. 512, 16 Sup. Ct. 401, 40 L. Ed. 510):

"The only position, other than the denial of the constitutionality of the act of Congress, argued by the plaintiff in error in this court, was that by the statutes and decisions of Maryland the jury which returned the inquisition was but a body of assessors of damages, in the nature of a special jury of inquest, or board of commissioners, and that he was entitled to have the whole case tried anew by an ordinary jury. In support of this position were cited the following cases, decided under different statutes of Maryland: *Tide Water Canal Co. v. Archer*, 9 Gill & J. [Md.] 479; *Steuart v. Baltimore*, 7 Md. 500; *State v. Graves*, 19 Md. 351 [81 Am. Dec. 639]. But,

however that may be under the statutes of the state, it is not so under the act of Congress."

On this branch of the case the opinion concludes (160 U. S. 514, 16 Sup. Ct. 402, 40 L. Ed. 510):

"This plaintiff in error had the benefit of a trial by an ordinary jury at the bar of the District Court on the question of the damages sustained by him; and he was not entitled to a second trial by jury, except at the discretion of that court, or upon reversal of its judgment for error in law."

In the opinion Mr. Justice Gray (160 U. S. 512, 16 Sup. Ct. 401, 40 L. Ed. 510) assumed that the Maryland decisions supported Chappell's contention as to the state procedure, and the entire point of his argument is that the conformity provision of the act of 1888 does not require the federal court to so closely follow a cumbrous, expensive, and dilatory state procedure as to allow a second jury trial to a landowner who had already had a regular common-law jury trial. "Such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States." 160 U. S. 514, 16 Sup. Ct. 402, 40 L. Ed. 510. It is undeniably true that Mr. Justice Gray expressed the opinion (160 U. S. 513, 514, 16 Sup. Ct. 402, 40 L. Ed. 510) that the federal statutes (sections 566 and 648, R. S., being intended) require that federal condemnation cases in the federal courts be tried by a common-law jury. But it is manifest that the appeal of a landowner, who without objection had had a common-law jury trial, did not and could not present for decision this question.

The question presented by Chappell's contention was: Does the conformity provision of the act of 1888 require the federal trial courts to follow a state procedure which allows a landowner, who has had one common-law jury trial, to have a second jury trial? If in dealing with this question a judge, in passing, says that the federal statutes require one jury trial, such statement is necessarily a dictum. No such question was in issue. Chappell had been allowed one jury trial. That case could not have raised for decision the question we are concerned with, unless Chappell had objected to allowing a common-law jury trial in the first instance. While great weight is and should be given to the dicta found in the Supreme Court opinions, it is the clear duty of the subordinate courts to decline to follow any mere dictum, if, after careful consideration, it is believed to be erroneous.

If I am right in reaching the conclusion that section 566, R. S., does not embrace condemnation cases, there is no federal statute which requires a jury trial in condemnation cases. There is, therefore, no reason why in these cases the direction of the second section of the act of 1888 should not have been observed and the state procedure followed, unless by so doing we were following a procedure which unnecessarily encumbers the administration of justice in the federal courts. No such charge can be made against the Virginia procedure. In a great many condemnation cases in this state both parties accept the award made by the commissioners, and there is no trial in court at all. If the procedure under the law of this state were, as Chappell argued the Maryland procedure was, such that it provided for a jury

trial de novo on exceptions to the commissioners' report, it might be necessary to consider the proposition that such a procedure unwisely encumbers the administration of justice.

The contention that commissioners should not have been appointed at all, and that these proceedings should have been started as common-law cases, to be tried only before a common-law jury, has in effect been disposed of by what has been said. If section 566, R. S., does not require that issues of fact in condemnation cases be tried by jury, and if in following the Virginia procedure we do not unwisely encumber the administration of justice, there is absolutely no reason or excuse for a total and absolute disregard of the direction in the act of 1888 to conform as near as may be to the procedure in like cases in the state courts. The Constitution does not give a right to a jury trial in condemnation cases; no federal statute (if my reasoning be sound) gives such right; no Virginia statute gives it. For a federal court in this state to try a federal condemnation case before a jury is simply to deny to the party who objects to such method of trial a right given by the second section of the act of 1888. In the trial of Chappell's Case the trial court's order (160 U. S. 502, 16 Sup. Ct. 398, 40 L. Ed. 510) expressed the opinion that the question of damages ought to be submitted to a jury. But there is nothing in the report of the case to show that this was not agreed to by both parties.

[3] 3. On the hearing of the exceptions, objection was made by the exceptants to allowing the commissioners who made the reports to testify. I am unable to think of any rule of law which would make the commissioners incompetent. In *Hunter v. Railroad Co.*, 107 Va. 158, 162, 59 S. E. 415, 17 L. R. A. (N. S.) 124, the commissioners testified. In 2 Lewis, Em. Dom. (3d Ed.) § 652 (433), it is said:

"In regard to the competency of witnesses the general rules apply."

[4] 4. Subject to objection, I heard testimony as to prices paid by the government to adjoining landowners for land somewhat similar to the tracts here in controversy. The best conclusion I can reach is that the weight of authority supports the objection of the exceptants. 2 Lewis, Em. Dom. § 667 (447); *Mills*, Em. Dom. § 170. So far as appears, the landowners who sold to the government may have been influenced by fear of condemnation. In reaching my conclusion on the merits, I disregard the evidence referred to.

5. Some of the witnesses were asked to state the value, without regard to the fact that the government wanted the land. While no exception was based on this fact, it may be well to note that in *Five Tracts of Land v. U. S.*, 101 Fed. 661, 665, 41 C. C. A. 580, this theory is approved.

[5] 6. After careful consideration, I have concluded that I should confirm the reports in each of these cases. No attempt will be made to discuss the evidence in detail. A very considerable number of honest witnesses expressed opinions to the effect that the land is worth considerably more than the commissioners have reported. Opin-

ion evidence is advisory only, and is not binding. The Conqueror, 166 U. S. 131, 17 Sup. Ct. 510, 41 L. Ed. 937, et seq. The commissioners in these cases were agreed upon by the parties. The impression made upon me by their appearance and demeanor upon the witness stand was most favorable. There has been no suggestion of any improper influence brought to bear upon them. To my mind they undoubtedly intended to award full and fair compensation. The weight to be given to their reports, under both the general authorities and under the Virginia decisions, is such that I cannot in any of these cases find sufficient reason for refusing to confirm.

In *Hunter v. Railroad Co.*, supra, 107 Va. 158, 170, 171, 59 S. E. 415, 419 (17 L. R. A. [N. S.] 124), is the following:

"In *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906, this court said: 'When it becomes necessary to ascertain what is just compensation for land taken for public use, as in the present case, the statute directs that the court shall appoint five disinterested freeholders as commissioners to perform this duty, and requires that, in its performance, they shall themselves view the land so taken. The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners. They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself which is taken, and judging as to its value. * * * They have, as they also had here, after having their attention especially drawn to the element of damage relied upon, the opportunity to apply the evidence produced before them to the subject of the controversy, and to determine the weight to be given to its several parts. We are without the benefit of their opportunities, and of what they saw and were the judges, and it should be a very clear case, indeed, of inadequate compensation, to justify the court in disturbing their sworn, deliberate, and disinterested judgment as disclosed in their report.'

"In *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361 [37 L. Ed. 170] the opinion, quoting from *Mills on Em. Dom.*, says: 'An appellate court will not interfere with the report of commissioners to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up, so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.' See, also, the recent case of *Tidewater Ry. Co. v. Cowan*, 106 Va. 817, 56 S. E. 819."

See, also, 7 Ency. Pl. & Pr. 613, 614; 15 Cyc. 905 et seq.; 2 Lewis, Em. Dom. § 776 (524); *Columbia Co. v. Rudolph*, 217 U. S. 547, 560, 30 Sup. Ct. 581, 54 L. Ed. 877, 19 Ann. Cas. 854; 5 Ency. Ev. 248; *Railroad Co. v. Pack*, 6 W. Va. 397.

In re DICKS.

(District Court, N. E. D. Georgia, S. D. June 28, 1912.)

BANKRUPTCY (§ 403*)—DEATH OF BANKRUPT—WIDOW'S ALLOWANCE—AWARD.

Code 1910, § 4041, provides that among the necessary expenses of administration of a decedent's estate and to be preferred before all other debts, except as otherwise specially provided, is a provision for the support of the decedent's family to be set off either in money or property by appraisers sufficient to support and maintain them for 12 months from the date of administration according to the circumstances and standing of the family before decedent's death, keeping in view the solvency of the estate. Bankr. Act July 1, 1898, c. 541, § 8, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3425), provides that the death or insanity of the bankrupt shall not effect the proceedings, but they shall be conducted and concluded in the same manner so far as possible as though the bankrupt had not died or become insane, provided that, in case of death, the widow and children shall be entitled to all rights of dower and allowance fixed by the law of the state of the bankrupt's residence. *Held*, that since the title of the bankrupt cast on the trustee by bankruptcy law is not an absolute one, but for distribution to pay debts, the rank and priority of which is generally determined by the law of the state, where a bankrupt died shortly after adjudication, his bankruptcy did not deprive the widow and minor children of their right to a year's support under section 4041.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 217; Dec. Dig. § 403.*]

In Bankruptcy. In the matter of bankruptcy proceedings against L. K. Dicks. On petition to review a referee's decision refusing to order the trustee to pay to the widow and minor children a year's support under Code Ga. 1910, § 4041. *Reversed*.

On appeal, questions certified to Supreme Court by divided court.

B. B. McCowen, of Augusta, Ga., for petitioners.

Wm. H. Barrett, of Augusta, Ga., for trustee.

SPEER, District Judge. L. K. Dicks was adjudicated a bankrupt. He died shortly thereafter, and after his trustee had been elected and qualified, but before the property comprising his estate had been sold. His widow, Mrs. M. J. Dicks, made application to the ordinary of Richmond county (the county of her residence) to have a year's support set aside for herself and four minor children under the provisions of section 4041 of the Code of Georgia of 1910. Appraisers were duly appointed, and reported, setting aside the sum of \$2,500, to be paid out of the money or property in the hands of the trustee in bankruptcy. Application was thereupon made to the referee for an order directing the trustee to pay to the widow this sum. The trustee resisted the application. The referee sustained the contentions of the trustee, and denied the petition of the widow, and the controversy is now before the court on a petition for a review of the referee's finding.

The inquiry it seems must be determined by the relating portions of the Code of Georgia and of the Bankruptcy Act. The law of Georgia providing allowances for the temporary support of families who

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have been bereaved by the death of the husband or father is found in section 4041 of the Code. Under the title, "Year's Support to Family," this provides:

"Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family to be ascertained as follows: upon the death of any person, testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children * * * it shall be the duty of the ordinary, on the application of the widow * * * to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration * * * to be estimated according to the circumstances and standing of the family previously to the death of the testator or intestate, and keeping in view also the solvency of the estate. * * *

The "ordinary" in this state is the probate court. Section 8 of the Bankruptcy Act provides:

"The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

The questions raised on the finding of the referee by this petition must be determined it seems by the proper interpretation to be placed upon these sections of the state and national law. It is contended for the trustee that since the "year's support" in Georgia must be set aside "from the estate" of the deceased, the latter, having been divested of his property by the adjudication in bankruptcy, died without an estate from which the year's support could be carved out. In support of this contention, several Georgia cases are cited, where the deceased had made deeds of assignment of his property before his death. By these the Supreme Court of Georgia held that he had absolutely parted with all title, and the widow could make no claim as against such property for her statutory "year's support." The distinction, however, between an absolute sale and conveyance of title by the owner when in life, and the qualified divestiture of his title by operation of law, seems quite plain.

Mr. Collier, in his useful treatise on the Law of Bankruptcy ([8th Ed.] p. 195), in discussing section 8, quoted above, remarks:

"The proviso protects all the rights, dower, and otherwise granted to the widow and children under state statutes. The clause is a new enactment, but it does not change existing law. The doctrine rests on the principle that the trustee's title is charged with the same liens and burdens, whether actual or inchoate, as was the bankrupt's. It is not material that the husband died after the vesting of the title in the trustee."

In support of this statement the learned author cites *In re Slack* (D. C.) 111 Fed. 523. In that case Judge Wheeler, in the district of Vermont, while enforcing the proviso of section 8, observes:

"The estate of the bankrupt, that the creditors are entitled to the benefit of, has gone to the trustee for sale and distribution of the proceeds, but not

for inheritance, or for distribution of the real estate itself. The bankrupt is not wholly disseised till the land is gone out of the estate."

This authority clearly distinguishes the question before the court from the Georgia authorities above referred to.

In the case of *In re Newton* (D. C.) 122 Fed. 103, may be found this clear and cogent statement by Judge Platt, of the district of Connecticut:

"Section 6 of the Bankruptcy Act takes care of the bankrupt in certain respects while he lives. Section 8 continues the machinery of the court after his death or insanity, but proceeds with caution to offer to the widow and children of the bankrupt, who shall die or become insane after the proceedings have been instituted, the fostering care of the federal tribunal just as far as the local tribunal had been authorized to go by its creator, the local Legislature, and no further. If the proceedings were abated by the death or insanity of the bankrupt, it is clear that the probate court would have had ample authority to make the allowance. But the Congress says that they shall not abate, and in the same breath says that 'the widow and children shall be entitled to all rights of dower and allowance fixed by the law of the state.'"

We hold that the year's support of the family immediately succeeding the death of its head is an "allowance" of this character. It is an allowance singularly promotive of a benevolent public policy.

To no period of the life of the family could the state more wisely and justly direct and apply its fostering care; in no other is the distress so poignant, or the extremity so great. The provision of the Georgia law is then not only in harmony with the soundest public policy, but with the most tender and compassionate teachings of that holy religion which admonishes us to care for the "widow and the fatherless in their affliction."

The authority in which learned counsel for the trustee reposes his strongest reliance is *In re McKenzie*, 142 Fed. 383 et seq., 73 C. C. A. 483, a decision by the Circuit Court of Appeals of the Eighth Circuit. In that case, however, the dower of the widow was involved. It was not even the dower at common law, but it was the right of dower extended to the personal property by the statute of Arkansas. This provides (Kirby's Digest, § 2708):

"A widow shall be entitled as part of her dower, in her own right, to one-third of the personal estate * * * whereof the husband died seised or possessed."

Upon the construction of this statute, the court, holding that the husband did not have actual seisin or possession of the personal assets claimed by the widow, held that her right must be denied.

The statute of Georgia granting the year's support does not use the words of rigid and long ascertained import adopted by Arkansas. It declares the year's support to be "among the necessary expenses of administration, and to be preferred before all other debts," and declares that for the widow and children, or children only, the ordinary, through appraisers, shall set apart "either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration." Here it is true the deceased did not die actually seised and possessed of

the values set apart for the year's support. A statutory, but not an unqualified, title to this had vested in the trustee. But can it be denied that the bankrupt living, or his family when dead, had an "estate" in the assets? While he lived, he had the right to an exemption, he had the right to propose a composition with his creditors, which the court might have ratified, and directed the trustee to reconvey the assets to him. For many years the salutary rights of the wife and children in that estate had been fixed by law. For many years, and on many occasions, the supreme appellate court of the state had reiterated the doctrine that this right is one dear to the law. As early as *Cheney v. Cheney*, 73 Ga. 66, 70, it had declared of the year's support:

"This court has always regarded such claims favorably, as will clearly appear from the following cases, to which many others, if necessary, might be added: [*Lang v. Hopkins*] 10 Ga. 37; [*Cole v. Elfe*] 23 Ga. 235, 237; [*Murphy v. Vaughan*] 55 Ga. 361; [*Rust, Johnston & Co. v. Billingslea*] 44 Ga. 316; [*Wilson v. Peeples*] 61 Ga. 218, 221; [*Mitchell v. Word*] 64 Ga. 208, 221."

The creditors then dealt with the party who became bankrupt with a full knowledge of this law and the policy of the state. It is not conceivable that Congress could intend to annul a statute framed with such benignant philosophy, and designed to afford sustenance to the wife and children of the dead. Nor does this view take into account the strong dissenting opinion of Circuit Judge Adams, filed in *Re McKenzie*, supra, which seems to have met with approval in many quarters.

To briefly restate our view of this question, the title of the debtor cast upon the trustee by the bankruptcy law is for distribution to pay the debts. It is not an absolute title. The rank and priority of the debts are almost without exception determined by the law of the state. By the law of Georgia the year's support is to be "preferred before all other debts," with certain exceptions not material here, and the year's support must be set apart either in property or money from the estate of the deceased. The year's support is then an inchoate lien, with few exceptions, superior to the claims of creditors. It is true that the argument against this view is presented with great ingenuity and force, and other courts may reach a different conclusion.

It is related that in a great ecclesiastical convocation at Oxford, when, in profound theological debate, the powers of those heavenly ministers and messengers of grace were in jeopardy, Benjamin Disraeli, Lord Beaconsfield, arose, and exclaimed to the Primate presiding: "My Lord, I am on the side of the angels."

Let order be taken accordingly.

CARPENTER et al. v. KNOLLWOOD CEMETERY et al.

(District Court, D. Massachusetts. July 1, 1912.)

No. 162, Equity.

1. COURTS (§ 328*)—JURISDICTION—FEDERAL COURTS—AMOUNT IN CONTROVERSY.

Where a suit is brought by owners of landholders' shares in a cemetery on behalf of themselves and all other owners of such shares similarly situated to protect the interests of the lands as against a proposed sale, the aggregate interest of the whole class constitutes the matter in dispute, and, when that is more than \$2,000, the federal court has jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

Jurisdiction of circuit courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

2. INJUNCTION (§ 118*)—RESTRAINING SALE OF CEMETERY LOTS—PLEADING—SUFFICIENCY.

A bill to restrain a sale of cemetery lands, which alleges that a contract provided that proceeds from a sale of the use of lots in the cemetery should be divided into equal shares, distributed among persons named according to their several interests, that the cemetery, pursuant to the contract, issued shares to persons named, that the shares were fully paid and are outstanding, and that complainants own a specified number of shares, sufficiently alleges the ownership of the shares as against a demurrer averring that the complainants do not appear as shareowners of record.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

3. EQUITY (§ 219*)—PLEADING—SURPLUSAGE.

Where complainants request the striking out of matters in a bill, demurrers to the parts stricken out are no longer available.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 496, 498-500; Dec. Dig. § 219.*]

4. INJUNCTION (§ 114*)—RESTRAINING SALE OF CEMETERY LANDS—PARTIES.

Where a trustee under a mortgage executed by a cemetery corporation is a party to a suit to restrain a sale of cemetery lands, the bondholders need not be made parties, for they are represented by the trustee.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.*]

5. INJUNCTION (§ 114*)—RESTRAINING SALE OF CEMETERY LANDS—PARTIES.

Where, in a suit by owners of landowners' shares in a cemetery, on their own behalf and on behalf of all others similarly situated, to restrain a sale of cemetery lands, the issue was between the class of shareholders in whose behalf the bill was brought, on one hand, and the cemetery and a class of shareholders represented by a shareholders' committee, on the other, the shareholders' committee, or such members as may be presumed to represent the interests of such class of shareholders, must be made parties to the bill, since the interests of such class will be affected by a decree in favor of complainants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Reese Carpenter and others against the Knollwood Cemetery and others. Demurrer overruled in part, and in part sustained, with leave to complainants to amend.

See, also, 195 Fed. 96.

Francis E. Baker, C. H. Tyler, O. D. Young, I. H. Ellis, and Francis I. McCanna, for complainants.

Atherton N. Hunt and A. L. Harwood, for defendant Knollwood Cemetery.

Joseph W. Lund, for defendant Beacon Trust Co.

Warren, Garfield, Whiteside & Lamson, for defendant Puritan Trust Co.

Barney & Lee and Thomas Z. Lee, for intervener John J. Cameron.

Wendell P. Murray, pro se.

COLT, Circuit Judge. This case is now before the court on demurrer to the bill. The grounds of demurrer are set forth in defendants' brief as follows:

- (1) The complainants are not entitled to the relief sought.
- (2) The subject-matter in dispute is less than \$2,000.
- (3) The complainants on their bill do not appear as shareowners of record, and are therefore not entitled to maintain this suit.
- (4) The complainants have a complete and adequate remedy at law.
- (5) The sixth prayer of the complainants' bill is vague, uncertain, and inconsistent with any of the other prayers of said bill.
- (6) The bill sets forth inconsistent states of facts.
- (7) The several prayers of the complainants' bill are inconsistent, in no sense alternative, and the relief sought irreconcilable.
- (8, 9, 10) Divers persons not at present parties to the bill are necessary and indispensable parties.

1. The bill prays for the appointment of a receiver, for an injunction, and for an account. Assuming the allegations of the bill, which are well pleaded, to be true, I am not prepared to hold that the bill does not set forth a cause for equitable relief; and it follows that this ground of demurrer is not well taken. In disposing of this ground of demurrer, I do not deem it necessary to consider in detail the allegations of the bill, as the bill has already been before the court, as well as before a master, in connection with the motion for a preliminary injunction.

[1] 2. The second ground of demurrer, that the subject-matter in dispute is less than \$2,000, is overruled for the following reasons:

The bill alleges that this suit is brought by the complainants on behalf of themselves and all other owners of landholders' shares who are similarly situated, seeking, among other things, to protect the interests of the lands of the defendant corporation as against a proposed sale of such lands.

"Where a suit is brought by one or more, for themselves, and all others of a class jointly interested, for the relief of the whole class, the aggregate interest of the whole class constitutes the matter in dispute." 1 Foster's Federal Practice (4th Ed.) § 16k, p. 107, and cases cited.

Since this case is governed by this general rule, it is clear that the matter in dispute is far in excess of the statutory requirement.

[2] 3. With respect to the third ground of demurrer, that the complainants in their bill do not appear as shareholders of record, it is sufficient to refer to the ninth paragraph of the bill, which reads as follows:

"Ninth. That said John J. Cameron contract provided in sections 3 and 4 thereof that the one-half of the proceeds to be realized from the sale of the use of lots and plats in the cemetery should be divided into fifteen thousand (15,000) equal shares, which shares should be distributed to and among said Cameron and his associates named in said contract according to their several interests, and that one or more certificates should be issued to each of said persons for his share, and the said shares should be personal property and transferable by the said persons or their legal representatives or assigns on the books of the said cemetery corporation upon the surrender of the certificates, the same as stock is usually transferable; that said Knollwood Cemetery, pursuant to said authority, issued the fifteen thousand (15,000) landowners' shares mentioned therein to the following named persons, to wit: John J. Cameron, Samuel I. Knight, Reese Carpenter, Leonard W. Ross, Daniel H. Watson, and Thomas D. Husted, all of which were fully paid for and are now outstanding. That said complainant Reese Carpenter now owns 50 of said landowners' shares. That said complainant Caroline L. Carpenter now owns 50 of said landowners' shares. That said complainants Chauncey M. Depew and Chauncey M. Depew, Jr., together now own 266 of said landowners' shares. That said complainant Samuel I. Knight now owns 312 of said landowners' shares. That said complainant Gardiner Wetherbee now owns 100 of said landowners' shares. That said complainant Charles W. Carpenter now owns 226 of said landowners' shares. That said complainant James B. Murray now owns 800 of said landowners' shares. That the original owners of said landowners' shares or their assigns are in equity the actual owners of said land, and are the principals for whom the trust created under the terms of the Cameron contract was established, having paid a good and valuable consideration for same."

In my opinion, reading this paragraph as a whole, the allegations of ownership are sufficient. The cases cited by the defendants presented special circumstances, and do not apply to the case at bar.

4. Assuming the truth of the allegations of this bill, it is manifest that this case is within the equity jurisdiction of the court, and that the complainants have no sufficient or adequate remedy at law.

[3] 5, 6, 7. These grounds of demurrer are to the effect that the sixth prayer of the complainants' bill is vague, uncertain, and inconsistent with any of the other prayers of said bill.

The sixth prayer of the bill is as follows:

"That a decree be entered by this honorable court winding up said cemetery corporation and revesting the title of the remaining land of said cemetery corporation, free and clear from all incumbrances, in said John J. Cameron and his associates mentioned in said contract, their respective executors, administrators, and assigns, and decreeing said pretended mortgage to be null and void."

With respect to the fifth, sixth, and seventh grounds of demurrer the complainants in their brief say:

"As to the fifth, sixth, and seventh causes of demurrer, as has already been stated, the complainants, on more mature deliberation, do not insist on the position taken in the bill that the corporation has forfeited its right to retain the title to and possession of the premises, and hereby offer to strike

out the portions of the twenty-eighth paragraph setting up such a claim and also such portions of the sixth prayer for relief as seek a revesting of the title to the remaining land of the cemetery in Cameron and his associates.

"The portion of the twenty-eighth paragraph of the bill asserting that, for reasons therein stated, the defendant Knollwood Cemetery has forfeited its right to longer retain the title to and possession of any of said lands conveyed to it by said John J. Cameron, and that title to the same should now be declared vested, by decree of the court, free and clear from all liens and incumbrances, in said John J. Cameron and his associates mentioned in said contract, is a conclusion of law, which the complainants are willing to admit is unsound in view of the fact that the land conveyed has, with the knowledge and assent of their predecessors in title, been dedicated and used for cemetery purposes so as to involve the rights of lot owners and the public. * * * Said portions of said bill may therefore be treated, for the purposes of this hearing, as mere surplusage."

With this matter stricken from the bill, as requested by the complainants, it seems to me that the fifth, sixth, and seventh grounds of demurrer are removed.

[4, 5] 8, 9, 10. The remaining ground of demurrer is that the bill is defective for want of necessary parties. This point raises two questions: First, whether the bondholders' committee are necessary parties to the bill; and, second, whether the shareholders' committee are necessary parties to the bill.

In answer to the first question, it is sufficient to say that the trustee under the mortgage, who is made a party to the bill, sufficiently represents the bondholders. This rule is well stated by Foster, as follows:

"Trustees under a railroad mortgage, or under any other trust deed of a similar nature securing the rights in real property of a large number of beneficiaries, are held, in all proceedings affecting the property which they thus hold, adequately to represent the latter, who will be bound, in the absence of fraud, by notice given or a decree entered against trustees, although the court may in its discretion make any of such beneficiaries a party to the suit at his application." 1 Foster's Federal Practice (4th Ed.) 317.

With respect to the second question, I have reached a different conclusion, for the following reasons:

The shareholders, as appears from the bill and exhibits, are not members of the defendant corporation. The important issue raised by the bill is between the class of shareholders in whose behalf the bill is brought, on the one hand, and, on the other hand, the Knollwood Cemetery and the class of shareholders represented by the shareholders' committee. As the bill is now framed, this latter class of shareholders is not represented; and, since in my opinion their interests would be affected by a decree in favor of the complainants, I think they should be so represented by making the shareholders' committee parties to the bill, or, if that should be found impracticable, by making such members of the committee parties to the bill as may be fairly presumed to represent the interests of all this class of shareholders. Story's Equity Pleading (10th Ed.) § 35b, pp. 143, 144.

The first, second, third, and fourth grounds of demurrer are overruled. The fifth, sixth, seventh, eighth, ninth, and tenth grounds of demurrer are sustained, with leave to the complainants to amend their bill.

JONES v. MOORE, State Treasurer of Delaware.

(District Court, D. Delaware. March 18, 1912.)

No. 6.

1. RECEIVERS (§ 173*)—LEAVE TO SUE—EFFECT.

That a receiver of a railroad company was authorized by the court to sue the State Treasurer at law or in equity to recover assets of the railroad company in his custody was not a final determination by the court in advance of the jurisdictional validity, propriety, or legality of any particular proceeding at law or in equity which might be instituted in consequence of such authority.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 327-332; Dec. Dig. § 173.*]

Actions by or against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

2. ASSUMPSIT, ACTION OF (§ 4*)—RIGHT TO SUE.

Assumpsit lies only to recover damages for breach of a parol contract, and to sustain it it must appear that there was a valid contract, express or implied, on the part of the defendant and a breach by him.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. § 13; Dec. Dig. § 4.*]

3. CORPORATIONS (§ 20*)—ORGANIZATION—FUNDS—DEPOSIT WITH STATE TREASURER—RECOVERY.

Delaware General Corporation Law (22 Del. Laws, c. 394) § 108, provides for the filing of articles of association of railroad corporations organized in that state with the Secretary of State only after \$500 of stock for every mile proposed to be constructed is subscribed and paid in in good faith to the directors, who shall have deposited such sum with the State Treasurer, to be repaid to the directors or treasurer of the railroad in sums of \$500 for each mile constructed, etc. Section 117 declares that any corporation created under the act to construct a railway shall commence its proposed construction within six months from organization, and shall complete at least one track within two years from the date of its commencement, provided that, if it fails to do so, it shall forfeit the franchises given by the act. *Held*, that where a railroad company and its predecessor had each deposited \$7,000 with the State Treasurer under such act, and, after consolidation, the latter company forfeited its franchise, and was dissolved for failure to construct any part of its road, the treasurer's obligation to repay the money so deposited did not arise out of contract, and therefore assumpsit would not lie to recover the same.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 27; Dec. Dig. § 20.*]

At Law. Action by William G. Jones, Jr., as receiver of the Delaware Interurban Railway Company, against David O. Moore, Delaware State Treasurer. On demurrer to declaration. Sustained in part, and overruled in part.

David J. Reinhardt, of Wilmington, Del., and Reynolds D. Brown, of Philadelphia, Pa., for plaintiff.

Andrew C. Gray, Atty. Gen., and Josiah O. Wolcott, Deputy Atty. Gen., both of Wilmington, Del., for defendant.

BRADFORD, District Judge. This case is an action of assumpsit brought by William G. Jones, Junior, receiver of Delaware Interurban

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Railway Company, a corporation of Delaware, hereinafter referred to as the interurban company, against David O. Moore, treasurer of the state of Delaware. The declaration contains four counts, each of which has been demurred to generally. It is unnecessary to set forth in detail the allegations of the several counts; and only such of the facts, admitted by the demurrer, will be referred to as raise material points in the case. The Delaware Suburban Railway Company, hereinafter referred to as the suburban company, having been incorporated and organized under the general corporation law of Delaware (Vol. 22, Chap. 394, Del. Laws) for the purpose of constructing, maintaining and operating a line of railway for the transportation of freight and passengers by any improved motive power other than steam, in the city of Wilmington, in New Castle county and state of Delaware, the directors of that company caused to be deposited October 13, 1902, and May 19, 1903, with Martin B. Burris, then state treasurer of Delaware, moneys aggregating \$7,000, under and pursuant to the provisions of section 108 of the general corporation law. The \$7,000 so deposited was received by the company from subscribers to its capital stock. At the expiration of the official term of Burris as state treasurer, he paid and transferred the \$7,000 so deposited to Thomas N. Rawlins, his successor in the office of state treasurer. Afterwards, and prior to March 9, 1905, the interurban company was incorporated and organized under the general corporation law with powers similar to those which had been conferred upon the suburban company, and the directors of the interurban company caused to be deposited on the last mentioned day \$7,000 with Rawlins, state treasurer, as custodian thereof, under and pursuant to the provisions of the same section of the general corporation law. This sum of \$7,000 had been received by the interurban company from subscribers to its capital stock. Afterwards, May 31, 1905, under and by virtue of the provisions of sections 59 and 60 of the general corporation law the suburban company was merged and consolidated with the interurban company, the latter company thereupon succeeding to all the rights, privileges, powers, franchises, property and debts of the suburban company. Owing to financial inability on the part of the interurban company the proposed railway was never constructed, and under and pursuant to the provisions of section 117 of the general corporation law its franchises were forfeited October 1, 1907, and under and pursuant to the provisions of sections 39, 40, 41 and 42 of the same law it was, March 1, 1910, duly dissolved and its corporate existence ended, rendering impossible the construction of the proposed railway by the interurban company. The sum of \$14,000, being the aggregate of the two sums of \$7,000 paid to the state treasurer by the directors of the suburban and interurban companies respectively, remained in the custody of Rawlins, state treasurer, until paid by him January 5, 1909, to Moore, his successor in that office, the defendant, who has since held and now holds and is in possession of the same. Certain interest on the \$14,000 has been received by the state treasurer during the time the principal

sum has been in his custody and possession. The plaintiff was appointed receiver of the interurban company by the circuit court of the United States for the district of Delaware and qualified in August, 1909, and has ever since remained such receiver. He made demand of the defendant for the payment to him of the above mentioned sum of \$14,000, together with the interest accrued thereon, with which demand the defendant refused to comply. The plaintiff was authorized by the circuit court, now the district court, June 17, 1910, to institute proceedings for the recovery of such assets of the interurban company as theretofore or then were in the custody and possession of the state treasurer. There are sundry other allegations of fact, and allegations of law in the guise of facts, as well as allegations of mere matter of law which hereinafter will be referred to. Section 106 of the general corporation law provides for the formation of corporations such as the suburban and interurban companies, and requires that the articles of association shall set forth, among other things, the "estimated length of such railway" and the amount of the capital stock which "shall not be less than two thousand dollars for every mile of road proposed to be constructed." Section 107 relates to the approval and filing of the articles of association, and to certain "additional powers" not material to be considered in this connection. Section 108 is as follows:

"Section 108. Articles of association, in compliance with the provisions of sections 106 and 107 of this Act as amended shall not be filed and recorded in the office of the Secretary of State until at least five hundred dollars of stock for every mile of railway proposed to be made is subscribed thereto and paid, in good faith and in cash, to the directors named in said articles of association, nor until the directors shall have deposited the said moneys so subscribed and paid to them with the State Treasurer, who is constituted the custodian of the same, and shall hold the same, subject to be repaid to the directors of the said corporation, or to the treasurer thereof, in sums of five hundred dollars for each mile of said railway, upon the construction of which it shall be proved, to his satisfaction, that the said corporation has expended at least the sum of five hundred dollars, nor until there is endorsed on such articles of association, or annexed thereto, an affidavit, made by at least three of the directors named in said articles of association, that the amount of stock required by this section has been in good faith subscribed and paid in cash as aforesaid, and that it is intended, in good faith, to construct or maintain and operate the railway mentioned in such articles of association, which affidavit shall be recorded with the articles of association as aforesaid."

Section 117, so far as material to the case in hand, is as follows:

"Section 117. That any corporation created under this Act for the purpose of constructing a railway, shall commence the proposed construction within six months from the date of its organization and complete at least one track of such railway within two years from the date of commencement as aforesaid; provided, that if any such company or corporation organized under this Act shall fail to comply with the provisions of this section, it shall thereby forfeit the franchises given it by this Act.

[1-3] Careful consideration has produced the conviction that with respect to the first three counts this action cannot be sustained. It is true that the receiver was authorized to bring suit at law or in equity against the defendant for the recovery of assets of the interurban company in his custody and possession; but such an ex parte

authorization cannot be treated as a final determination in advance by this court of the jurisdictional validity or propriety or legality of any particular proceeding, whether at law or in equity, that might be instituted in consequence of that authority. The plaintiff has resorted to an action of assumpsit, which lies for the recovery of damages for breach of a parol contract. To sustain the action it must appear that there was a valid contract, express or implied, on the part of the defendant and a breach by him. And in order that such a contract might exist on his part it was necessary that there should be a consideration to support it. An examination of the averments in the first, second and third counts of the declaration will fail to disclose either a contract or any consideration which could support a contract as between the defendant and the interurban company. It is true that in the first count it is in effect stated that the defendant on receiving the \$14,000 from his predecessor in the office of state treasurer became liable under sections 108 and 117 of the general corporation law to pay the same to the interurban company, together with interest accrued thereon, while in his custody, and that in consideration of such liability the defendant undertook and promised to pay that company that sum together with such interest when requested. And it is also true that in the second count it is in effect alleged that in consideration of the deposit with the defendant of the \$14,000 he undertook and promised the interurban company to pay to it the same together with interest accrued thereon while in his custody when requested. And in the third count it is in effect alleged that in consideration of the deposit with the defendant of the \$14,000 he undertook and promised the interurban company to keep the same in his custody subject to be repaid to the directors or treasurer of that company in sums of \$1,000 for each mile of railway upon the construction of which it should be proved to his satisfaction that the company had expended at least \$1,000, or, if the railway was not constructed and built and its franchises became thereby forfeited, to pay the \$14,000 with any interest accrued thereon to the company when requested. The allegations in the counts in question of contractual relations between the defendant and the interurban company are erroneous averments of matter of law and as such not admitted on demurrer. The moneys deposited by the directors of the suburban and interurban companies with the state treasurer were not illegally exacted by him nor paid to him under protest. They were not paid to him for his own benefit, nor was it by reason of any requirement by him that they were paid. They were paid in obedience to the mandate of the general corporation law for the accomplishment of its purposes, and their receipt by the state treasurer could not constitute any consideration for a binding undertaking or contract by him for their repayment. There was absolutely no consideration to support any supposed contract on his part to repay the whole or any part of the \$14,000 or its interest. If he was clothed with any duty to refund to the company, that duty did not arise by virtue of any contract on his part resulting from the deposit of the

moneys with him, but was created solely by the provisions of the general corporation law. So far as the first three counts are concerned whatever contract may have existed with the interurban company was one, not with the defendant, but one between the state of Delaware and that company, for any breach of which this action cannot in any aspect of the case be sustained.

Wholly aside from the foregoing considerations this court strongly inclines to the opinion that the plaintiff on the facts set forth in the first three counts is not entitled to recover the moneys deposited by the suburban and interurban companies with the state treasurer under any form of remedy, legal or equitable, and that whatever hardship may exist calls for legislative and not judicial relief. But in view of the conclusion reached as to the legal impropriety of this action it is not necessary to consider other difficulties confronting the plaintiff. The demurrers to the first three counts must be sustained.

The fourth count, unlike those preceding it, does not set forth facts necessarily showing the invalidity or impossibility of the alleged contract of the defendant to pay to the interurban company the moneys mentioned in that count, and the demurrer to that count must be overruled.

CHASE et al. v. ERHARDT.

(District Court, D. Vermont. July 20, 1912.)

1. REMOVAL OF CAUSES (§ 84*)—NOTICE—SUFFICIENCY.

Where the state court was satisfied that proper service of a written notice of removal proceedings was made, and it appeared that a copy of the petition was furnished to the counsel of record in the state court before being filed, the notice was sufficient on objection made in the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 164; Dec. Dig. § 84.*]

2. REMOVAL OF CAUSES (§ 88*)—BOND—SUFFICIENCY.

Where defendant, within three months after the taking effect of the new Judicial Code on January 1, 1912, instituted removal proceedings in good faith, and a general appearance was entered by plaintiff, and a certified copy of the record was filed in good faith and no delay resulted, and where the bond filed provided for the entering of a certified copy of the record on the first day of the next term of court, instead of within 30 days as required by the provisions of the new Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), and no objection was made and the attention of defendant's counsel was not called to the change in the Code, the defect in the bond, being one relating to the mode of procedure, was not fatal to the defendant's right to remove.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 184-188; Dec. Dig. § 88.*]

3. REMOVAL OF CAUSES (§ 88*)—DEFECTIVE BOND—AMENDMENT.

Where a party praying for removal of a cause to the federal court files a bond which does not comply with the statute, he may, upon objection being made, amend or file a new bond as the state court may require.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 184-188; Dec. Dig. § 88.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—20

4. REMOVAL OF CAUSES (§ 86*)—PETITION.

The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), enacted March 3, 1911, and taking effect January 1, 1912, does not require that the petition to remove state that the petitioner has a just cause or a just defense and intends to prosecute it.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

5. REMOVAL OF CAUSES (§ 92*)—FILING OF RECORD.

The new Judicial Code enacted March 3, 1911, and taking effect January 1, 1912 (Act March 3, 1911, c. 231, § 29, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), requires that the bond in removal proceedings shall provide for the filing of a certified copy of the record in the federal court within 30 days, and that, "said copy being entered within said 30 days as aforesaid," the pleading shall follow within the next 30 days, but this Code nowhere requires that such copy "shall be" so entered. Section 39 authorizes enforcement of a forfeiture if the clerk fails to file such copy within "such time as the court may determine." Section 294 provides that there shall be no implication from any change of words of a change of the intent in the existing statutes unless clearly manifest. The time of filing the copy of the record does not affect any jurisdictional question. *Held*, that the words "said copy being entered within said 30 days" are not mandatory, and the federal court has discretionary power the same as before the enactment of this Code, to extend the time for filing.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 190; Dec. Dig. § 92.*]

6. STATUTES (§ 236*)—CONSTRUCTION.

Laws are liberally construed to give a remedy or carry into effect an object declared in the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. § 236.*]

Action by J. N. Chase and another against Fannie D. Erhardt, brought in the Rutland County Court of Vermont, and removed to the federal court on petition of defendant. Plaintiff moves that the case be remanded to the state court. Motion denied.

V. A. Bullard, of Burlington, Vt., for plaintiffs.

W. N. Theriault, of Montpelier, Vt., and M. C. Webber, of Rutland, Vt., for defendant.

MARTIN, District Judge. This is an action on the case for breach of warranty claiming damages to the amount of \$5,000. One plaintiff is a citizen of Vermont, the other of Connecticut, and the defendant is a citizen of Massachusetts. The suit was brought in the Rutland county court of the state of Vermont and removed to this court on the petition of the defendant. The plaintiff moved that the case be remanded to the state court. On hearing it was claimed by the plaintiff:

(1) That no written notice of the petition and bond for removal was given before the filing of said petition and bond by the defendant.

(2) That the bond is not in compliance with the provisions of the Judicial Code in that its proviso is that a certified copy of record shall be filed in the federal court on or before the first day of the

*For other cases see same top. c & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

term, whereas said Judicial Code requires that it shall be within 30 days.

(3) That the petition for removal contains no allegation that the defendant has a just defense and intends to make it.

(4) That a certified copy of record was not filed by the defendant within 30 days.

I. Written Notice.

[1] It appears that the state court was satisfied that written notice was furnished to the counsel of record in that court in accordance with the provisions of law. I find, from the affidavit of the clerk of the state court and the evidence of M. C. Webber, Esq., that a copy of the petition for removal was furnished counsel of record in the state court before the same was filed, and that the notice was satisfactory to that court, and it should be and is to this court.

II. Defective Bond.

[2] The alleged defect of the bond is that it does not provide for the filing of a certified copy of record within 30 days. Instead of that, it provides for the entering of said copy on the first day of the next term of court. The provisions as to the bond were changed by the Judicial Code. The Code, § 29, requires that the bond shall provide for the filing of a certified copy of record within 30 days.

[3] The party praying for removal, having filed a bond that does not comply with the statute, upon objection being made, may amend or file a new bond to the satisfaction of the state court. In the case at bar, had counsel for the plaintiff objected to the bond, the state court could have required an amendment or a new bond before granting the prayer of the petition. This bond is simply to compel the party petitioning for removal to actually enter the case in the federal court and pay costs if he fails in his removal proceedings. If the party petitioning for removal fails to enter his case in the federal court, then there is a liability under the bond for whatever damages the adverse party may suffer. This bond was executed and filed in accordance with the provisions of the statute as it was prior to the enactment of the Judicial Code, and within three months of the time when the Judicial Code took effect. The attention of counsel for the defendant had not been called to the change made in the Judicial Code. The removal proceedings were instituted in good faith under a constitutional right, and with no intent to hinder or delay, and immediately upon the entering of the case in the federal court there was a general appearance by counsel for the plaintiff. The certified copy of record has been filed in good faith, and no delay is caused to the prosecution of the case. This defect in the bond relates to the mode of procedure and is not fatal to the defendant's right to remove. I am aware that there are cases where the courts have held that, where a defective bond has been filed in the state court, it cannot be amended in the federal court, and the case should be remanded; but to my mind the cases cited below are the better authority, based upon better reasons, and result in a more just administration of the law. *Harris v. Dela-*

ware L. & W. R. Co. (C. C.) 18 Fed. 833; Overman Wheel Co. v. Pope Mfg. Co. (C. C.) 46 Fed. 577; Deford v. Mehaffy (C. C.) 13 Fed. 481.

Justice Bradley in *Ayers v. Watson*, 113 U. S. on pages 598 and 599, 5 Sup. Ct. 641, 643, 28 L. Ed. 1093, briefly discusses what are formal and what are jurisdictional questions in matters of removal in these words:

"We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and, if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time in which the application for removal is made. *It does not belong to the essence of the thing*; it is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word 'jurisdiction' is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it."

Rose's Code of Federal Procedure, vol. 2, § 1138, a recent and excellent authority, states this:

"By comity at least, the state court, or the judge in vacation, should be given opportunity to pass upon the petition and bond. Its acceptance and order of removal thereon relate back to the filing of petition and bond. Moreover, there are advantages in formally presenting the petition and bond and obtaining their acceptance and an order of removal. *Defects may be pointed out which the party can remedy by amendments*; and the fact that the state court has formally accepted the petition and bond, places the removing party in a better position to enjoin the state court's proceedings, or to obtain amendment in case defects are made the basis of objection in the Circuit Court." *Guarantee Co. v. Hanway*, 104 Fed. 369, 44 C. C. A. 312.

See, also, cases cited below under point IV.

III. Allegation of Defense.

[4] The statute does not require that a party in a petition to remove shall assert that he has a just cause or a just defense and intends to prosecute it. See chapter 3 of the Judicial Code.

IV. Filing of Record.

[5] The Judicial Code provides that one of the conditions of the bond shall be that a certified copy of record shall be filed in the federal court within 30 days. Before the enactment of the Code it was to be filed on or before the first day of the next term of the federal court. Congress evidently intended by this change that the party petitioning for removal should have 30 days in which to secure his copy of record from the state court, and that there should be no confusion or embarrassment as to the date of the next succeeding term of the federal court. There is not a word in section 29 of the Judicial Code, which relates to the procedure of removal, indicating that Congress was demanding or intending to require a more strict enforcement of the rules and regulations as to the procedure in the removal of causes. The Judicial Code nowhere provides that the entry of the

copy of record in the federal court *shall be* within 30 days. Observe the language:

"The said copy being entered within said thirty days, as aforesaid, in said District Court of the United States, the parties so removing the said cause shall within thirty days thereafter plead," etc.

The words above quoted, "as aforesaid," refer to the provision as to the bond, viz.:

"A bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record."

The Judicial Code was approved March 3, 1911, to take effect January 1, 1912. Former statutes which provided for the filing of the copy of record on or before the first day of the next term, as above stated, have been construed rigidly by some judges and liberally by others. The trend of authorities is that the provisions of law relating to the filing of the copy of record are not mandatory, but directory, and that the court should exercise a discretion in the matter, the line to be drawn upon good faith on the part of the moving party; and if a slip is made in a step in the process of removal, the party should not thereby necessarily lose a constitutional right. It had been held, before the enactment of the Judicial Code, that bonds might be amended and the time for filing papers and pleadings extended in the discretion of the court. If Congress had intended to deprive the court of a discretionary power in these directory steps, upon technical objection being made, it would have used far different language from that made use of in the Judicial Code. I quote again:

"The said copy being entered within said thirty days."

Not the said copy *shall* be entered within 30 days as aforesaid, nor that the said copy not being entered within 30 days the court shall, on motion, remand. On the contrary, it simply provides that the copy being entered in 30 days, the pleadings shall follow within the next 30 days. Is there any question but what, if the copy of record was entered in 40 days, the court could direct the pleadings to be filed within 20 days, especially when there is a general appearance for all the parties in the case? I see nothing in the Judicial Code indicating that the directory steps of the old statute are intended by the Code to become mandatory. I do not wish to be understood that it is not the duty of the court to heed the directory steps pointed out in the statute, but that for good cause shown the court has a discretionary power in the matter.

In this case it appears that the certified copy of record was filed in good faith. It appeared on hearing that counsel for the defendant was following the provisions of the old statute, and that his attention had not been called to the changes made in the Judicial Code. The petition to remand was filed March 21st, less than three months after the changes provided by the Judicial Code took effect. It further appeared on hearing that no delay has been caused by the failure to file the transcript within the 30 days. Under this state of facts, I think it an injustice to hold that a nonresident citizen shall be de-

prived of the right to have his case heard in the federal court, as provided by the Constitution. Suppose the clerk of the state court, through omission, illness, or willfulness, omits to furnish the certified copy within the 30 days. Is the removing party to be deprived of his right in the federal court? Clearly not. Section 39 makes provision for compelling the filing of the record, and, among other things, that section gives the United States District Court power to issue writ of certiorari commanding the state court to make return of the record and to enforce said writ against the clerk of the state court and to enforce a forfeiture should he fail "to file a copy of the paper or proceeding by which the same was commenced within such time as the court may determine." That time to be determined by the federal court may be 30 days or 60 days, as the facts and circumstances may warrant. Of course, the federal court would not issue a writ of certiorari until the 30 days had expired, for the county clerk is entitled to the full 30 days before he can be proceeded against, so the evident intention was that the court should have a discretionary power to extend the time for filing the record beyond the 30 days. This provision of section 39 plainly indicates that Congress did not intend that the words "said copy being entered within said thirty days" should be mandatory. On the contrary, it shows care in guarding against a mandatory construction. Section 294 of the Judicial Code squarely provides that there shall be no implication of a change of intent by reason of change of words unless such change of intent shall be clearly manifest.

The jurisdictional questions that arise on removal proceedings are: (1) Matters relating to the Constitution and laws of the United States, or treaties with foreign states or governments. (2) Diverse citizenship. (3) The amount involved.

The time for filing a copy of record does not affect any of these questions, so I hold that the question raised under point 4 is within the discretion of the court, and, under the facts in this case, I exercise that discretion in favor of the defendant.

In *Guaranty Co. of North Dakota v. Hanway*, 104 Fed. 369, at page 374, 44 C. C. A. 312, at page 318, Judge Sanborn, speaking for the Court of Appeals in the Eighth Circuit, uses this language:

"The time and the manner of the presentation of the pleadings and the *petition* relate to the form and method of the proceeding and not to the essentials of the right of removal."

[6] The technical steps in the mode of procedure are the only objections raised in the case at bar, and those are under a general appearance of counsel and, in my opinion, should not prevail. Laws are construed strictly to assert a right or avoid a penalty; they are construed liberally to give a remedy or carry into effect an object declared in the law. *Deford v. Mehaffy*, *supra*; *Woolridge v. McKenna et al.* (C. C.) 8 Fed. 650; *Canal Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226; *Kinney v. Columbia Savings & Loan Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103; *Overman Wheel Co. v. Pope Mfg. Co.*, *supra*; *Ayers v. Watson*, *supra*; *Creagh v. Insurance Co.* (C. C.) 83 Fed. 849; *Hamilton v. Fowler* (C. C.)

83 Fed. 321; *Torrent v. Martin L. Co.* (C. C.) 37 Fed. 728; *St. Paul R. R. v. McLean*, 108 U. S. 216, 2 Sup. Ct. 498, 27 L. Ed. 703; *National Ship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; *B. & O. Railway Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Powers v. Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Northern Pacific Terminal Co. v. Lowenberg et al.* (C. C.) 18 Fed. 339; *Rowell v. Hill* (C. C.) 28 Fed. 433; *Eisenmann v. Delemar's Nevada Gold Min. Co.* (C. C.) 87 Fed. 248; *Hughes*, Federal Procedure, 346; *Randall v. N. E. Order of Protection* (C. C.) 118 Fed. 782.

The motion of the plaintiff to remand is denied.

CARSON LUMBER CO. V. ST. LOUIS & S. F. R. CO.

(District Court, E. D. Oklahoma. June 4, 1912.)

No. 1,238.

1. CARRIERS (§ 200*)—SHIPMENTS—RATES—RECOVERY BACK.

Plaintiff made intrastate shipments of rough lumber to a certain Oklahoma point for milling and shipment beyond, when there was in force on the carrier's line a milling in transit tariff schedule under which he was entitled to have his inbound shipment rate readjusted to a lower schedule at the time of his outbound shipment. Before the outbound shipment, the milling in transit schedule was canceled, Oklahoma was admitted to statehood, and its corporation commission established a lower rate, which plaintiff paid on the outbound shipment. *Held*, that he could not recover back any part of the rate paid on the inbound shipments.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 901-905; Dec. Dig. § 200.*]

2. CARRIERS (§ 189*)—RATES—REMEDY OF SHIPPER.

The tariff published and filed as required by law governs between the shipper and carrier, and, if unjust and unreasonable, resort must be had by proper proceedings to correct the injustice before the shipper can secure redress on such account.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.*]

3. CARRIERS (§ 189*)—RATES—RIGHTS OF SHIPPER.

Freight rates being creatures of law and of its administration, and not of contract, a shipper of lumber to be milled in transit could not, by contract at the time of his inbound shipments, acquire a vested right to a through rate applicable to both inbound and outbound shipments.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.*]

4. CARRIERS (§ 202*)—SHIPMENT—RATE—MEASURE OF RECOVERY BACK.

Where rough lumber is shipped to a point for milling in transit and shipment beyond, the arrangement being that on making the outbound shipment the higher inbound rate shall be readjusted to a lower schedule, the measure of the shipper's recovery for the carrier's wrongful refusal to make such readjustment is the difference between the aggregate amounts actually paid on the inbound and outbound shipments, and the amount which would have been payable under the lower schedule, and not a difference estimated on the inbound shipments alone; a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

milling in transit rate being an entirety which must be accepted and carried out in full or not at all.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915; Dec. Dig. § 202.*]

Action by the Carson Lumber Company, a corporation, against the St. Louis & San Francisco Railroad Company, a corporation. Judgment for defendant.

Howe & Stanley, of Hugo, Okl., for plaintiff.

R. A. Kleinschmidt, of Oklahoma City, Okl., for defendant.

POLLOCK, District Judge. This is an action brought by plaintiff to recover from defendant a sum of money alleged to be the difference between that which plaintiff did pay, and what it should have been required to pay, on certain shipments of lumber over defendant's line of railway. On issue joined, the parties, by stipulation made and filed in the case, waived a trial by jury and submitted the matter to the judgment of the court on an agreed statement of the facts, filed herein, and on briefs and arguments of counsel.

The controversy, in so far as necessary to decision of the rights of the parties, may be briefly summarized, as follows: Between August 8, 1907, and February 27, 1908, while Oklahoma Territory and the Indian country were under territorial forms of government, plaintiff made various shipments of rough lumber over the line of road of the defendant to Hugo, Okl., for milling in transit at that point and shipment beyond during a period when there was in force a milling in transit privilege and a scale of rates applicable thereto which had become effective on April, 1907. When the outbound movements of the finished product took place from March 4, 1908, to September 15, 1908, the milling in transit rates and privileges had been canceled, Oklahoma had become a state, and its Corporation Commission had established a lower mileage scale of rates than those in effect at the time of the inbound movements. It is the contention of plaintiff the scale of inbound rates from points of origin to Hugo which were paid by it on inbound movements exceeds the scale of rates contained in the milling in transit tariff, and that the latter were applicable to be used on inbound movements, and it brings this suit to recover the difference. Upon the outbound movements the plaintiff paid the scale of rates established by the Oklahoma Corporation Commission. It appears from the agreed statement of facts the inbound movements were made under the sets of tariff known as 856-B which became effective March 20, 1906. The amount paid by plaintiff, therefore, in accordance with the scale of rates contained in that tariff, was the sum of \$6,193.14. It is claimed by plaintiff if the rates contained in the milling in transit tariff had applied to the inbound movements, as they should have been, the total amount payable by it on the inbound movements would have been \$1,700.78. Therefore plaintiff demands judgment for the difference between the amount actually paid and that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which it now alleges should have been paid; same being the sum of \$4,449.18.

By the fifth paragraph of the agreed facts, it is stipulated as follows:

"It is further agreed that the defendant recognizes its liability upon those cars mentioned in plaintiff's petition and which moved to interstate points, there being eight of said shipments."

Therefore, in so far as the interstate shipments are concerned, as defendant acknowledges its liability for the amount demanded on them, nothing further need be said. The matters hereinafter considered have reference alone to intrastate shipments.

[1] At the time of the inbound movements, defendant's tariff 856-B was in effect, it having been duly filed and published as required by law. There was also in effect an amendment No. 11, to defendant's tariff 25-D (I. C. C. No. 5,585) which became effective June 26, 1907, providing a mileage of local and joint rates, which, as above stated, were lower than the corresponding mileage scale of rates in tariff 856-B, and containing regulations for the application of that tariff upon shipments of forest products in car loads which were milled, concentrated, or reconsigned in transit. Under this tariff rough lumber could be shipped into milling or concentrating points such as Hugo upon the higher scale of rates prescribed in defendant's tariff 856-B, and when 65 per cent. of the manufactured product should be shipped out the lower scale of rates contained in amendment No. 11 was then applied to the aggregate mileage of the inbound and outbound movements, and the freight payable by the shipper would be adjusted in accordance therewith. In amendment No. 11, under the heading "Application of Rates," it is provided as follows:

"Effective June 26, 1907.

"The rates named herein unless otherwise specified, will only apply on shipments of forest products car loads, which move into milling, resawing, reconsigning or concentrating points, and when the manufactured products or shipments that have received concentrating privilege are reshipped via the St. Louis & San Francisco Railroad from such milling, resawing, reconsigning or concentrating points to destinations named in and under rates covered by tariffs Nos. 186, 200, 368, 546, 599, 900 and 904 series, but will not apply on shipments moving between points within the state of Arkansas or between points within the state of Missouri (will not apply on sections 3 and 4)."

On page 3 of the same tariff occurs the following:

"Effective June 26, 1907.

"On shipments of lumber, car loads to be resawed, planed, dressed, tongued, grooved, seasoned or manufactured into box material, vehicle and agricultural shapes at resawing points the following will govern, subject to specific rules named below."

Then follows a list of originating points, which includes the point at which the lumber in controversy in this case originated and a list of milling or concentrating points, which includes Hugo, and the schedule of rates applicable thereto. There was also in effect at the time of the inbound shipment the following provision in defendant's tariff 25-D:

"Effective April 1, 1907.

"These rates apply only when shipments of lumber to be rehandled or billed into milling or stop-over points at local tariff rates: The difference

between local rates and the above rates will be refunded when lumber is reshipped via the Frisco, the weight of lumber reshipped to be sixty-five per cent. of the inbound weight."

The inbound shipments in question moved from their various points of origin to Hugo during a period when the rates and milling in transit regulations above set forth were in effect. These rates and regulations continued in effect until March 2, 1908, on which date amendment No. 33 to defendant's tariff 25-D became effective. By this amendment the defendant canceled the milling in transit privileges and rates applicable thereto on movements within the state of Oklahoma by giving notice in the following language:

"Notice. Cancellation of milling in transit on forest products between points within the state of Oklahoma, effective, interstate, March 31, 1908, intrastate March 2, 1908. Cancel all milling in transit rules shown in tariff or amendments thereto between points within the state of Oklahoma. Milling in transit arrangement discontinued. (F. 1,834.)"

All the above tariffs and amendments thereto were duly filed with the Interstate Commerce Commission. It is admitted Hugo was a resawing, planing, milling, reconsigning, and concentrating point for rough lumber on defendant's line. On this state of facts it is clear, while it is admitted in the agreed facts the inbound shipments were made under tariff 856-B, yet the plaintiff was entitled to the milling in transit privileges accorded by amendment No. 11 to tariff 25-D above referred to. The two tariffs were in effect concurrently, and the one was obviously intended to supplant the other; hence they must be construed together. The plaintiff was therefore entitled by the tariffs then in force to the milling in transit rates and privileges. This gave to plaintiff the right to the lower rates prescribed in amendment No. 11 and applicable to the aggregate inbound and outbound movements and entitled it, so long as that tariff remained in force, to a readjustment of the amounts which it paid on the inbound movements whenever the outbound movements within the 65 per cent. limitation should be made. But the milling in transit privilege thus granted was canceled by amendment No. 33 to defendant's tariff 25-D effective March 2, 1908.

[2] As between the shipper and the carrier the rights of the parties are necessarily measured by the tariffs published and filed as by law required whether applicable to state or interstate movements. Before a plaintiff can become entitled to recover from a carrier on account of an alleged overcharge or for a refund based upon an alleged misapplication of rates, he must be able to point to the lawfully established rates or regulations which entitle him thereto. If the rates in effect are unjust or unreasonable, a resort must be had by appropriate proceedings to the established tribunal to correct the injustice before the shipper is entitled to any redress on such account. In an action of this character, the only question between the shipper and the carrier is, what were the legal published rates and regulations, and not, what they should have been. The milling in transit privilege was canceled by a lawfully published tariff prior to the making of outbound movements from Hugo; hence such cancellation is conclusive

against the right of plaintiff to recover in an action of this character. Prior to the admission of Oklahoma to statehood, the federal government exercised jurisdiction over rates in territories of which the state was thereafter created. This jurisdiction was provisional until such time as the state should itself become a sovereign by reason of its admission into the Union. Oklahoma became a state in November, 1907. Thereupon, the jurisdiction of the general government and of the Interstate Commerce Commission over local rates within the state ceased, and the jurisdiction thus relinquished was taken up and exercised by the authority of the new state. The state put into effect a new scale of rates applicable to the outbound movements in question, and those rates became the only lawful charge therefor. It results, therefore, plaintiff paid the lawful rates then in effect upon the inbound movements and the lawful rates in effect on outbound movements, and therefore it has no complaint as to shipments in controversy which had both origin and destination within the state of Oklahoma.

[3] The contention that the plaintiff at the time of the inbound shipments acquired a vested right to the through rate applicable to both inbound and outbound shipments, as provided in amendment No. 11 to defendant's tariff, cannot be upheld. Freight rates are not the subject of contract; they are the creatures of the law and of those charged with its administration. If it were otherwise, a very low milling in transit rate might be established at the instance of some favored shipper without limitation of time as to the outbound movements, and when he had completed his inbound movements the rate might then be raised by lawful process, the result of which would be that the favored shipper would thus secure for an indefinite period of time a vested right to the application of the low rate to both inbound and outbound shipments, while other shippers would be required to pay the higher rate. It is well settled such contracts of shipment entered into between the shipper and a carrier may not be enforced in the face of a published tariff rate for the service. *New Haven R. R. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515; *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

[4] Again, although the right which amendment No. 11 to defendant's tariff conferred upon plaintiff, to adjust the freight actually paid on both inbound and outbound movements to the milling in transit scale of rates, had survived the cancellation of the milling in transit rates on March 31, 1908, and also survived the admission of the state of Oklahoma, and the establishment of its Corporation Commission, yet the plaintiff could not recover upon the pleadings and evidence in this case. The measure of recovery would be the difference between the aggregate amounts actually paid upon the inbound and outbound shipments, on the one hand, and the amount which would have been payable under the scale of rates contained in said amendment No. 11.

There is neither allegation nor proof in this case as to what would have been payable by the plaintiff upon the outbound shipments or upon the aggregate of both inbound and outbound shipments at the

milling in transit rates. This action is brought upon the erroneous theory that the milling in transit rates may be applied to the inbound shipments, although the outbound shipments may actually move upon a wholly different rate established by a different authority. As the plaintiff obtained the advantage of the lower State Corporation Commission rate applicable to the outbound movements, and seeks in this action to make the milling in transit rates apply only to the inbound movements, it follows, this cannot be done. A milling in transit rate is an entirety and must be accepted and carried out in its entirety or not at all.

It follows, except as to the eight interstate shipments covered by the fifth paragraph of the agreed statement of facts for which the defendant admits its liability, as claimed in the petition of plaintiff, the plaintiff cannot recover in this action. Judgment will therefore enter that plaintiff take nothing in this case except such an amount as is admitted to be owing plaintiff on the eight shipments contained in paragraph 5 of the agreed findings of fact in amount (\$——), and that the defendant recover its costs, taxed at \$——.

It is so ordered.

In re PITTSBURG LEAD & ZINC CO., CONSOLIDATED.

ROSENBAUM et al. v. DUTTON.

(District Court, W. D. Missouri, C. D. July 8, 1912.)

No. 295.

1. BANKRUPTCY (§ 342*)—ALLOWANCE OF CLAIM—REMEDY OF STOCKHOLDERS.

Bankruptcy Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), provides for the allowance of claims unless objected to by "parties in interest," and section 57k provides that allowed claims may be reconsidered before the estate has been closed. Nearly six months after the referee had set aside an order expunging an allowed claim, and after a call had been made upon unpaid stock, though before the estate was closed, certain stockholders, who had acquiesced in the allowance of the claim, for the first time objected to it and, instead of seeking review of this last order through the referee, made an original motion before him to expunge the claim. *Held*, that they were not entitled to the relief sought.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529; Dec. Dig. § 342.*]

2. BANKRUPTCY (§ 342½*)—ALLOWANCE OF CLAIM—REVIEW—BURDEN OF PROOF.

On petition in bankruptcy for a review of the referee's denial of a motion or petition to expunge a claim which the record showed he had allowed, the burden was on the petitioners to show that the claim ought to be expunged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

3. BANKRUPTCY (§ 342½*)—ALLOWANCE OF CLAIM—REVIEW—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to overcome the presumption in favor of the validity of a claim allowed by a referee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from, and Petition for Review of Order of, the District Court of the United States for the Central Division of the Western District of Missouri.

In the matter of the Pittsburg Lead & Zinc Company, Consolidated, a corporation, bankrupt. Ruling and order was made by the Referee, overruling a motion and petition of H. S. Rosenbaum and another to expunge the claim of F. R. Dutton, and petitioners appeal and petition for review. Sustained.

Botsford, Deatherage & Creason and Sangree & Bohling, for appellants.

R. S. Martin, R. D. Williams, and W. V. Draffen, for respondent.

VAN VALKENBURGH, District Judge. This is an appeal and petition for review of H. S. Rosenbaum and S. A. Will from the orders, findings, and judgment of the referee in the matter of and in connection with the allowance of the claim of F. R. Dutton. According to the statement of the referee:

"The Pittsburg Lead & Zinc Company, Consolidated, was adjudged a bankrupt on the 14th day of September, 1908, upon an involuntary petition filed August 28, 1908. The first meeting of creditors was held on the 13th of October, 1908, at which meeting a claim in favor of F. R. Dutton was proved and allowed in the sum of \$7,352.69. Mr. S. A. Will was present at the meeting, and in answer to his inquiry was advised by the referee that he would be given time and that, if he saw proper, he might file a motion to expunge the allowance. On October 18, 1908, claims were proved and allowed in favor of Rosenbaum and Will, respectively. On the 1st day of April, 1909, the trustee filed motions to expunge the allowance so made in favor of Will and Rosenbaum, respectively, and such proceedings were had thereon that on the 26th of April, 1909, the allowances of these claims were expunged. On the same day, April 1, 1909, the trustee filed a motion to expunge the claim allowed in favor of F. R. Dutton. Issues were made upon this motion, evidence heard, and a finding and judgment entered by the referee on the 15th day of July, 1909, sustaining the motion and expunging the allowance in favor of F. R. Dutton. On the 27th of July, 1909, Dutton filed a motion for a rehearing which was granted on the 15th of November, 1909, and the cause set down for hearing on the 17th of December, 1909. On that day by consent of the parties a judgment was entered overruling the motion to expunge and permitting the claim to stand as allowed. On the 5th day of May, 1910, the trustee filed a motion for an assessment and call upon the unpaid stock of the stockholders of the bankrupt corporation to meet its unpaid debts, and notice was given to the stockholders thereof, and among others to Rosenbaum and Will, as such stockholders. On June 13, 1910, Rosenbaum and Will filed the motion now under consideration. This pleading, which is herein termed a 'motion,' is called a 'petition' by the pleader. It is, in effect, a motion to set aside the allowance of the claim and also a motion to expunge the claim, as the pleading embraces both matters, and the evidence is upon both points. The cause was submitted to the court upon both questions at the same time. The trustee also filed a paper in which he stated he unites in the motion to set aside the order allowing the claim of Mr. Dutton and to expunge the same, but expressly refuses to adopt the pleading so far as any improper act was done in the entering of the judgment sought to be set aside."

This motion was overruled by the referee, and Rosenbaum and Will have brought the ruling to this court for review. In this proceeding the trustee refuses to join. The specific grounds upon which the ref-

eree based his rulings are: (1) The petitioners are in no position to raise the question of setting aside the order allowing the claim of Dut-ton. (2) The trustee cannot present it at this time. (3) The delay has been such as now to preclude the parties from seeking to set aside the judgment.

[1] It must be conceded that the petitioners are not creditors of the bankrupt estate. They took no exception to the order expunging their claims originally allowed, more than a year has elapsed, and they cannot now prove their claims. They are stockholders of the bankrupt company who may be assessed to pay the debt which they seek to have expunged, and, for that reason, claim to have such an interest as entitles them to move in the matter. The clauses of the Bankrupt Act upon which petitioners base their right are paragraphs "d" and "k" of section 57 thereof. These paragraphs are as follows:

"(d) Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowances shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

"(k) Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

In this case the estate had not been closed, but a considerable part of it had been distributed. This phase of the controversy turns upon the meaning of the term "parties in interest," found in paragraph "d" above quoted.

In *Chatfield et al. v. O'Dwyer et al.*, 101 Fed. 797, 42 C. C. A. 30, it was held that the trustee alone could take an appeal from an order of the District Court allowing a claim presented by a creditor against the estate of a bankrupt which was objected to and contested by another creditor; that this could not be done by such objecting creditor, but if the trustee, in such case, refuses to appeal from the allowance of the claim, on the request of the objecting creditor, the latter may move the District Court to direct the trustee to take an appeal as requested, or to permit the creditor to prosecute an appeal in the name of the trustee. The court points out the evil results which would follow if every factious creditor was allowed to litigate individually and in his own name the claims of other creditors, without the sanction or approval of the trustee of the bankrupt court.

In *Re Lewensohn*, 121 Fed. 538, 57 C. C. A. 600, it was held that a proceeding may not be instituted by a creditor, without the concurrence of the trustee in bankruptcy, to re-examine the allowed claims of other creditors, the statute covering the subject of proof, allowance, and re-examination of claims being silent as to the party who may move for the re-examination; and general order 21 of the Supreme Court, providing that when the trustee or any creditor shall desire the re-examination of any claim he may apply by petition to the referee for an order for the re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, merely intending to permit a proceeding by a creditor prior to the qualification of a trustee.

In *Re Sully et al.* (D. C.) 142 Fed. 895, it was held that, after the appointment of a trustee in bankruptcy, he alone is authorized to institute proceedings for the consideration of claims. The court said:

"It would be an intolerable practice to permit any debtor sued by a trustee, by reason of his interest in the result of the suit, to intervene in bankruptcy, file objections to and litigate the claims proved by the creditors, or to take any measures to interfere with the proceedings or to annul the adjudication, in order to defeat the right of the trustee to maintain the action. Such a practice would give rise to interminable delay and expense in the settlement of estates."

In the same case on appeal (152 Fed. 619, 81 C. C. A. 609), the Circuit Court of Appeals upheld the District Court in this particular, but upon petitions for review of other creditors reversed the ruling of the court, denying to such creditors leave to re-examine the claims of other creditors. The court said:

"The term 'parties in interest,' as used in section 57d of the Bankrupt Act, which permits parties in interest to object to the allowance of claims against the estate, applies only to those who have an interest in the res which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt."

In *Re Hatem* (D. C.) 161 Fed. 895, an unsecured creditor of a bankrupt was permitted to move to expunge the allowed claim of another creditor; the trustee upon application duly made to him having refused to act. The court holding that:

"This provision for objection to their allowance by parties in interest clearly indicates the purpose of Congress to abrogate the rule as to proceedings in bankruptcy, and provide for objections being made by parties in interest, other creditors."

In all these cases the parties in interest in the fund to be administered and distributed, who were allowed to proceed in this manner, were creditors. Debtors are expressly denied this right. It is true that the indebtedness of these petitioners to the bankrupt estate, if any, arises out of their relationship as stockholders who may be assessed to pay the debts of the bankrupt estate. For this reason, counsel for petitioners urge that they are such parties in interest as to bring them within the list of qualified objectors.

If this be so, a very serious obstruction is presented in the administration of bankruptcy cases involving corporations. When, and under what circumstances, should this procedure be indulged, if at all? It will be remembered that these petitioners presented their claims at approximately the same time that Dutton originally presented his. They knew of the allowance of his claim, and they took no step to oppose it. Approximately six months elapsed, and then the trustee moved to reconsider and expunge all of these claims—those of petitioners as well as Dutton. Petitioners' claims were at once set aside, and that of Dutton was expunged two or three months later. The latter order was, however, set aside upon petition for rehearing, and in December, 1909, some months later, the trustee, considering it inadvisable to proceed further, conceded that the motion to expunge

should be overruled, and the referee so ordered. This was on December 17, 1909. No further step was taken until May 5th following, when the trustee filed a motion for assessment and call upon the unpaid stock of petitioners Rosenbaum and Will. Thereupon, on June 13th, the latter filed the motion or petition now under consideration. Six months had elapsed since the judgment of the referee overruling the motion to expunge.

It will be observed that the trustee had, in fact, acted for estate and creditors in moving a reconsideration of the allowances to Dutton. He had pursued his objection to a point where he deemed it to be no longer for the benefit of the estate to continue his opposition. His position was sanctioned by the referee in the order finally made. The petitioners had been made aware of the allowance of this claim since October 13, 1908. It does not appear that they ever opposed it, or urged the referee to do so, until six months after its final adjudication, and then only when it appeared that this allowance was to be made the basis of calls upon them for assessments upon their unpaid stock. Their present move is not made in the interest of all the creditors, nor of any creditors, and it comes at a time when, because of long inaction, the allowance of this claim may be deemed to have been acquiesced in by them. The bankruptcy law does not contemplate such interruptions in the administration of estates.

Furthermore, as has been said, the trustee has acted in this case, and an adjudication had resulted. Petitioners were evidently not dissatisfied with the action taken until they found that their own pecuniary interests were likely to be involved. Then, instead of seeking a review of the order of December 17, 1909, through the referee, acting either voluntarily upon request or by order of court, if need be, they filed a motion or petition to expunge, thereby seeking unnecessarily a relitigation of the same matter before the referee. This is a procedure that is decidedly to be condemned, and is without apparent warrant in the statute. Even though the petition for review were not taken until so long a time after the ruling of the referee, nevertheless it would have been the recognized form of procedure pointed out in the law, and the lapse of time, under a proper showing, could have been explained to the court as satisfactorily as can the failure of petitioners more seasonably to object to the original allowance of the claim. I am of the opinion that the petitioners have mistaken their remedy, and that the spirit of the Bankrupt Act denies them the relief sought in any aspect of the case.

[2] It is again to be recalled that this is an original motion or petition to expunge, and, upon petition for review of the ruling and order of the referee upon that motion and petition, this court is asked to expunge the Dutton claim. A certificate has been filed, together with a transcript of all the proceedings and evidence before the referee, the claim stands as allowed, and the burden is upon the petitioners to show that it ought to be expunged.

[3] The prayer is based: First, upon the contention that the trustee acted improperly, and that the referee was deceived in making the

final order of December 17th; the second, the prior action of the referee in ordering the claim to be expunged is urged in support of the contention that the final action of the parties was improper and should be set aside. No fraud is disclosed, unless assumed knowledge on the part of the trustee that the claim was invalid is sufficient to support the further inference that he acted fraudulently in withdrawing his opposition. This is not sufficient. It is disclosed in the record that the original order was based upon an agreed statement of facts, which afterwards the parties complained had been misinterpreted by the referee. It was decided to present the matter anew. It does not follow that both trustee and referee may not in good faith have believed that the former conclusion was unjustified.

But the court must base its present ruling, if it take cognizance of the matter at all, upon the entire record before it. At the hearing upon the present motion and petition to expunge, new evidence was adduced in the form of depositions of Will, Rosenbaum, and Dutton, filed July 15, 1910. The referee was impelled to his former ruling by the fact that it appears to have been agreed that Dutton received \$20,000 worth of stock in payment of bills for services amounting to \$5,000. This indicated that the stock under the law of Maine remained unpaid to the extent of \$15,000, and, Dutton being liable in this sum, his indebtedness to the estate exceeded his claim. He was also claimed to owe an additional amount of \$1,169, because of deficiency in stock payments; but this was more than covered by an offset allowed by the pleadings amounting to \$3,000. Testimony of all parties in these new depositions relating to the account and these stock transactions is somewhat rambling, uncertain, and unsatisfactory; but nevertheless the testimony of Dutton, supported by the minute book of the bankrupt company, tends to prove that this stock was not issued to him in payment of different bills for services in the aggregate sum of \$5,000. On the contrary, the resolution recited as follows:

"In consideration of the services heretofore and to be hereinafter rendered by the duly appointed auditor and the fiscal agent F. R. Dutton to this company, the executive officers are directed to issue to F. R. Dutton 10,000 shares of the treasury stock of the company in full consideration of all services as auditor not already paid for, rendered and to be rendered, in full of all services rendered and to be rendered in and about the development of the mine, erecting mill, in payment of debts incurred or that may be incurred, in erection and enlargement of mill, development of grounds, as well as debt secured by trust deed as unpaid purchase money of land, and any and all other services required until said mine shall be fully developed and in good running order, cleaning ore for market.

"Provided, however, that the provisions of this resolution shall in no wise or manner affect or supersede the compensation to him as fiscal agent as per resolution of the board heretofore adopted, providing a compensation for sale of stock to raise a fund for development purposes and mill erection."

A second issue of 10,000 shares was similarly made. So there is ample evidence from which both referee and court could find that Dutton's stock was not unpaid, and therefore that legal objection to the allowance of his claim is removed. Certain it is that the petitioners have fallen far short of carrying the burden resting upon them

to overcome the presumption in favor of the validity of the claim allowed by prior judicial action.

For all the foregoing reasons, the ruling and order of the referee overruling the motion and petition to expunge the Dutton claim are sustained. An order will be entered accordingly.

In re J. S. APPEL SUIT & CLOAK CO.

(District Court, D. Colorado. August 1, 1912.)

1. BANKRUPTCY (§ 140*)—TRUSTEE—RECLAIMING GOODS FRAUDULENTLY PROCURED.

Bankruptcy Act July 1, 1898, c. 541, § 47, subd. "a," cl. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), providing that trustees, as to all property coming into the custody of the bankruptcy court, shall be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, did not deprive a petitioner of his right in the Colorado jurisdiction to rescind an unconditional sale made to the bankrupt corporation in reliance on a fraudulent statement to a commercial agency and to reclaim that part of his goods which came into the hands of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*]

2. EVIDENCE (§ 317*)—HEARSAY—REPORT BY AGENTS.

In the hearing on a claimant's petition praying for an order on a trustee in bankruptcy for the return of goods shipped to the bankrupt corporation, claimant's testimony as to a conversation between his agents and the bankrupt's officer and reported to him by his agents was incompetent to establish either that the shipment was on consignment and not as an absolute sale, or that it was made in reliance on false statements by the bankrupt as to its solvency.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

3. BANKRUPTCY (§ 303*)—RECLAIMING GOODS FROM TRUSTEE—EVIDENCE.

Where such claimant testified that the goods were shipped in reliance on reports made by the bankrupt to a commercial agency and attached three reports to his deposition, two of which bore dates after all shipments had been made and the other after a part had been made, said dates appearing to have been placed on said reports by the agency which sent them to claimant, such testimony left grave doubt as to whether he relied on any of said reports.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 184*)—PROPERTY—CONDITIONAL SALE.

A contract specifying that the title to a pneumatic tube system sold to the bankrupt should remain in the seller until fully paid for, being fraudulent and void in Colorado as against creditors who acquired a lien without notice, was void under Bankruptcy Act July 1, 1898, c. 541, § 47, subd. "a," cl. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), as against the trustee of the buyer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the J. S. Appel Suit & Cloak Company, Bankrupt. Referee denied the petitions of the Fabian Manufacturing Company, S. J. Jackson, doing business under the style of the S. J. Jackson Manufacturing Company, and the Lamson Consolidated Store Service Company. Order reversed in part, and affirmed in part.

Thomas, Bryant, Nye & Malburn, of Denver, Colo., for Fabian Mfg. Co.

Bicksler, Bennett, Dana & Blount, of Denver, Colo., for S. J. Jackson and Lamson Consol. Store Service Co.

Rogers, Ellis & Johnson, of Denver, Colo., for trustee in bankruptcy.

LEWIS, District Judge. The Suit and Cloak Company, a Colorado corporation, is an involuntary bankrupt under decree of October 14, 1911, on petition filed 22 days prior thereto.

The Fabian Company, claimant, is a corporation doing business in the state of Ohio, and certain merchandise which it had sold and delivered to the bankrupt within three months prior to adjudication was in the place of business of the bankrupt in Denver at the time of adjudication. On November 3, 1911, the Fabian Company filed its petition in the bankruptcy proceedings alleging therein its rescission of the contract of sale of said merchandise on account of alleged fraudulent practices by the vendee, said bankrupt, in the purchase of said merchandise, and praying therein for an order on the trustee to return to it said merchandise then in his possession.

S. J. Jackson, claimant, is doing business in the state of New York in the name of S. J. Jackson Manufacturing Company, and certain merchandise which he delivered to the bankrupt between May 8th and July 24th, next preceding adjudication, was in the possession of the bankrupt at its place of business in Denver at the time of adjudication. On November 6, 1911, he also filed his petition wherein he prayed for an order on the trustee to return said merchandise to him, alleging therein that he had not sold said merchandise to the bankrupt, but only consigned it for sale, that that to be sold should be paid for at the prices designated and that not sold should be returned to him within a specified time. He also alleges fraudulent practices on the part of the bankrupt in obtaining from him said merchandise on the conditions above named.

The Lamson Company, claimant, is a corporation doing business in the state of New Jersey. On March 20, 1911, it entered into a written contract with the bankrupt by which it agreed to provide the material and construct in the building and place of business of the bankrupt at Denver a pneumatic tube system for the agreed sum of \$818, payable to it in instalments thereafter. It complied with the contract on its part, but has not received any part of the sum due it. It also filed a petition on November 11, 1911, asking for an order on the trustee to deliver to it the tubes and material composing said system. It alleges that by the terms of its contract it retained title to said property until the same should be fully paid for, and, further, that said contract was induced by fraudulent practices on the part of the bankrupt.

By agreements between the trustee and the respective claimants the property claimed by each of them was set aside, after it had been identified, and sold separately from the bankrupt's other assets, and the funds arising therefrom have been retained by the trustee to abide the termination of their respective claims.

The referee denied the petitions of all of the claimants and his certification here discloses that he took this action on account of the amendment to section 47, clause 2 of subdivision "a" of the Bankruptcy Act, said amendment being found in the act approved June 25, 1910, c. 412, 36 Stat. 840, viz.:

"And such trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."

[1] I. The proof adduced by the Fabian Manufacturing Company to sustain its claim and certified here, establishes these facts: In January, 1911, the bankrupt made to R. G. Dun & Co., a mercantile agency, a written statement of its then assets and liabilities by which it appeared that its assets then exceeded its liabilities to an amount more than \$19,000. This statement was given by the bankrupt for the purpose and with the knowledge on the part of the bankrupt that it would be circulated in the trade and that on it credit would be fixed and extended to the bankrupt. The bankrupt was not at that time a customer of the petitioner. The bankrupt sent to the petitioner June 17, 1911, its written order and request, by the hand of one of petitioner's traveling salesmen who had solicited in Denver, for the purchase of a large bill of merchandise. Immediately on the receipt of the order the petitioner applied to R. G. Dun & Co., at its Cincinnati office, for report to it on the financial standing of bankrupt, and received in reply a copy of the statement made by the bankrupt in January preceding, noted above. On this statement petitioner extended credit to the bankrupt, accepted its order and shipped the goods therein called for, beginning in the late days of July and extending up to September 9, 1911. The sale was unconditional. The bankrupt did not pay for the goods. The proof is clear and positive to the effect that credit was extended and the goods shipped by petitioner relying on its belief that the financial report made by the bankrupt to R. G. Dun & Co., and by it communicated to petitioner, was a true statement of its financial worth at the time said statement was made. Said statement was at that time untrue and grossly false. The bankrupt was then hopelessly insolvent. Its liabilities at that time greatly exceeded its assets. It then knew that its assets were not then sufficient to meet its liabilities and that its failure was imminent. Its insolvent condition was thenceforth intensified.

The petitioner had no knowledge of the insolvent condition of the bankrupt until after proceedings in bankruptcy were instituted.

On these facts it is the general rule that the vendor is entitled to rescind the sale and reclaim the goods sold from the vendee and from all others who are not bona fide purchasers for value, on discovering the fraud of his vendee. 1 Benjamin on Sales, §§ 648, 649; 2 Pom-

eroy's Eq. Jur. §§ 777, 778; *Turner v. Ward*, 154 U. S. 618, 14 Sup. Ct. 1174, 23 L. Ed. 391; *Stove Co. v. Mitchell* (D. C.) 117 Fed. 774; *Reid, Murdoch & Co. v. Bird*, 15 Colo. App. 118, 61 Pac. 353.

And this right in the vendor to retake his goods is superior to a judgment lien (2 Pomeroy's Eq. Jur. § 721 et seq.), to a mortgage lien for a preexisting debt (*Id.* § 749; *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754; *Broom Co. v. Guymon*, 115 Fed. 112, 53 C. C. A. 16; *Reid, Murdoch & Co. v. Bird*, 15 Colo. App. 116, 61 Pac. 353), and to an attachment levy (*Mining Co. v. Lambert*, 15 Colo. App. 445, 62 Pac. 966). Such lienors are not armed with the rights of bona fide purchasers.

It is the established rule in Colorado that one who takes possession of property in payment of or security for a preexisting debt can successfully invoke the protection given a bona fide purchaser for value. *Knox v. McFarraan*, 4 Colo. 586; *McFarraan v. Knox*, 5 Colo. 217; *McMurtrie v. Riddell*, 9 Colo. 497, 13 Pac. 181; *Bank v. Campbell*, 2 Colo. App. 271, 30 Pac. 357. But the holding to that effect in each of these cases is properly attributable to the requirements of the state recording act in relation to real property. *Jerome v. Bank*, 22 Colo. 40, 43 Pac. 215. It is held also, in *Beaman v. Stewart*, 19 Colo. App. 226, 74 Pac. 344, that a preexisting creditor may take his debtor's chattels in satisfaction of the debt and successfully defend his title as a bona fide purchaser for value against an execution levy thereafter made on the same property in behalf of another creditor; but there the debt for which the property was turned over was extinguished. These Colorado cases, except the last two, were carefully considered in *Reid, M. & Co. v. Bird*, supra, wherein, after noting the holdings of the state Supreme Court to the effect that one who takes property in payment or security of a preexisting debt is to be regarded as a purchaser for a valuable consideration, it is said (at page 122 of 15 Colo. App., at page 355 of 61 Pac.):

"This doctrine was very early announced and ever since that time the courts have universally held that a preexisting debt is a good consideration for the transfer of property either in payment of, or as security for a debt. This however has only been holden so far as the cases themselves show where there has been an actual transfer of the title, or a turning over of the property in payment, or as security. We have been referred to no case nor have we found one where it has been held that the execution of a chattel mortgage on personal property on the consideration of a preexisting debt, would be a valid transfer unassailable by a vendor who had the right to rescind the sale on the ground of fraud."

The amendment to section 47 of the Bankruptcy Act, supra, does not attempt to put the trustee in such a favored position. It only gives him "the rights, remedies and powers of a creditor holding a lien." Prior to the amendment the trustee would have taken title to this merchandise subject to claimant's equities, i. e., a right to rescind the sale induced by the vendee's fraud. *Zartman v. Bank*, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418. It must therefore be held that in this jurisdiction said amendment does not cut off the right of petitioner to rescind the sale and reclaim the unsold part of its goods. The order of the referee will be reversed and the trustee is directed to pay

over to petitioner, the Fabian Manufacturing Company, the sum in his hands received for the goods of petitioner. It is so ordered.

[2, 3] II. The claimant, S. J. Jackson, delivered to the bankrupt, on its order, between early in May and late in July, 1911, merchandise of the value of about \$3,500, for which claimant did not receive payment, and a part of said merchandise passed into the possession of the trustee on adjudication, as already noted. The only testimony bearing upon the character of the transaction between claimant and the bankrupt concerning said merchandise and the fraud on the part of the bankrupt therewith, as alleged in the petition, is that of claimant himself, given by deposition. This testimony, as found in his direct examination, would support the conclusion, (1) that claimant's merchandise was shipped to the bankrupt on consignment for sale by bankrupt and accounting therefor; that there was no sale of said merchandise to bankrupt, and that title to said merchandise never vested in bankrupt, (2) that claimant was deceived and entered into said transaction with bankrupt on account of the same fraudulent practices by bankrupt that induced the Fabian Manufacturing Company to enter into the transaction it had with bankrupt, above noted, and (3) one of the chief officers of bankrupt personally, while at New York, at claimant's place of business there, made false and fraudulent representations as to bankrupt's solvency, which also induced claimant to ship said merchandise to bankrupt. Perhaps it is more proper to say that a part of the direct examination of claimant would lead to this conclusion. But when the entire deposition of claimant is carefully considered, that is, his answers to both the direct and cross interrogatories, a clear impression is left that the conclusions above noted are not justified by his testimony, and the firm conviction is created that all of his testimony is hearsay,—that is, that J. S. Appel, bankrupt's officer, who was at claimant's place of business in New York in behalf of bankrupt, negotiated for the merchandise in question with claimant's agents only, to-wit, Max Stember and Louis Ginsburg, and that said Appel had none of the conversation, about which claimant testifies, with claimant himself, and that all claimant knows about any such alleged conversation with said Stember and Ginsburg was reported to him by them. This is true both as to the character of the disposition of the merchandise,—whether on consignment or as an absolute sale,—as also the claimed representations as to bankrupt's solvency made by said Appel in person. This testimony also leaves grave doubt as to whether claimant relied upon and acted upon the Dun & Company reports to him, which he attaches to his deposition, and are the same statements made by bankrupt as to its solvency, noted in the claim of Fabian Manufacturing Company. These reports, so attached to the deposition, are three in number and are marked on the back apparently by Dun & Co. with the following dates: June 19, August 23, and August 23, 1911; only the last one mentioned purporting to give in full the assets and liabilities as scheduled to Dun & Co. by the bankrupt in January, 1911; whereas it appears from an itemized account of the merchandise shipped, and attached to the deposition, that the billing out of the merchandise began on May 8th and closed on July

24th, and there is nothing thereon to indicate that the transaction was not an absolute sale. We have the testimony of neither Stember nor Ginsburg, and that of claimant, as already said, is mere hearsay, on which a finding in his favor can not be made. I understand the rule to be that hearsay evidence is not competent to establish a specific fact, which fact is susceptible of being proved by witnesses who can speak from their own knowledge. *Mima Queen v. Hepburn*, 7 Cranch, 290, 3 L. Ed. 348; *Hopt v. Utah*, 110 U. S. 581, 4 Sup. Ct. 202, 28 L. Ed. 262; *Masonic Ass'n v. Shryock*, 73 Fed. 777, 20 C. C. A. 3. The finding of the referee as to this claim is therefore confirmed. It is so ordered.

[4] III. The Lamson Company alleges in its petition the same false and fraudulent financial statement to Dun & Co. in January, 1911, noted above, but it offered no evidence that it relied upon the same in entering into the contract on March 20, 1911, for the installation of the pneumatic tube system which it constructed for the bankrupt. It offered in evidence that written contract and it contains these provisions:

"17. It is hereby understood and agreed that the pneumatic tube system as above specified shall remain the property and in the custody of the Lamson Consolidated Store Service Company or its legal representatives, until the full consideration for the entire plant is fully paid by you. When this full payment is made, this company will deliver to you a good and perfect title conveying full ownership in the entire plant.

"In case of your default in making any of the payments as above specified, or in case of your insolvency, or any assignment for the benefit of your creditors, or in case of voluntary proceedings by you, or involuntary proceedings against you in insolvency or bankruptcy, then in any of the said cases, the whole contract price is to become immediately due and payable and the Lamson Consolidated Store Service Company or its legal representatives shall have the right to enter your premises without further notice, to take possession of and remove said system or any part thereof without being liable therefor in any way either at law or in equity. And such sum or sums as you may have paid under this contract, shall be applied on account of the whole contract price, and we shall be entitled to approve the balance of the contract price and for extras furnished against your estate, allowing upon such claim a fair price for the tubes, terminals and machinery which we have taken from your premises under this agreement."

There being no evidence to establish the contention of claimant that the contract was induced by fraud on the part of the bankrupt the rights of claimant must be determined by the written contract itself. It is unnecessary to determine whether the contract in the clause quoted operated as an absolute sale with the reservation of a secret lien or whether its effect was a conditional sale of the tube system. In either event it would be constructively fraudulent and void as against creditors who had acquired a lien without notice of the rights of the vendor. *George v. Tufts*, 5 Colo. 162; *Coors v. Reagan*, 44 Colo. 126, 96 Pac. 966. The trustee is by the amendment to the Bankruptcy Act clothed with the rights of such creditors. The order of the referee disallowing the claim of this petitioner is also confirmed. It is so ordered.

McCALDIN v. CARGO OF LUMBER.

SAME v. PHILADELPHIA & G. S. S. CO.

(District Court, E. D. Pennsylvania. July 26, 1912.)

Nos. 42, 43, of 1910.

1. SHIPPING (§ 42*)—CHARTERS—FITNESS OF VESSEL.

Under a time charter party, warranting the vessel to be tight, staunch, strong, and in every way fitted for the service, and giving the charterer the right to cancel if she becomes defective for service, she is not required to be perfect, but in good condition and efficient and reasonably safe for the service which is required of her.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 156-164; Dec. Dig. § 42.*]

2. SHIPPING (§ 58*)—CHARTERS—FITNESS OF VESSEL.

Evidence considered, and *held* not to justify a time charterer in canceling the charter on the ground that the vessel had become defective for service, where she had been in possession of the charterer for six months under a charter which it had renewed only a short time before the attempted cancellation.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244; Dec. Dig. § 58.*]

In Admiralty. Suit by Joseph McCaldin, managing owner of the steamship Lassell, against a cargo of lumber; Philadelphia & Gulf Steamship Company, claimant. Suit by said McCaldin against the Philadelphia & Gulf Steamship Company in personam. Decree for libellant.

Howard M. Long, of Philadelphia, Pa., for libellant.

Lewis, Adler & Laws, of Philadelphia, Pa., for respondents.

WITMER, District Judge. Two libels are filed by Joseph McCaldin, managing owner of the steamship Lassell; the one, in rem, against a cargo of lumber laden on board the vessel, to recover \$2,375 charter hire from March 28 to April 14, 1910, and the further sum of \$23.30 damages to the cabin house of the vessel. No evidence having been offered in support of the latter claim, it will not be considered.

The Philadelphia & Gulf Steamship Company, claimant, admitting the use of the vessel from March 28 to April 14, 1910, filed a cross-libel setting up a counterclaim for certain damages specified as growing out of an alleged breach of the charter party.

The other libel is in personam against the Philadelphia & Gulf Steamship Company to recover a balance of \$4,607.98 alleged to be due for charter hire from April 14 to July 12, 1910, first allowing certain credits upon recharters.

The respondent denied all liability for the sum claimed in this libel, and defends upon the ground of a surrender of the vessel, because of the libellant's alleged failure to maintain her in a thoroughly efficient state of repairs in hull and machinery, and, furthermore, the failure of being able to proceed on her voyages with dispatch as required by the terms of the charter party.

The *Lassell* hails from New York, and was chartered, with officers and crew, by the respondent, for six months, from June 22, 1909, to December 22, 1909, with the option of renewing the charter, to be used in transporting merchandise between Philadelphia and New Orleans. Continuing in the service of respondent, on November 22, 1910, the charter was extended for a further period of six months, "subject to cancellation of charter at 30 days' notice if the ship becomes defective for service."

The respondent, February 28, 1910, notified libelants that because of the defective condition of the vessel they would surrender her on and after March 28th, claiming that she was unseaworthy and that libelant had failed to maintain her hull and machinery in an efficient state, and that her captain had failed to prosecute the voyages undertaken with dispatch. The vessel continuing to make her voyages, on April 6, 1910, on arriving in port at Philadelphia, suit was brought to recover, by attachment, the charter hire, \$2,375, due March 28th preceding. The respondent continued to use the vessel, making an unsuccessful effort on April 12th to surrender the same at Philadelphia. She was subsequently ordered to New York, and was there surrendered to the libelant, after the respondent on April 22d expressed its willingness to have the *Lassell* chartered by some other people without prejudice to the rights of either party. The *Lassell* was afterwards chartered and earned considerable money, which was placed to the credit of the respondent on claim of libelant.

[1] The respondent endeavors to justify its action in attempting to terminate or cancel the contract of hire upon the ground reserved, claiming that the vessel had become defective for the service in which she was employed. Did he succeed? Answer to this question implies an examination of the charter of vessel here required, and, furthermore, the efficiency of the one in question. A vessel need not be perfect, or such as cannot break down except under extraordinary peril. If such were the requirements, our merchant marine would altogether disappear. The rule governing is founded, as usually in matters of this character, on good sense and sound reason. The degree of fitness demanded is that which an ordinary, careful, and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. Carver on Carriage by Sea, § 18, p. 21. The charter party contains the warranty that the "ship shall be tight, staunch, strong, and in every way fitted for the service." The owners, in terms and by legal implication, warranted the seaworthiness of the vessel; that is, that she was reasonably fit for the service in which she was engaged as a merchant freight vessel. What was her condition from the evidence?

[2] This is a practical question, and there is no other criterion, it is well understood, than the judgment of competent, practical men versed and experienced in nautical affairs and in the operation of such machinery. The *Lassell* was, at the time, classified as "A No. 1" in the Classification Society of the American Bureau of Shipping. She was inspected, shortly before and after respondent's move to cancel the charter, by the United States government board of local inspectors

of steam vessels at the Philadelphia port, and pronounced sufficient for the service; they, saying in their report of April 15, 1910:

"After having carefully examined vessel's hull, boilers, and machinery, we are of the opinion she is in a condition to navigate with safety as a steamer on the route named in her certificate of inspection."

True she is not a new ship, and not as safe, possibly, as those of more modern type and construction; yet it appears from an examination of all the evidence of those who operated and inspected her that she was in good condition and efficient and reasonably safe for the service in which she was engaged. And this is all that could be required. The *Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. Then, again, it is presumed that the respondents regarded the ship properly fitted and capable for their employment, having made an extension of the charter using the same, in the service continued, for a period of six months. As was said by Judge Benedict, in *The Pis-kataqua* (D. C.) 35 Fed. 622:

"The charterers have much less ground for reclamation because of the result of events accruing after they have definitely accepted the vessel, which they, themselves or by their agents, have acknowledged to be in good seaworthy condition to perform the voyage. This was, on the other hand, for the ship owners the best evidence of good seaworthy condition which they could have, because it proceeded from their own charterers interested in the performance of the voyage."

Whereupon it cannot be allowed that the charterers can come to-day and argue against a fact which they have themselves acknowledged.

But it is argued that since renewing or extending the charter the ship became so defective as to render her unfit to meet her requirements. This is not borne out by the proof, and it appears reasonable that, having been in service some thirty years, and being of strong build, of good material, which is also implied from her long use and service, she would not deteriorate very rapidly. It is true that the government inspectors reduced her steam pressure from 100 to 70 pounds. However, it does not appear that this affected the efficiency of the vessel. Indeed it had very little, if any, effect upon the speed of the vessel under the load she was accustomed to carry. It is, furthermore, questioned whether she at any time reached or even approximated the full pressure formerly allowed. The log book shows that after the pressure was reduced she made her voyages in about the same time, carrying the same kind and quantity of cargo, as before; hence she lost nothing on account of speed required.

Though the vessel's efficiency was not impaired by reason of reduction in steam pressure, furnishing respondent no reasonable excuse for cancellation of their charter extension, it seems equitable and just that some allowance should be made for increase in coal consumption thereby necessitated. It appears that such reduction, if made, would necessarily cause the consumption of from three to four additional tons of coal daily to maintain her speed, that it required from eight to nine days to make the trip each way, and

that coal cost \$3.11 per ton. Taking, as a basis, three tons per day, and eight days each of ten trips made after such reduction, at \$3.11 per ton, justifies an allowance to respondent of \$746.40. Credit is also allowed respondent for time lost and coal consumed while the vessel was stranded on Tinicum Island, to wit, \$587.19 and \$155.50; total, \$742.69. It appears that the vessel was chartered to Lent April 27, 1910, being then idle at New York, but was not delivered under the charter until April 30th. In view of the testimony that she was placed on the dry dock for repairs on April 26th, and in the absence of any satisfactory explanation, it is presumed that the vessel was undergoing repairs, thereby preventing delivery, for which a credit of \$479.99 will be allowed respondent.

The item, \$59.60, captain's expenses at Knight's Key, has not been sufficiently proven as being chargeable against the respondent, and is disallowed; and for the same reason two items, \$91.70 and \$58.85, expenses of James McCaldin, are disallowed.

In No. 42:

| | |
|---|-----------------|
| Charter hire due March 28, 1910..... | \$2,375 00 |
| Credits allowed respondent: | |
| Extra coal consumed..... | \$746 40 |
| Stranding vessel on Tinicum Island..... | 742 69 |
| | <u>1,489 09</u> |
| Balance due..... | \$885 91 |

Let a decree be entered for this balance, \$885.91, due March 28, 1910, with interest from this date, and costs.

In No. 43:

| | |
|--|---------------|
| Balance due steamer and owners, as per claim of libellant..... | \$4,607 98 |
| Credits disallowed libellant: | |
| Captain's expenses at Knight's Key..... | \$ 59 60 |
| Expenses, James McCaldin..... | 150 55 |
| Vessel hire from April 27th to 30th..... | 479 97 |
| | <u>690 14</u> |
| Balance due..... | \$3,917 84 |

Let a decree be entered for this balance, \$3,917.84, due July 12, 1910, with interest from this date and costs.

SECURITY TRUST CO. OF ROCHESTER, N. Y., v. DES MOINES COUNTY, IOWA.

(Circuit Court, S. D. Iowa, E. D. March 1, 1909.)

No. 416, Law.

COUNTIES (§ 167*)—CERTIFICATE OF INDEBTEDNESS—"NEGOTIABILITY."

Under the Negotiable Instrument Act of Iowa (Acts 1902, c. 130, § 2; Code Supp. Iowa 1907, § 3060a2), which provides that the sum payable by an instrument shall be a sum certain within the meaning of the act, "although it is to be paid * * * with exchange, whether at a fixed rate or at the current rate," an obligation of a county, negotiable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

in form and issued under a statute permitting it to be made negotiable, is not nonnegotiable because it is made payable "in New York or Chicago exchange."

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 249; Dec. Dig. § 167.*]

At Law. Action by the Security Trust Company of Rochester, N. Y., against the County of Des Moines, Iowa. On demurrer to answer and on trial to the court. Judgment for plaintiff.

John J. Seerley and Frank Keiper, for plaintiff.

W. E. Blake and H. F. Kuhlemeier, for defendant.

SMITH McPHERSON, District Judge. This is an action at law by the plaintiff, a corporation of the state of New York, against the county of Des Moines, one of the counties of the state of Iowa, asking judgment for \$17,550, with interest thereon, on an evidence of indebtedness of which the following is a copy:

Certificate of Indebtedness of the County of Des Moines, State of Iowa.

\$17,550.00. This is to certify, that the county of Des Moines, state of Iowa, is justly indebted to, and for value received, promises to pay to, the U. S. Standard Voting Machine Company, of Rochester, New York, or bearer, on the fifteenth day of April in the year one thousand nine hundred and eight, at the office of the county treasurer of said county, the sum of seventeen thousand five hundred and fifty dollars (\$17,550.00) lawful money of the United States of America, without interest, payable in New York or Chicago exchange.

In witness whereof, the said county of Des Moines, Iowa, has caused its corporate seal to be hereunto affixed and these presents to be signed by its chairman of county board of supervisors and its county auditor this 29th day of December, 1906.

[Seal of the County.]

County of Des Moines, State of Iowa,

By E. L. Naumann,

Chairman of Board of Supervisors in and for Des Moines County, Iowa.

By M. P. Sharts,

County Auditor in and for Des Moines County, Iowa.

It is further alleged that in June, 1907, said certificate for good and sufficient consideration and in the due course of business became the property of plaintiff, and at all times since has been held by the plaintiff as its property; and it is alleged that demand was made for the payment, which was refused.

The answer is in many divisions. The first division is not assailed. It consists of a denial that the plaintiff is a bona fide holder of the certificate sued on, acquired for a valuable consideration, without notice, before due. The second division alleges that the defendant by its board of supervisors by resolution was authorized to purchase from the Rochester Company 27 voting machines at the net price of \$650 each. The contract, which is in writing, is set out at length. It is alleged in the answer that the board of supervisors was without authority to execute said instrument sued on, for the reason that it was provided in the contract that the obligation was to bear interest at the rate of 5 per cent. from and after April 15, 1908, and not to run over 15 years, payable annually, whereas the instrument sued on bears 6

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

per cent. interest from April 15, 1908, and is not the instrument authorized, and for the further reason that the instrument sued on is not an unconditional promise to pay a sum certain in money. It is further alleged that for at least two of said years, namely, 1908 and 1912, presidential elections will occur, and that the machines are so constructed as to prevent and will not permit the voter to vote for such presidential electors as he may desire, because the law requires that it must be so constructed—

“as to prevent voting for more than one person for the same office, except where the voter is lawfully entitled to vote for more than one person for that office; and it must afford to him an opportunity to vote for any and all persons for that office as he is by law entitled to vote for, and no more, at the same time preventing his voting for the same person twice.”

And the machine is so constructed in that it compels the voter, if he votes at all, to vote for all electors designated by any political party, and will not permit him to vote for some of the candidates for electors on one ticket and some on another. It is further alleged that the machine is so constructed as not to permit the conducting of said election for electors as for state officers and representatives in Congress. For instance, as the answer recites, at the general election in 1908, 10 men were candidates for Judge of the Supreme Court of the state, when but 3 were to be elected, and any of the said 10 men could be voted for by the voter, and the voting machines would so permit. But by the machine a voter cannot vote for presidential electors unless he votes for all the candidates of a certain party. And the answer recites there were 78 presidential elector candidates, with but 13 to be elected.

The answer further recites that the Rochester Company perpetrated a fraud upon the defendant, in that it represented to the defendant's board of supervisors, as an inducement to make the contract, that the particular voting machine, which would register the will of the voter, had been approved by the Iowa state board, whereas, if such authority was given and such approval was made by the state board, it was a fraud upon the voters, because such approval of the state board would be unlawful and unconstitutional. The answer further recites that the voting machine law (chapters 3, 4, Code of Iowa Supplement) is contrary to the Constitution of the state of Iowa, to wit, article 1, § 6, which provides:

“All laws of a general nature shall have a uniform operation.”

And to enable a voter to vote for different candidates for presidential electors, he could not use the machine, but would be required to call for a ticket and indicate thereon his preference. So the question is, if the obligation sued on is negotiable and issued by authority, there can be a recovery herein; but if the instrument is not negotiable, and the machine will not enable the voter to vote his will, then under the guaranty of the Rochester people the plaintiff, occupying this position, cannot recover.

Plaintiff has filed a demurrer, insisting that the instrument declared on is negotiable and that the alleged defenses cannot be made as

against plaintiff; so that the question, and the only question, now to be decided, is as to whether the instrument is negotiable or nonnegotiable. Plaintiff alleges that it became the holder for value, before maturity, without notice of any defense, of the obligation sued on. If it is a negotiable instrument, usually, but with an exception in case of fraud, the maker has the burden of proof on the question of whether the plaintiff is an innocent holder. But that question is not now before the court. It is practically conceded that the obligation is in form negotiable, unless the recital "payable in New York or Chicago exchange" makes it nonnegotiable.

The cases can be briefly cited. That the cases are in irreconcilable conflict is apparent. Many of the cases have been decided accordingly as to whether the particular courts believed in a rigid or liberal construction of the long time requirement that the obligation should be *certain* as to the amount the obligor should pay. The Iowa case of *Culbertson v. Nelson*, 93 Iowa, 187, 61 N. W. 854, 27 L. R. A. 222, 57 Am. St. Rep. 266, and the several cases therein cited, show that down to the year 1895 the words "with exchange" make the note nonnegotiable; and the annotations to that case as found in 27 L. R. A. 222, give many, and perhaps all, the cases, down to that date, from which will appear the authorities on the two sides of the question.

It is a familiar general rule that as to commercial paper the courts of the United States will exercise their own independent opinion, and will not be controlled by view of the Supreme Court of the state in which the United States Court is sitting. In the case of *Hughitt v. Johnson* (C. C.) 28 Fed. 865, Circuit Judge (now Justice) Brewer in an oral opinion declared that such a note was nonnegotiable. The case of *Windsor Savings Bank v. McMahon* (C. C.) 38 Fed. 283, 3 L. R. A. 192, by Judge Shiras, is with a like holding.

But there are authoritative holdings to the contrary. A recital on what account the note was given does not make it nonnegotiable. The words "in current funds" do not make it nonnegotiable (*Bull v. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97) although the Iowa Supreme Court holds otherwise (*Haddock v. Woods*, 46 Iowa, 433). A note payable in pounds sterling is negotiable, although an allegation and proof would be required as to the amount this would be in money. *King v. Hamilton* (C. C.) 12 Fed. 478, and cases cited. A certificate of deposit is negotiable. *Miller v. Austen*, 13 How. 218, 14 L. Ed. 119. And this is so although the certificate is (1) a receipt for money, or a certificate that the sum has been deposited; (2) it is for the use of a party named; (3) it is payable when the certificate is returned, properly indorsed. A note reciting for what property it was given, and that the title to the property does not pass until the note is paid, and that the failure to pay one note matures all others connected with the transaction, is a negotiable note. *Railroad v. Merchants' Bank*, 136 U. S. 285, 10 Sup. Ct. 999, 34 L. Ed. 349.

It was argued that the obligation in suit is not payable in money, because it is made payable in exchange, and not *with* exchange. This is very critical, and the distinction so refined, that it is difficult to see it. Whether "in" and "with" are synonyms, and whether there

are such things as synonyms, I leave to others who have time for such discussions. But great commercial questions like this ought not to turn on the particular shade of meaning of some preposition. The defendant agreed to pay so much money, and the payee was to receive it. The payee was in another state. It must either come after the money, or the money when paid at the county treasurer's office was to be carried in some form to Rochester, N. Y. It was a method of carriage to Rochester, which would be attended with cost, and it was agreed that the payor should pay the cost. I do not say the distinction between "in" and "with" cannot be seen, but it is difficult to see. The great per cent. of the business of the country is done in commercial paper, and a great per cent. of that paper is payable both "in" and "with" exchange.

It is undoubtedly true that questions pertaining to the law merchant are matters of general jurisprudence, concerning which United States courts are not governed by the rulings of the state courts. The obligation in suit was executed in the year 1906. At that date there was in force in Iowa the statute of 1902 (Laws 1902, c. 130) with reference to negotiable instruments. It is uniform with the statutes of 30 or more states, enacted within the past few years. New York then had, and now has, such statute. There the payee resided and did business. Among other things the statute provides:

"The sum payable is a sum certain within the meaning of this act, although it is to be paid: (1) * * * (2) * * * (3) * * * (4) With exchange, whether at a fixed rate, or at the current rate." Section 2.

That chapter under which the obligation was issued is chapter 37 of the Laws of 1900, section 8 of which provides that the county on the adoption and purchase of a voting machine may provide for the payment in such manner as may be deemed best for the locality, and for that purpose may issue bonds, certificates, or other obligations which shall be a charge on the county. These may be with or without interest, payable on time, and shall not be sold at less than par. Here is an express authority to issue bonds, and an implied authority at least to issue negotiable bonds. *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Dillon, Municipal Corporations* (4th Ed.) § 125. The statute expressly authorizes the county to buy voting machines. It expressly authorizes the county to issue bonds therefor, with or without interest, payable at such time as may seem best. Impliedly it has the power to make such bonds negotiable in form, and in effect. This has been done, and all that is urged is that the machines are defective.

Orders in conformity to the foregoing will be made. But it is pleaded that the plaintiff is not a good-faith purchaser, before due, for value, without notice of defense. Of course, if that issue shall be determined in favor of the county, then the alleged defenses will be treated as though the original payee was plaintiff herein.

NOTE.—At the trial the findings were for plaintiff.

In re DANCY HARDWARE & FURNITURE CO.

In re STOUGHTON WAGON CO.

(District Court, N. D. Alabama, W. D. August 14, 1912.)

No. 222.

1. CARRIERS (§ 74*)—RIGHTS OF SELLER—STOPPAGE IN TRANSITU—LOSS OF RIGHT.

Where merchandise sold to a bankrupt by a contract of conditional sale was shipped, and, with the consent of the seller's agent, delivered to the bankrupt, which gave a check to the carrier for the freight, the fact that when the check was dishonored the carrier again took possession of the property in an attempt to reinstate its lien for freight was not an exercise of the right of stoppage in transitu, which inured to the benefit of the seller, but the carrier held the property as bailee of the bankrupt.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 245-250; Dec. Dig. § 74.*]

2. BANKRUPTCY (§ 184*)—CONDITIONAL SALES—RIGHT OF TRUSTEE TO AVOID—ALABAMA STATUTE.

Under Code Ala. 1907, § 3394, which requires contracts of conditional sale under which property is brought into the state to be recorded within three months thereafter, and provides that otherwise the condition shall be void "against * * * judgment creditors without notice," as construed by the Supreme Court of the state, the failure to record renders the condition void as to judgment creditors whose debts were contracted or judgments obtained after the delivery of the property, whether or not they have acquired an execution lien, and this although they may have had actual notice within the three months, but after their judgments were obtained. Applying the principle of such decisions, the intervention of the bankruptcy of the purchaser within the three months does not dispense with the necessity of recording the contract, and where it is not recorded the trustee in bankruptcy, by virtue of Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which provides that "such trustees as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon," succeeds to the rights of such a judgment creditor and may avoid the contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In the matter of the Dancy Hardware & Furniture Company, Bankrupt. On petition of the Stoughton Wagon Company to reclaim certain property. Petition denied.

Harsh, Beddow & Fitts, of Birmingham, Ala., for petitioner.

Brown & Murphy and J. E. Robinson, all of Birmingham, Ala., for trustee in bankruptcy.

GRUBB, District Judge. Petitioner sold wagons to the bankrupt under a contract by which title was retained by it until the purchase money was paid, and which, under the Alabama law, would be construed to be a conditional sale. The wagons came into Alabama from without the state, and were delivered to the bankrupt on or about

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

October 9, 1911, and remained in its possession until after the filing of the petition in bankruptcy, which occurred on December 19, 1911, and were then taken possession of by the receiver in bankruptcy. The instrument containing the condition reserving title was never recorded as required by section 3394 of the Civil Code of Alabama of 1907, and at the time of the hearing before the referee three months or more had expired since the property came into the state subject to the condition.

[1] The petitioner upon that hearing contended that it was entitled to the wagons because it had exercised its right to stop them in transit before the petition was filed. The evidence, however, shows that the wagons were delivered to the bankrupt after their arrival by the carrier with the consent of the petitioner's agent, and that a check was given the carrier by the bankrupt for the freight charges, and that, the check having been dishonored, the carrier attempted to re-take possession to protect its lien for unpaid freight. There was no exercise of the right to stop in transit by the petitioner. The carrier, by surrendering possession to the bankrupt, waived its lien for freight, and, when it repossessed itself of the property, held it as bailee of the bankrupt.

The petitioner also contended that the original contract for sale had been modified or rescinded subsequent to the delivery of the wagons; but the evidence clearly showed that negotiations to that end never resulted in any new agreement between the parties, and that the original sale agreement was the one in force at the time the petition in bankruptcy was filed.

[2] The other question presented by the review is whether, under the Alabama law, a failure to record a conditional sale contract until after the expiration of three months from the time the property subject to the condition came into the state avoids the condition in favor of the trustee in bankruptcy of the buyer, though at the time bankruptcy intervened the property had not been within the state for the full period of three months allowed by the statute for that purpose. Section 3394, Civil Code of Alabama 1907, is as follows:

"All other contracts for the conditional sale of personal property, by the terms of which the vendor retains the title until the payment of the purchase money and the purchaser obtains possession of the property, and all contracts for the lease, rent or hire of personal property, by the terms of which the property is delivered to another on condition that it shall belong to him whenever the amount paid shall be a certain sum, or the value of the property, the title to remain in the other party until such sum or value shall have been paid, are, as to such condition, void against purchasers for a valuable consideration, mortgagees and judgment creditors without notice thereof, unless such contracts are in writing and recorded in the office of the judge of probate of the county in which the party so obtaining possession of the property resides, and also in the county in which said property is delivered and remains; and if, before the payment of the purchase money or sum or value stipulated, the property is removed to another county, the contract must be again recorded, within three months from the time of such removal, in the county to which it is removed; and if any such property is brought into this state while subject to such condition, the contract of sale, lease, hire or rent must within three months thereafter, be recorded in the county into which the property is brought and remains, and all local or special laws in conflict herewith are expressly repealed."

The questions are: (1) What class of creditors are entitled to complain of the want of record under the section of the Code quoted? (2) Under the amendment of June 25, 1910, to section 47 of the Bankruptcy Act, does the trustee acquire the rights of the class of creditors entitled to so complain? And (3) is the requirement of record within three months after the property subject to the condition comes into the state dispensed with when bankruptcy intervenes pending the three months?

The Supreme Court of Alabama has construed the words "judgment creditors without notice" of the statute to include creditors who have obtained a judgment but have not secured a lien by the issuance or levy of an execution. *Wood v. Lake*, 62 Ala. 489. Judgment creditors, therefore, include both creditors having and those without an execution lien. The Supreme Court of Alabama has also held that the judgment creditors of the statute are subsequent creditors (*Chadwick v. Carson*, 78 Ala. 116); that is, either those whose debts were contracted or whose judgments were obtained after the making of the incumbrance or conveyance, of the want of record of which complaint is made. No other creditors than those who extended credit after the property had been delivered to the vendee and the conveyance or incumbrance executed could have been misled into giving credit upon the apparent ownership of the conditional vendee. The evidence showed that in this case there were creditors whose claims were incurred by the bankrupt after the property conditionally sold to the bankrupt came into the state and was delivered to the bankrupt, and after the conditional sale had been made to it, and who may have extended credit on the faith of the bankrupt's ownership of the wagons.

Reservation to the bankrupt of the right to resell the property conditionally purchased and placed in his possession (the retention of title in the vendor being to secure the balance of purchase money) would not under the Alabama decisions render the conditional retention of title void. *Adkins v. Bynum*, 109 Ala. 281, 19 South. 400; *Cox v. Birmingham Dry Goods Co.*, 125 Ala. 320, 28 South. 456, 82 Am. St. Rep. 238. It could be avoided by creditors only upon the idea that the instrument creating the condition should have been and was not recorded within three months after the property came into the state, subject to the condition; and on that ground only by judgment creditors without notice, with or without an execution lien, whose claims were contracted or judgments obtained after the conditional sale was made and the property came into the state and into the possession of the bankrupt subject to the condition.

2. Does the trustee in bankruptcy, under the Amendment of June 25, 1910, acquire the right of such creditors to complain of the want of record? It is clear that he could not have done so prior to the amendment. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Crucible Steel Co. v. Holt*, 174 Fed. 127, 98 C. C. A. 101, affirmed 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756. The language of the amendment is:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

One of the purposes of the amendment was to confer on trustees in bankruptcy the same right to avoid secret unrecorded liens as the creditors would have had under the state laws, had not the bankruptcy intervened and the exercise of which they are deprived of by the bankruptcy proceeding. The rights of creditors to avoid unrecorded liens, which the bankruptcy act confers on trustees, are to be determined by the laws of the particular state requiring the record. The act was intended to give to the trustee the rights, remedies, and powers of each and all classes of creditors who are clothed by the recording statutes of the states, as construed by their courts, with the right to avoid such secret and unrecorded liens or conveyances. The laws of Alabama and the amendment of June 25, 1910, to the Bankruptcy Act determine the right of this trustee to set aside this conditional sale for want of record. If a creditor holding a lien by legal or equitable proceedings on the wagons had the right under the laws of Alabama to avoid the condition, then the trustee, being by the amendment to the Bankruptcy Act vested with the rights, remedies, and powers of such a creditor, has the same right to avoid the condition.

The Alabama statute confers on all subsequent judgment creditors without notice the right to avoid an unrecorded conditional sale. A creditor with a lien by execution is a judgment creditor under the Alabama recording act, and is also a creditor holding a lien by legal proceedings under the Bankruptcy Act, and would therefore be entitled to avoid the condition of an unrecorded conditional sale contract under the state statutes. There were subsequent creditors at the time of the filing of the petition in this case, whom the trustee represents. They are presumed to have had no actual notice of the unrecorded condition, in the absence of evidence to the contrary; the burden being on the petitioner to show such notice. The trustee by the express language of the Bankruptcy Act has the potential rights in this respect of a creditor holding a lien by legal proceedings. It is not necessary to his right that there should, in fact, have been such lien creditors when the petition was filed.

This is the construction put upon the amendment by most of the District Courts which have passed upon it. The Supreme Court has not as yet construed the amendment, so far as I have been able to ascertain. The only District Court which has given the amendment a different interpretation is that of the Western District of Kentucky in the case of *In re Lausman* (D. C.) 183 Fed. 647. The District Court of the Eastern District of Kentucky, however, has taken a contrary view of the amendment in *Re Kreuger*, 199 Fed. 367. In *re Hartdagen* (D. C.) 26 Am. Bankr. Rep. 532, 189 Fed. 546; In *re Franklin Lumber Co.* (D. C.) 26 Am. Bankr. Rep. 37, 187 Fed. 281; In *re Gehris-Herbine Co.* (D. C.) 26 Am. Bankr. Rep. 470, 188 Fed. 502; In *re Geiver* (D. C.) 193 Fed. 128; In *re Nelson* (D. C.) 27 Am.

Bankr. Rep. 272, 191 Fed. 233; *In re Waite-Robbins Motor Co.* (D. C.) 192 Fed. 47; *In re Williamsburg Knitting Co.* (D. C.) 27 Am. Bankr. Rep. 178, 190 Fed. 871; *In re Bazemore* (D. C.) 26 Am. Bankr. Rep. 494, 189 Fed. 236; *In re Calhoun Supply Co.* (D. C.) 26 Am. Bankr. Rep. 528, 189 Fed. 537.

It is contended by petitioner that the necessity for complying with the provision of the Alabama Code, requiring the record of conditional sale contracts within three months after the property subject to the condition is brought into the state, was dispensed with in this case by the intervention of bankruptcy before the expiration of the three months. This question is ruled by the case of *Winston v. Hodges*, 102 Ala. 304, 309, 15 South. 528, 529. In that case the Supreme Court of Alabama said:

"The evidence on the question of notice is by the plaintiff, Hodges, who testified that he gave the plaintiff in execution personal notice of his purchase from James G. Coleman, 'a week after, but inside of 2 weeks,' from the date of his deed from Coleman. The judgment was rendered three days subsequent to the execution of the deed, and 'inside of 2 weeks' is less than 30 days. Section 1810 of the Code declares that 'conveyances of unconditional estates * * * are void as to purchasers for a valuable consideration, mortgagees and judgment creditors, having no notice thereof, unless recorded within 30 days from their date.' The judgment was rendered before notice, but within less time than 30 days. It is argued that the purpose of registration is to give notice, and actual notice is always at least the equivalent of constructive notice by registration. The conclusion deduced therefrom is that, as registration of the conveyance within 30 days from its date under the statute would render it superior to any rights of purchasers, mortgagees, and judgment creditors acquired at any time during the 30 days before registration, so personal notice given at any time during the 30 days allowed for registration would relate back and have the same effect as registration. We do not think the statute, in terms or in spirit, admits of this construction. If John G. Winston & Co., on the 23d day of February, instead of obtaining a judgment, had purchased the land from James G. Coleman, and paid him the purchase money, and received a deed to the land, personal notice by Hodges of his prior purchase subsequently given to John G. Winston & Co., although within the 30 days, would not invalidate to their purchase. The statute expressly provides that conveyances not recorded are void as to purchasers for a valuable consideration, unless recorded within 30 days. Judgment creditors with or without a lien by the terms of the statute stand on the same footing as purchasers for a valuable consideration. This construction better accords with justice, as in harmony with the spirit of our previous decisions, and we believe to be the express purpose of the Legislature. *De Vendell v. Hamilton*, 27 Ala. 156, *supra*; *Tutwiler v. Montgomery*, 73 Ala. 263; *Wood v. Lake*, 62 Ala. 489; *Watt v. Parsons*, 73 Ala. 202; *Chadwick v. Carson*, 78 Ala. 116. The trial court held differently, and in this respect erred."

It seems quite clear that, if actual notice to the judgment creditor of the unrecorded conveyance within the 30 days given for record would not dispense with the necessity of recording the conveyance, after such actual notice was given and within the 30 days, the intervention of bankruptcy during the period given the vendor for recording the conditional sale contract would not excuse its failure to record during the required period. Actual notice would seem to displace, as to the person having such notice, the necessity for complying with a recording statute, the effect of which at most would be to give con-

structive notice of the same fact to the person having actual notice. The Supreme Court of Alabama, construing its own statute, has held otherwise upon the ground that the *statute expressly provides* that conveyances not recorded are void as to purchasers for a valuable consideration *unless* recorded within 30 days. The same reasoning would avoid conditional sales of property which is out of the state, unless they are recorded within 3 months after the property subject to the condition is brought into the state. If the statute is so exigent as to require the recording within the statutory period as to one who has actual notice, even after he has received such notice, it is clear that it would also require record within the required period, though bankruptcy intervened before its expiration.

The practical necessity for record is equally hard to discover in each case. The only justification for enforcing the requirement in either case is in the literal language of the statute, which admits of no exceptions and is to be strictly followed. The Alabama court held that the actual notice given to the judgment creditor would not relate back, though given within the 30 days, unless the conveyance was also recorded within that time. So the intervention of bankruptcy cannot relate back to the time the property subject to the condition came into the state, so as to cut off the rights of creditors who may have extended credit on the faith of the bankrupt's apparent ownership of the property between its delivery to the bankrupt and the filing of the petition in bankruptcy. All the cases relied on by petitioner are cases in which the instrument was *in fact recorded within the statutory period*, though after rights adverse to the instrument had accrued. The court in each case emphasizes this fact. In such cases the recording of the instrument relates back to the date of its execution by the terms of the statute. *Johnson v. Hughes*, 89 Ala. 588, 8 South. 147; *Brandon Printing Co. v. Bostick*, 126 Ala. 247, 28 South. 705. On the contrary, when there has been no record within the statutory time, the Supreme Court of Alabama, construing the language of the statute, has expressly decided that there is no relation back, that the statute makes no exception to the requirement, and the court cannot do so. The federal court will follow the construction placed on the Alabama statute by the court of last resort of that state.

For the reasons given, the petition to reclaim is denied, at the costs of the petitioner.

DE NOBILI v. SCANDA.

(District Court, W. D. Pennsylvania, July 6, 1912.)

No. 33.

TRADE-MARKS AND TRADE-NAMES (§ 84*)—VALIDITY OF TRADE-MARKS—NON-RESIDENT ALIENS—UNFAIR COMPETITION.

Complainants, who were all citizens and residents of Italy, as partners, established a cigar factory in the United States, adopting a label for their boxes and also a trade-mark, which they registered under Act Feb. 20, 1905, c. 592, §§ 1, 2, 33 Stat. 724 (U. S. Comp. St. Supp. 1911,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

p. 1459). The label was printed almost entirely in Italian, and did not show where the cigars were made; but a cut of a building thereon showed a sign in English giving the firm name of complainants, with the words "Italian Cigar Manufacturers." *Held*, that complainants were not entitled to the protection of a court of equity against infringement of their trade-mark or unfair competition by simulation of their label by a citizen of the United States, first, because, the manufacture of tobacco being a government monopoly in Italy, neither complainants nor an American citizen could secure a similar trade-mark in that country, which was essential to a valid registration of their trade-mark under the statute; second, because their label was calculated to deceive purchasers into the belief that their cigars were made in Italy; third, because upon the building shown in the cut on the label there were two Italian flags, which, under section 5 (b) of the statute would render it ineligible to registration as a trade-mark, and, as evidenced by such provision, contrary to the public policy of the United States.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 93, 97; Dec. Dig. § 84.*]

Unfair competition in use of trade-marks and trade-names, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Suit by Prospero De Nobili, on his own behalf and on behalf of others, against Joseph S. Scanda. On final hearing. Decree for defendant.

Stonecipher & Ralston, of Pittsburgh, Pa., for plaintiff.

A. H. Wanner, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This matter comes before the court for final hearing. The bill is filed by Prospero De Nobili, for himself and about 40 others, who are not named, who are engaged as partners under the name and style of Prospero De Nobili & Co. in the manufacture of cigars and tobacco, to restrain the defendant, Joseph S. Scanda, who is also engaged in the manufacture of cigars, from using a trade-mark, labels, packages, and boxes like those of the plaintiffs. The evidence discloses the following facts:

The plaintiff and his associates are all residents of Italy and citizens of that foreign country. Near the close of 1906, or early in 1907, they began the manufacture of cigars at Long Island City in the state of New York. They adopted a trade-mark and duly registered the same in the United States Patent Office on January 18, 1907. That trade-mark consists of a circle having inclosed therein the initials of the firm and having upon its outer circumference, immediately above the initials, the Roman symbol of the wolf suckling Romulus and Remus. The said trade-mark appears upon the plaintiffs' label, which label is intended to be applied so that the trade-mark will appear at the end of the plaintiffs' box of cigars. The defendant uses upon his label a design different from the trade-mark of the plaintiff in some respects. Instead of a circle, the defendant uses a diamond-shaped parallelogram, within which are the defendant's initials and upon which is the Roman symbol of the wolf and children. These devices are by no means the important features of the labels used by the parties.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The distinction pointed out in these designs is, however, one of the most noticeable differences between the labels of the plaintiff and that of the defendant. The label adopted by the plaintiff is straw-colored, upon which appear designs and printing in the making of which five or more different colors are used. To one not accustomed to careful discrimination, the label of the defendant would be mistaken for that of the plaintiff. A mistake might be made in the purchase of the defendant's cigars for those of the plaintiff, not only from the similarity of the labels, but from the marked similarity of the boxes upon which the labels are respectively placed, and also from the fact that the cigars inside of the boxes are packed in the same way.

From all the evidence the conclusion must be found that the defendant, who had been in the business of manufacturing cigars for a number of years, first used the label now placed by him upon his cigars after the plaintiff had begun to place his cigars upon the market. The defendant is not sufficiently clear in his testimony as to the time of the adoption of the designs, labels, and boxes used by him to even raise a doubt in the mind of the court that he has sought by unfair means to avail himself of the growing demand for the plaintiff's cigars by simulation intended to lead consumers to the belief that his cigars were the same as the plaintiff's. If there were nothing else in the case, the plaintiff would be entitled to a decree and an injunction as prayed for.

It appears, however, that while the plaintiff is claiming that the defendant is deceiving the public, he himself may not be wholly free from a similar charge. That portion of plaintiff's label which is placed upon the top of the boxes containing cigars, so far as it appears without a most careful examination, is all in Italian. The only portion which does not appear to be in Italian is upon one of two signs on the red building inclosed within an ellipse. On that sign appears:

Prospero De Nobili & Co., Italian Cigar Manufacturers.

Upon the other sign upon said building appears:

Prospero De Nobili & Co., Manifattura di Sigari Italiana.

Above the ellipse appears:

100

Prospero De Nobili & Co., Manifattura di Sigari & Tabacco.

And below the ellipse:

Pierce Ave. and Hamilton St., L. I. C.
Sigari a foggia Napoletani.
Cento.

There is another label in litigation in this case like the one just above described, differing, however, from that one in that the word "Toscani" appears on it in place of "Napoletani." The Toscani and Napoletani are names given to certain shapes of cigars, and the labels are used with respect to the different shapes as the case may be.

At the time these labels were first used by the plaintiff there appeared upon the building an American flag, and as well, also, on either

side of the American flag, an Italian flag. But for some years past the American flag has been blotted out, so that there appears to be a flag of deep blue or black only. The Italian flags still remain. There is nothing upon the upper part of the label, or the side of the label, or on the box, to indicate the place of manufacture of the cigars. On the upper part of the box there is, of course, the factory notice required by the act of Congress, upon which appears the statement that the cigars are from factory No. 409, First district, New York. It is true the words "Pierce Ave. and Hamilton St., L. I. C.," when explained by the testimony, are the English names of streets in America, with an abbreviation of the city in which the streets are located. But an ordinary consumer of a cheap cigar, such as are sold by both parties to this suit, would not have anything to show that the cigars were not made in Italy, unless he turned the box upside down. The cigars sell at retail at two cents apiece, and therefore would be consumed by a man of limited means and intelligence. The plaintiff explains that his use of the term "Italian Cigars" is not intended to convey the impression that the cigars are made in Italy, or that they are made of Italian tobacco. The tobacco, according to the evidence, is grown in Kentucky. The cigars, he says, are made according to the Italian process. One of the witnesses states that they used the name "Italian Cigars" to distinguish their cigars from Havana cigars and American cigars. It appears, also, that the government of Italy has an exclusive monopoly of tobacco and the tobacco industry in Italy and that there is some tobacco raised in Italy. Plaintiff does not disclose what the Italian process is in detail, but asserts that he is manufacturing his cigars according to the process used by the Italian government. He is doing in this country, therefore, what American citizens cannot do in Italy.

Plaintiff insists that none of his consumers can be misled by his label, because his cigars are intended for the Italians living in this country, are consumed in this country by Italians alone, and that all Italians know that Kentucky tobacco is used by the Italian government in the manufacture of cigars, and that there are no cigars exported from Italy to this country. I am satisfied that the plaintiff should not be permitted to maintain this action. We have the fact hereinabove mentioned as to the citizenship and residence of the plaintiff and his associates. While residents of Italy, where they cannot carry on the business they are now engaged in, they establish a factory in this country to cater to a particular class of people, and mark their wares in such a way as to deceive purchasers, who may or may not be of the class intended by them as the consumers of their product.

In 1881 Congress passed an act (Act March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401]) to authorize the registration of trade-marks, to protect the same, which extended only to owners of trade-marks who were domiciled in the United States, "or located in any foreign country or tribes, which by treaty, convention or law afford similar privileges to the citizens of the United States." On June 1, 1882, the trade-mark declaration with Italy was signed, wherein it was recited that the contracting parties, "wishing to provide for

the reciprocal protection of the marks for manufacture and trade, have agreed as follows: The citizens of each of the high contracting parties shall enjoy in the dominions and possessions of the other the same rights as belong to native citizens, or as are now granted or may hereafter be granted to the subjects or citizens of the most favored nation in everything relating to property in trade marks and trade labels." Act Feb. 20, 1905, c. 592, 33 Stat. at Large, 724 (U. S. Comp. St. Supp. 1911, p. 1459), authorizing the registration of trade-marks, contains provisions similar to those found in the act of 1881, *supra*. This is observed in section 1 of said act. In section 4, which relates to the rights of foreign registrants, there is provision for the registration of trade-marks in this country by persons who have previously "filed in any foreign country, which by treaty, convention or law affords similar privileges to citizens of the United States." Indeed, in all the acts of Congress on the subject, since the act of 1881, it seems that residents of foreign countries should have the right of protection for their trade-marks in the United States only where citizens of the United States could have protection for their trade-marks in the countries in which they were respectively citizens and residents.

In view, therefore, of the evidence in this case and of the legislation upon the subject, there seems to be no equity on the part of the plaintiff and his associates, citizens and residents as they are of Italy, to cause this court to restrain the defendant, who is a citizen of the United States, from the use of plaintiff's trade-mark. Nor does the lack of equity relate to the trade-mark alone, but also to the label upon which it is used, for the rights of a manufacturer to the enjoyment of both are the same. The definitions of a trade-mark are collected in section 2 of Hopkins on Trade-Marks, note 3. The author of that work, however, has taken the several decisions and therefrom gives the following definition:

"A trade-mark is a distinctive name, word, mark, emblem, design, symbol or device used in lawful commerce to indicate or authenticate the source from which has come, or through which has passed, the chattel upon or to which it is applied or fixed."

A label is usually much broader in its information than a mere trade-mark; but a label, to be the subject of litigation in a case of unfair competition or trade must "indicate or authenticate the source from which has come, or through which has passed, the chattel upon or to which it is applied or fixed."

There is another phase of this question, arising from the use of the flags upon the red building contained within the oval upon the label. The act of February 20, 1905, authorizing the registration of trade-marks, in section 5, provides:

"That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark * * * unless such mark * * * (b) consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any state or municipality, or of any foreign nation," with other provisions not necessary to be considered.

That provision appears again in the act of 1907 (34 Stat. at Large, 1251), and is the law to-day, as it was before the trade-mark and label of the plaintiff was devised and used.

It has been seen that there were originally on the plaintiff's label a flag of the United States and two flags of Italy, or simulations thereof, on either side, and that since the obliteration of the flags of the United States, as above stated, there still remain the two flags of Italy. It is true, they are small as compared with the other features of the label; but it cannot be said that the label does not comprise those Italian flags. Lexicographers state that the word "comprise" means "embrace" or "include." Under the law, therefore, the design of the label could not be registered as a trade-mark, because it comprises a flag of a foreign nation. If it could not be registered as a trade-mark for that reason, we see no reason why it should be protected as a label. The policy of the law, as indicated by the statutes above mentioned, recognizes the impropriety of using the flags of nations upon advertising matter, and the court is of the opinion that the policy of the law ought to be considered in this case as having more or less weight against any equity in favor of the plaintiff which may exist by reason of other considerations. Again, a wholly foreign label upon goods manufactured in America from American natural products ought not to be encouraged in this country. It is true the plaintiff says that his goods are intended for the Italians in this country, and that the consumers will not be deceived; but a manufacturer of American goods is not entitled to protection in a court of equity for a label which would deceive any portion of the population of the United States. This is not a country made up of Italians and of people from other nations, but is composed of American people using the English language. To encourage home manufacturers for the people of one alone of the nationalities represented in the United States should not be required of a court of equity. Nothing should be encouraged which tends to foster divers national distinctions among those intending to become a part of the whole body of the people.

The conclusion, therefore, is that in spite of the unfair competition on the part of the defendant in the similarity of the trade-marks, labels, and packages, the plaintiff, for the reasons stated, has no standing in this court for the relief demanded. The bill must be dismissed, at his costs.

THE CAPE CHARLES.

(District Court, E. D. North Carolina. July 6, 1912.)

No. 66.

1. CARRIERS (§ 4*)—DISTINCTION BETWEEN COMMON AND PRIVATE CARRIER.

A "common carrier" is one who openly professes to carry for hire the goods of all who choose to employ him, and whose duty it is to carry for all who comply with the terms as to freight, etc.; while a "private

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

carrier" is one who, without being engaged in the business generally, undertakes to carry goods for hire in a particular case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 2, pp. 1313-1319; vol. 8, p. 7607.

Who are common carriers of goods, see note to *Wade v. Lutchter & Moore Cypress Lumber Co.*, 20 C. C. A. 521.]

2. SHIPPING (§ 120*)—PRIVATE CARRIER—LIABILITY FOR INJURY TO CARGO—ACT OF GOD.

Claimant undertook as a private carrier to carry for libelant on his schooner a quantity of corn, and hay and straw in bales, to be delivered at various life-saving stations on the coast of North Carolina. The time was winter, and libelant understood that the hay was to be carried on the deck and covered with canvas. Claimant signed receipts or bills of lading on printed forms containing conditions which, *inter alia*, exempted him from liability for loss or damage caused by act of God. While in the sound the schooner encountered a heavy snowstorm, with wind which blew the snow under the canvas, and although the canvas was kept down as well as possible, and the snow brushed off after the storm, the hay was damaged. *Held*, that the damage was due to act of God, and not to any negligence of claimant which rendered him liable under his contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 440-448, 466; Dec. Dig. § 120.*]

In Admiralty. Suit by Aydlett Bros. against the schooner Cape Charles; D. B. Silverthorne, claimant and cross-libelant. Decree for cross-libelant.

E. F. Aydlett, of Elizabeth City, N. C., for libelants.

Thos. J. Markham, of Elizabeth City, N. C., for libelee.

CONNOR, District Judge. The testimony tends to establish the following facts: On December 11, 1911, libelants delivered to D. B. Silverthorne, captain and owner of the schooner Cape Charles, at Elizabeth City, N. C., the hay and straw, in bales, and corn, in sacks, described in the libel, pursuant to an agreement on his part to carry and deliver, in stipulated quantities, to different life-saving stations along the coast of North Carolina—all of which is set forth in the libel. The libelants aver that the schooner is a common carrier, engaged in carrying freight for libelants from Elizabeth City to Cape Hatteras and other life-saving stations along the coast of North Carolina. Libelee denies that said schooner is a common carrier, and avers that her owner made a special contract of carriage with libelants, whereby, for a stipulated sum, he agreed to carry and deliver the hay, straw, and corn—he to exercise ordinary care in the performance of the contract.

There is some controversy in respect to the condition of the hay at the time it was placed on the deck of the schooner. I find that it was in good condition, having been inspected and accepted by the inspector of the government. I find that it was known to libelants that the hay was to be placed upon the deck of the schooner and protected by being covered with canvas. At the time of receiving

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the hay Capt. Silverthorne signed certain papers, which libelants insist are bills of lading. After delivering a portion of the hay and corn at several stations, the schooner went to her home at Aurora, where she remained until the last of December or 1st of January. While passing from Beaufort to Core Bank Station, being on the route to the places of delivery, the schooner encountered a severe snowstorm. The hay was covered with canvas, but the winds blew the snow under portions of the canvas, causing, when melted, damage thereto.

The only evidence on this point is that of Silverthorne and Bryan Rose, his employé on the boat. The former says that he went from Morehead to Core Bank Station, and, while in the sound was struck by a snowstorm.

"The hay was protected the best I could. I covered it up three different times while the storm was on. The wind would get under the canvas and blow it off. We would get up and put it back. We kept it down the best we could. The snow would blow under the canvas and blow on the hay. As soon as the snowstorm was over we uncovered the hay and raked the snow all off—all we could get off. The snowstorm commenced one afternoon and lasted through half the next day. We were in the open sound."

Rose said:

"We covered it up three times during one night. Wind was right smart and heavy. We were in Core Sound. After the storm was over we brushed it off. The snow went in on the hay."

Silverthorne went to the different stations, as directed; but the persons in charge of the stations refused to receive a part of the hay because it was damaged by reason of having been wet. The schooner was carried to Aurora, her home, with the hay, and libelants notified by Silverthorne that he would bring it back to Elizabeth City, if the freight was paid, or, if so directed, ship by rail. To this proposition they replied:

"We, of course, expect you to make good what damaged stuff you have on board. You remember we delivered it to you in good condition, and you were to cover with canvas and deliver same. We have been informed that you have not used canvas on same."

Silverthorne thereupon stored and later sold the hay at public auction, and holds the proceeds on account of balance due on freight. Twenty-five dollars was paid on account of freight at the time the hay was delivered.

Libelants contend that the schooner was a common carrier at the time of making the contract of carriage. This is denied. The evidence, in this respect, is meager and unsatisfactory. There is nothing in the testimony indicating in what capacity, or for what purpose, she was employed by her owner, or why she was at Elizabeth City. Mr. Aydlott simply says that he made a contract with him to take forage to the life-saving stations at a stipulated freight. It does not appear that they had, at any former time, employed her, or that her owner had sought such employment from libelants or others. Mr. Aydlott was asked the questions:

"You had shipped hay before, hadn't you? Ans. Yes. And since? Ans. Yes, sir."

These questions, however, were asked in regard to his knowledge as to the manner in which the hay was to be loaded and protected. Capt. Silverthorne says that his home is at Aurora; that he is a sailor—has been for 18 years; that he knows the waters of the Albatraz Sound and its tributaries; that he has carried cargoes of almost all kinds.

[1] The distinction which marks a common from private carrier is clearly defined. A common carrier is one who openly professes to carry for hire the goods of all such persons as may choose to employ him. Redman's Law of Railway Carriers (2d Ed., 1880) 1. In some cases it is said that the test whether one comes within the definition of a common carrier is whether he holds himself out to carry goods for every one who applies to him. Simpson, C. J., says:

"The true test of the character of the party, as to the fact whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry for all? If it is his legal duty to carry for all alike who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and in all the states, upon common carriers." *Piedmont Mfg. Co. v. Columbia, etc.*, R. R. Co., 19 S. C. 353; 16 Am. & Eng. R. R. Cas. 194.

"A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward." *Pennewill v. Cullen*, 5 Har. (Del.) 238.

"One who is the owner of a vessel, and who is especially employed to transport a cargo of grain, is not a public carrier, but only a private carrier for hire." *Allen v. Sackrider*, 37 N. Y. 341; *Bennett v. Filyaw*, 1 Fla. 403; 6 Am. & Eng. Enc. 242.

[2] I am of the opinion that, upon the testimony in this case, the schooner Cape Charles was a private carrier for hire, and that the extent of its liability for the injury sustained by the hay is fixed by terms of the contract, and not by the principles and rules of the common law. It appears that Silverthorne, at the time the goods were delivered and placed upon the deck of the boat, signed several printed forms of bills of lading used by the Norfolk Southern Railway Company. The name of the railway company was written over in pencil with the words "Schooner Cape Charles." The printed portion of the bill of lading acknowledged the receipt of property written in as the hay and corn. The printed portion contained the usual provisions of the "Standard Form Straight Bill of Lading." They are signed by "D. B. Silverthorne." On the back is printed, among other "conditions," the following:

"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy," etc.

This limitation of liability is, of course, valid without regard to the character of the carrier. Silverthorne, who is evidently a man of little education, says that he cannot read and did not know that the papers to which he attached his name were bills of lading—thought that it was a simple receipt for the goods. While I do not think it very material, I incline to the opinion that his statement, in this

regard, is true, without attributing any improper conduct to the libelants. Assuming that the limitation, in respect to liability, is valid, the question arises whether the injury to the hay was caused by the act of God, or by the negligence of Silverthorne. It will be noted that the manner of loading the schooner—that is, the part of the boat upon which the hay was deposited to be carried—was known to the libelants. They saw the loading, by their agents, on the deck. It will be further noted that libelants knew that the hay was to be protected from the weather by the use of canvas. They were also familiar with the route to be taken and the waters over which the hay was to be carried to the points of destination. No fault can, therefore, be imputed by reason of the placing the hay on the deck of the schooner, nor for using canvas for its protection.

It is conceded by counsel that the hay was not injured prior to the time that the boat left Aurora, after the Christmas holidays—that is, about the 1st of January, 1912. The case is thus brought within a narrow compass in respect to the time, place, and manner of the injury. It was between Beaufort and Core Bank Station—while on the Sound—and by reason of the schooner encountering a severe snowstorm, lasting a part of two days and one night. The wind blew the snow under the canvas, and, notwithstanding the efforts of the owner and his employé, wet the hay. This is all without controversy. That a snowstorm, with wind, etc., is an act of God, both in contemplation of law and the proper interpretation of the contract, is manifest. In *Ballentine v. North Mo. R. R. Co.*, 40 Mo. 491, 93 Am. Dec. 315, it was held that, where a carrier was delayed by a snowstorm, he was not responsible. The storm was the act of God. So of the freezing of a canal. 1 Am. & Eng. Enc. 499.

The sole question remains: Was the snowstorm, with the accompanying wind, the proximate cause of the injury; or did the libelee carry the burden to anticipate and make provision to protect the hay from the effect of such a storm. I think it clear that, in view of knowledge on the part of the libelee the contract of carriage involved the necessity for passing through the Sound, the duty was imposed to make such provision for the protection of the hay against the usual and natural danger which a storm involved which a reasonably prudent man, under similar circumstances, would make, and in doing so he should have kept in mind the season during which the voyage would be made—that it was midwinter. The measure of duty, in this respect, is laid down by the Supreme Court in *Railroad Co. v. Reeves*, 10 Wall. 176, 191 (19 L. Ed. 909):

"When the carrier discovered himself in peril by inevitable accident, the law requires of him ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them."

Tested by this standard, I am unable to find that the owner of the schooner was guilty of negligence. The place on the boat and the means of protection from damage to the hay were known and assented to by libelants. They must be read into the contract of carriage as fixing the measure and standard of duty in those respects. The un-

contradicted evidence shows that the carrier provided the canvas and. I think, made such use of it as, under the circumstances, his contractual obligation required. A severe snowstorm, with high wind, raging during a part of two days and all night—the schooner in the Sound—it would seem imposed no higher duty than the efforts made to prevent the snow being blown under the canvas and upon the hay. The duty to remove the snow, as far as possible, was met. Common experience teaches that the penetration of snow driven by the wind is exceedingly difficult to prevent.

Upon considering the entire evidence, I am unable to fix any actionable negligence upon the owner of the schooner. This conclusion is not affected by the question as to the burden of proof to show negligence. It is held in *Railroad v. Reeves*, supra, that it is upon the libellant. No complaint is made of the manner in which the hay was disposed of, or the sum received therefor. The libelee is, of course, liable for the sack of corn and bale of straw short. No allowance for demurrage will be allowed. A decree will be drawn for libelee for the balance of freight, after deducting the proceeds of the sale of the hay and the value of the corn and straw which were not delivered.

Neither party will recover for witnesses attending upon the hearing. The balance of the cost will be taxed against the libellants.

BEAR GULCH PLACER MINING CO. v. WALSH.

In re KIMBERLY-MONTANA GOLD MINING CO.

(District Court, D. Montana. August 16, 1912.)

No. 178.

1. BANKRUPTCY (§ 210*)—JURISDICTION OF BANKRUPTCY COURT—ADVERSE CLAIMS TO PROPERTY.

A court of bankruptcy has ancillary and exclusive jurisdiction to hear and determine all adverse claims to property in the possession of a trustee in bankruptcy as a part of the assets of the estate which he is administering, but not to determine conflicting claims to a water right.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321-323; Dec. Dig. § 210.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. BANKRUPTCY (§ 212*)—PETITION BY ADVERSE CLAIMANT—LAND TAKEN BY BANKRUPT FOR A PUBLIC USE—POWER OF COURT TO AWARD DAMAGES INSTEAD OF PROPERTY.

Under the statutes of Montana, by which property taken for mining and milling ores is for a public use, and may be condemned by an individual or corporation for such use, where a bankrupt mining company had built an electric light and power plant for use in its business on the land of another, and the plant has come into possession of its trustee, on the filing of a petition by the owner of the land in the bankruptcy court to recover the land and the plant thereon, the trustee may defend on the ground that the taking was for a public use, and the court may permit him to retain the property for the estate, and may fix the compensation to be paid petitioner for the land.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. § 212.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. EMINENT DOMAIN (§ 133*)—TAKING OF PROPERTY WITHOUT CONDEMNATION—RULE OF DAMAGES.

Where property is taken for a public use without condemnation and the payment of compensation, but in good faith and in reliance on negotiations or condemnation proceedings then pending, the rule of damages is the same as in cases of condemnation before taking, and the improvements made thereon are not to be taken into consideration, and especially is such the rule where the owner of the land appeals to equity for relief.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 358-361½; Dec. Dig. § 133.*]

In the matter of the Kimberly-Montana Gold Mining Company, bankrupt. On petition by the Bear Gulch Placer Mining Company to recover property in possession of M. J. Walsh, trustee. Decree for petitioner in part.

E. C. Day, of Helena, Mont., for complainant.

Walsh & Nolan, of Helena, Mont., for respondent.

BOURQUIN, District Judge. This purports to be a suit in equity, brought December 6, 1909, in this court sitting in bankruptcy, wherein complainant, a citizen of Montana, seeks to establish and quiet its title to an electric power and light plant erected, without consent, by the above-named bankrupt, a citizen of Arizona, upon one of complainant's group of placer claims owned in fee, to the land covered thereby, and also to a water ditch, all of which are in defendant's possession as assets of the bankrupt's estate. The bill further seeks to establish the priority of complainant's right to use the waters of a certain Bear creek, over a like right claimed by defendant as an asset of said estate.

Defendant challenged the jurisdiction of the court by demurrer, and, the same being overruled, answer and replication were filed, evidence submitted before an examiner, and final hearing had. In the main, the controversy presents the aspect of a suit to quiet title; the usual relief being prayed.

[1] In so far as the property involved is in possession of defendant as trustee in bankruptcy and as assets of the estate, the bankruptcy court has ancillary and exclusive jurisdiction, independent of statute, to hear and determine all adverse claims involving title and possession or control of the property. All courts of competent jurisdiction, when they have taken possession of property through their officers—sequestrators, receivers, trustees, or other officers—have like jurisdiction. They will not permit their possession to be disturbed by process of any other court, and in connection with that possession will not permit their own process to be abused. Hence the said jurisdiction to hear and determine adverse claims to such property. *Murphy v. John Hoffman Co.*, 211 U. S. 568, 29 Sup. Ct. 154, 53 L. Ed. 327; *Krippendorf v. Hyde*, 110 U. S. 283, 4 Sup. Ct. 27, 28 L. Ed. 145; *Wiswall v. Sampson*, 14 How. (U. S.) 65, 14 L. Ed. 322. The proceedings are not to be treated as independent and original, for as such the bill could not be maintained to quiet title to property

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in defendant's possession, but as merely ancillary to the bankruptcy proceedings and the bill as merely a petition therein, asserting and seeking determination of a claim to property in custody of the court. Cases cited.

In such proceedings the bankruptcy court has full jurisdiction to render a final judgment or decree binding the parties. There is jurisdiction to determine complainant's adverse claim to the electric plant, the land covered thereby, and the ditch, but none in respect to the water rights, in that complainant's water right is not in possession of defendant, and so not in custody of the court. A right to the use of the waters of a stream is a right to divert the water so far as and when necessary for a beneficial use. Any number of persons may be vested with such rights, though aggregating many times the flow of the stream. They may or may not ever actually clash in user. Those first in time are first in right; but, when the first appropriator's needs are served, subsequent appropriators can supply their needs in order of time. There is no property or right in water until it is diverted. The right itself is incorporeal, and, to the extent that it may be possessed, the possession is in the owner thereof.

Complainant is in possession of its right; defendant is in possession of the bankrupt's right. The jurisdiction to determine priority between them is not in the bankruptcy court by virtue of the rule aforesaid, nor does the bankruptcy statute confer it. Jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, were by said statute, when this proceeding was initiated, vested in the Circuit Court (concurrently with state courts), save for certain exceptions not material here. To determine the priority of these water rights involves a "controversy in equity" in its nature to quiet title, and not a "proceeding in bankruptcy." It is an independent matter, to be determined in an original suit, properly in the state courts or in the federal court if jurisdiction it otherwise has. See *Bardes v. Bank*, 178 U. S. 525, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Bankr. Act* July 1, 1898, c. 541, §§ 2, 23, 60, 67, 70, 30 Stat. 545, 546, 552, 553, 562, 564, 565, 566 (U. S. Comp. St. 1901, pp. 3420, 3431, 3445, 3449, 3451). The bankruptcy court has no jurisdiction to adjudicate the priority of said water rights, no more than it would have to quiet complainant's title to any other realty in its possession, and to which the defendant as trustee asserted an adverse claim.

[2] The ditch involved seems in definite and larger part to have been constructed by complainant and leased by the bankrupt. To that extent it is the property of complainant. The electric plant and part of the attached water pipe are upon land owned in fee by complainant. To said plant complainant claims title by virtue of the following provision of the laws of Montana, viz., Rev. Codes, § 4572:

"When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section 4578, belongs to the owner of the land, unless he chooses to require the former to remove it."

Section 4578 applies to tenant's fixtures. Section 4572 is merely declaratory of the common law. The electric plant was erected pending condemnation proceedings for its site and for the ditch right of way. The ditch lease being secured, said proceedings were held in abeyance. The plant was completed and operated in mining and milling ores. Thereafter the proceedings were improvidently dismissed, probably by mistake.

It appears the plant cost about \$25,000, is reasonably necessary for power and light for mining and milling purposes, and its site is more necessary therefor than for complainant's placer purposes. The land involved seems unsuited for placer operations, has no known value for its placer contents, and if complainant's placer operations are resumed (having been suspended for 24 years, its facilities and appliances fallen into decay, and most, if not all, of its ground of promise forfeited and patented to others) they will not be materially, if at all, hampered by the location of the plant and pipe line.

Defendant asserts the bankrupt's right to in effect condemn in these proceedings, and offers to pay such damages to complainant therefor as will be inflicted upon it thereby. Complainant resists. Electric power and light plants, mining and milling ores, are "public uses" in Montana. Complainant and the bankrupt possess the power of eminent domain, and both of them intend or claim the site of the plant involved for "public use."

Whether or not the bankrupt's secondary franchise is vendible, and the title thereto as "property" passed to the trustee in bankruptcy, whether or not the trustee can exercise the power of eminent domain by virtue of such franchise, or by virtue of being vested with the bankrupt's title to said plant designed for a "public use," is not necessary to decide. But, since individuals in Montana may condemn for a "public use," it is clear that, being vested with title to said plant, the trustee can assert by way of defense herein, even as the bankrupt otherwise could, the right to maintain the plant and its site on payment of compensation and damages, for the protection of the estate, the creditors, the bankrupt, and the public interest in the use involved therein.

Where the power to condemn exists, it should be exercised before, but may be exercised after, taking. If taken without condemnation, the owner may resort to any appropriate action to vindicate his right to the property, and therein the taker may defend, in that the taking was for a public use; the owner recovering compensation and damages, instead of the property. Complainant resorting to equity to vindicate his right in the property taken, this court has jurisdiction to finally adjudicate the amount of unpaid damages, and to direct that the defendant retain the property, provided the damages are paid. 5 Pom. Eq. § 473.

The court will so decree here. The evidence is clear that the bankrupt did not erect the plant in willful disregard and defiance of complainant's right of property, but in reliance upon the tacit permission of the local agent of complainant, in contemplation of a subsequent

arrangement, which agent, however, had no authority to bind his principal therein, and in reliance upon said condemnation proceedings.

[3] Where property is taken and improved for public use before condemnation and compensation made, not in willful trespass, or improper motive, or defiance of the owner's right of property, but in good faith, relying on negotiations or condemnation proceedings then pending, the rule of damages is the same as in cases of condemnation and compensation made before taking, and the improvements so made are not to be taken into consideration. *Searl v. Lake Co.*, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740. See *Chase v. Jemmett*, 8 Utah, 231, 30 Pac. 757, 16 L. R. A. 805, the note, and cases cited. See *Village, etc., v. Smith*, 184 N. Y. 341, 77 N. E. 617, 5 L. R. A. (N. S.) 922, and case note, 6 Ann. Cas. 379; 15 Cyc. 763, 995. More especially is this the rule when the owner of the land taken subsequently appeals to equity for any relief in connection therewith. "He who asks equity must do equity."

The defendant, amongst other proof, submitted proof of the land necessary for the power plant and attached pipe line. The area is 2.03 acres. There is no evidence of the value, and of the damages, if any, to the remainder of complainant's land, save that, in so far as values are testified to, it is that at the power house and pipe line the land has no value for any purpose, but defendant is willing to pay \$100 per acre for that taken. Complainant seems to have ignored the issue altogether; its theory apparently being that no such issue was involved, and that in any case it was the owner of the improvements and entitled to a decree accordingly.

Any attempt to estimate the damages, would be merely speculative, and, unless the parties agree thereon, the court will proceed to a hearing upon the question of damages. Either party may request an issue framed thereon for submission to a jury.

Decree accordingly.

UNITED STATES v. HANKEY.

(District Court, D. Massachusetts. August 14, 1912.)

No. 302, Equity.

INTERNAL REVENUE (§ 26*)—WAR REVENUE ACT—LEGACY TAXES—LIEN.

The legacy tax imposed by the Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), on "legacies or distributive shares arising from personal property," construing said section in connection with section 30, providing for the collection of such tax, is not a lien upon the real estate of the decedent.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 74; Dec. Dig. § 26.*]

Internal revenue tax on legacies, inheritances, and transfers, see note to *Ward v. Sage*, 108 C. C. A. 417.]

In Equity. Suit by the United States against Louise O. Hankey. On demurrer to bill. Sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Asa P. French, U. S. Atty.

Blodgett, Jones & Burnham, Douw Ferris, and Reese D. Alsop,
for defendant.

COLT, Circuit Judge. The question raised by the demurrer to this bill relates to the proper construction of sections 29 and 30 of "An act to provide ways and means to meet war expenditures and for other purposes," passed June 13, 1898 (30 Stat. 448), as amended by Act March 2, 1901, c. 806, 31 Stat. 938 (U. S. Comp. St. 1901, pp. 2307, 2308, and U. S. Comp. St. Supp. 1909, p. 876).

Sections 29 and 30 of this act relate to the imposition of a tax on legacies and distributive shares of personal property, and the question raised by the demurrer is whether Congress intended under the provisions of these sections that this tax should be a lien on the real estate of the testator.

The present bill is brought to enforce such a lien.

It appears from the bill that Anthony Hankey died on June 19, 1899, leaving personal property to be administered under the provisions of his will, and that his son, Anthony Hankey, Jr., and Margaret A. Hankey, were duly appointed executors. It further appears that under the provisions of the will his son was left a legacy exceeding \$10,000. It further appears that under sections 29 and 30 of the aforesaid act a tax was due the United States upon the son's legacy, amounting to \$638.16, in accordance with the return made by the executors dated December 10, 1906, and that a tax of that amount was duly assessed upon said legacy by the Commissioner of Internal Revenue, and a demand for payment duly made upon said executors, and that said executors have refused to pay the same, and that said tax has never been paid.

It further appears from the bill that the testator left certain real estate situated in the city of Boston, and that under the provisions of the will his son became the owner of one undivided half of this property. It further appears that on June 15, 1908, the son conveyed his interest in this real estate by quitclaim deed to George F. Brown, and that on June 16, 1908, said Brown conveyed said real estate by quitclaim deed to Louise O. Hankey, of Philadelphia; said Louise being the wife of the son of the testator.

The bill further alleges that:

"The tax or duty levied by said acts upon legacies or distributive shares arising from personal property of persons whose estates were subject to said tax shall be a lien and charge upon the property of every person who may die possessed of property taxable under the provisions of said act for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States, and that said lien and charge duly attached to said lands and still exists."

The prayer of the bill reads as follows:

"That a judgment or decree be entered by this honorable court adjudging said tax to be due and payable, and, if said court shall find said tax to be due and payable, that process issue to subject said lands, or such portion of the same as may be necessary, to be sold, and from the proceeds of said sale that the amount of said tax, together with all costs and expenses of every description, be allowed by this honorable court to be first paid, and the balance, if any, deposited under the order of the court, to be paid by its di-

rection to the respondent, or such other person or persons as shall appear to be entitled to the same."

The government's case rests upon the proposition that under the statute this tax is a lien on the real estate of the testator, and that, upon the refusal of the executors to pay a tax duly assessed upon a legacy, the government at any time within 20 years may proceed to enforce a lien against any real estate belonging to the testator at the time of his death in the hands of any party who may be the owner of such real estate at the time the suit is brought. For example, in the case at bar, a tax of \$638.16 upon a legacy given to Anthony Hankey, Jr., under the will of his father, who died June 19, 1899, was due the United States, under the statute, in accordance with the return made by the executors on December 10, 1906; and the executors having failed to pay this tax and deduct it from this particular legacy, as provided by the statute, the government on December 20, 1911, brings this bill in equity against Louise O. Hankey, the purchaser of a part of the testator's real estate, seeking to enforce a lien against this real estate.

It is the wise policy of the law that no tax shall be assessed against property unless it clearly appears from the statute that such was the intention of the Legislature. Applying this rule to the case at bar, this demurrer should be sustained, unless it clearly appears that, under sections 29 and 30 of the act of June 13, 1898, as amended, Congress intended that this tax should be a lien on the testator's real estate.

Upon reading sections 29 and 30, the main purpose which Congress had in mind is free from doubt. It intended by these provisions to levy an inheritance tax on legacies and distributive shares of personal property in excess of \$10,000. It further intended that the executor, administrator, or trustee having in charge or trust any such legacy or distributive share should pay the tax due on such legacy or distributive share to the United States Collector, and that this tax should be deducted from the particular legacy or distributive share on account of which the tax is charged.

But Congress did not stop here. It further provided what proceedings should take place in case the executor, administrator, or trustee should refuse or neglect to pay the tax due on such legacy or distributive share; in other words, it provided what should be done in a case like the one at bar.

Section 30, among other things, says:

"And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided * * * the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any prop-

er conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. * * * Any tax paid under the provisions of sections twenty-nine or thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged."

These provisions declare that, in case the executors refuse or neglect to pay the tax, the collector *shall* commence legal proceedings against any person who may have the actual or constructive custody or possession of *such property or personal estate*, and shall subject *such property or personal estate* to be sold upon the judgment or decree of the court, and the deed or proper conveyance of *such property or personal estate* sold under such judgment or decree shall vest in the purchaser thereof *all the title of the delinquent* to the *property or personal estate* sold under or by virtue of such judgment or decree.

Reading the words "such property or personal estate" in connection with the general context, and especially in connection with the words "shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate," it is plain that "such property or personal estate" refers to the legacies or distributive shares of personal property which have come into the hands of the executors, and which were subject to the payment of a tax under section 29. I fail to find in these provisions, which relate to the remedy provided for the collection of the tax in case the executors refuse or neglect to pay it, any language to the effect that Congress intended that this tax should be a lien upon the real estate of the testator.

The government's position, and the whole ambiguity with respect to this statute, rest upon the use of the word "property" in the following first five lines of section 30:

"That the tax or duty aforesaid shall be due and payable in one year after the death of the testator and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States."

It is true that, standing alone, the words "shall be a lien or charge upon the property of any person who may die aforesaid" may be construed as covering the real as well as the personal estate of the testator; but when this language is read in connection with the purpose of the statute, which was to subject legacies and distributive shares of personal property above a certain amount to the payment of a tax, and also with the provisions which follow in this section as to proceedings to collect the tax, it is by no means free from doubt that Congress intended by this language to make this tax a lien on the testator's real estate. This doubt is strengthened by the fact that such a construction of the statute would lead to injustice. It would subject property to the payment of this tax which is not the subject of the tax. It would subject the real estate of the testator in the hands

of an innocent purchaser to the payment of this tax, and permit the legatee whose legacy is chargeable with this tax to escape its payment. It would render null and void the closing provision of section 30, that this tax "shall be deducted from the particular legacy or distributive share on account of which the same is charged."

Upon careful consideration of sections 29 and 30, I am of the opinion that if Congress had intended that this tax should be a lien on the testator's real estate it should have made its intention clear and unmistakable, and, failing to do this, that the defendant's third ground of demurrer should be sustained.

Demurrer sustained.

HENE et al. v. SAMSTAG et al.

(District Court, S. D. New York. June 28, 1912.)

No. 5—192.

LITERARY PROPERTY (§ 6*)—RIGHT TO CONTROL USE—REPRODUCTION OF SKETCH IN FORM OF DOLL.

An agreement by the artist who produced the sketches of "The Newlyweds," by which he licensed complainants to "use an exact reproduction of Napoleon, the Newlyweds' baby, in the shape of a doll," conferred no exclusive right, in the absence of any copyright covering such reproduction.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 5; Dec. Dig. § 6.*]

Rights of authors to control of publication, disposition, or use of their productions independent of statutory copyright, see note to *Bobbs-Merrill Co. v. Straus*, 97 C. C. A. 620.]

In Equity. Suit by William B. Hene, Jacob J. Rosenthal, and George McManus against Henry F. Samstag, Moritz Hilder, L. Albert Samstag, and Jacob Hilder, partners as Samstag & Hilder Bros. On final hearing. Decree for defendants.

Grafton L. McGill, of New York City, for complainants.

Livingston Gifford and Charles S. Jones, both of New York City, for defendants.

PLATT, District Judge. There are many interesting points in this case, and a general discussion of all the features would be a pleasant task, but it is not thought that any useful purpose would be subserved thereby. Complainants Hene and Rosenthal have no standing in court, unless they show some right growing out of the license agreement of June 19, 1909.

As to the enforced complainant McManus, all his rights as cartoonist to the presentation by sketches of "Napoleon, the Newlyweds' Baby," had been passed over to the Press Publishing Company long before. On June 19, 1909, he had, I presume, a right to produce his "Napoleon" in any concrete form for commercial purposes which it suited him to adopt and appropriate. In the license agreement he bar-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gained to license Hene and Rosenthal to "use an exact reproduction of Napoleon, the Newlyweds' baby, in the shape of a doll." He had not then obtained any copyright authority to make such a doll, indeed, has never asked for such authority, and it is stoutly contended that he could not have gotten it, if he had asked for it. It is altogether too far a cry to attempt to force out of the license agreement any suggestion of the copyright which he attempted to secure in the fall of 1909.

My conclusion on this phase of the case is decisive of the issues presented. Let the bill be dismissed, with full costs. In the light of the record, it seems unfair to enlarge them by adding any fee for the attorney.

IRVINE v. BLACKBURN.

(District Court, W. D. Pennsylvania. April 20, 1912.)

No. 142.

1. JUDGMENT (§ 828*)—FULL FAITH AND CREDIT—STOCKHOLDERS' LIABILITY.

An adjudication by a court of a state, in a proceeding authorized by its statutes, that a person is a stockholder of an insolvent corporation, and subject to an assessment for the benefit of its creditors under the statute, is a judgment to which full faith and credit must be given by the courts of other jurisdictions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

Giving full faith and credit, jurisdiction of federal courts, see note to Bailey v. Mosher, 11 C. C. A. 318.]

2. CORPORATIONS (§ 243*)—INSOLVENCY—STATUTORY LIABILITY OF "STOCKHOLDER"—OHIO STATUTE.

Under Rev. St. Ohio 1908, § 3259, which provides that the term "stockholder" shall apply, not only to persons who appear by the books of the corporation to be such, but also to an equitable owner of stock, although on the books it appears in the name of another, an action to enforce an assessment made under section 3260d may be maintained against both the equitable owner of stock of an insolvent corporation and the legal owner, in whose name the stock stands on the books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 943, 944, 946-950, 952-959, 974, 975, 979; Dec. Dig. § 243.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6667-6669; vol. 8, p. 7804.]

3. LIMITATION OF ACTIONS (§ 58*)—STATUTORY LIABILITY OF STOCKHOLDERS—ACTION TO ENFORCE—LIMITATION.

Under Rev. St. Ohio 1908, § 3260d, which authorizes the court, in a creditors' suit against an insolvent corporation, to adjudge the amount payable by each stockholder under the double liability imposed by section 3258 and to appoint a receiver to collect the same, who shall have authority to maintain actions against stockholders in other jurisdictions, limitation does not begin to run against such an action until the entry of the decree making the assessment and appointing the receiver for its collection.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324-328, 346, 347; Dec. Dig. § 58.*]

At Law. Action by Ellsworth C. Irvine, receiver, against Julius H. Blackburn. On motion by defendant for judgment notwithstanding the verdict. Motion overruled, and judgment for plaintiff.

Patterson, Sterrett & Acheson, of Pittsburgh, Pa., for plaintiff.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., and L. A. Manchester and L. H. Burnett, of Pittsburgh, Pa., for defendant.

YOUNG, District Judge. This is a suit to enforce the liability of a stockholder of the Columbus, Sandusky & Hocking Railroad Company, an insolvent corporation of the state of Ohio. The facts as they appear from the testimony taken at the trial of the case are these: A judgment creditor of the railroad company commenced proceedings in the courts of Ohio for the purpose of fixing the liability of the stockholders, and this cause was so proceeded in that upon July 17, 1905, an assessment of \$27,300 was made against the defendant, and it is upon this assessment that the plaintiff, as receiver, brought this action. At the trial of the cause, under the evidence, the court directed the jury to return a verdict for plaintiff, and subsequently a motion was made by the defendant for judgment notwithstanding the verdict.

The defendant sets up five defenses to the action, as follows: (a) That there can be no recovery against Blackburn in this proceeding, as it has been found that he is mere trustee, and the plaintiff has already elected to proceed against the equitable owner of the stock; (b) that the action is barred by the 18 months statute of limitations of Ohio; (c) that the plaintiff by his conduct is estopped from alleging that the statute of limitations has been tolled; (d) that the action is barred by the 6 years statute of limitations of Ohio; (e) that the action is barred by the 6 years statute of limitations of Pennsylvania. These defenses will be disposed of in order.

[1] (a) It appears from the record that the defendant was trustee for the stock upon which he was assessed, and that the real owner was Carnegie Bros. & Co., Limited, and it is asserted that by the bringing of suit against Carnegie Bros. & Co., Limited, the equitable owner of the stock, the plaintiff has made his election as to whether he would proceed against the equitable or legal owner, because it is asserted that he cannot proceed against both. This defense cannot avail the defendant. The courts of Ohio, which had jurisdiction of the assessment proceedings, have found that the defendant is liable for the amount of the assessment, and full faith and credit must be given to that judgment. *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, No. 42, October Term, 1911, of the Supreme Court of the United States.

[2] Section 3259 of the Revised Statutes of Ohio provides:

"The term 'stockholder' as used in the next preceding section shall apply not only to persons who appear by the books of the corporation to be such, but also to an equitable owner of stock, although on the books it appears in the name of another."

In *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111, it was held that in Ohio the term "stockholder" applies, not only as

to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another. There was, therefore, a liability resting upon both the legal and equitable owner of the stock, and a judgment might be obtained against both. True, the money could not be twice collected; but we do not know of any decision which would prevent the plaintiff from prosecuting his suit against both. The plaintiff has not elected to proceed against the equitable owner. True, he has commenced suit by filing a praecipe for summons; but he has not proceeded otherwise in the case, and he has proceeded with the case at bar.

(b) The second defense, viz., that the action is barred by the 18 months statute of limitations of Ohio, cannot avail the defendant. This identical question was raised in the state of Ohio in the case of *Marriott v. Columbus, Sandusky & Hocking Railroad Company*, 16 Ohio Dec. 135, and it was there decided that the 18 months limitation did not apply.

[3] (c) and (d), namely, (c) that the plaintiff by his conduct is estopped from alleging that the statute of limitations has been tolled, and (d) that the action is barred by the six years statute of limitations of Ohio, are so completely answered by the case of *Irvine v. Bankard* (C. C.) 181 Fed. 206, that it is unnecessary to add anything. While the case is not binding upon us, it is so well reasoned and so persuasive that we unhesitatingly adopt it.

(e) The fifth ground of defense is that the action is barred by the six years statute of limitations of Pennsylvania. The judgment was obtained against the defendant July 17, 1905, and the suit entered in this court upon that judgment June 27, 1910. The suit was therefore brought within the six years. It was held, however, in *Irvine v. Bankard*, supra, that the right of action did not accrue until the affirmance by the Supreme Court of Ohio, to wit, upon the 11th day of May, 1909. In this view of the case, then, the plaintiff had almost five years to spare under the six years statute.

We are therefore of the opinion that the defendant has shown no defense to the action, and that the motion for judgment for defendant non obstante veredicto must be overruled, and judgment entered upon the verdict.

BENNER v. BLUMAUER-FRANK DRUG CO.

(District Court, W. D. Washington, S. D. August 1, 1912.)

No. 841.

BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—REASONABLE CAUSE TO BELIEVE INTENT—KNOWLEDGE OF OFFICER OF CORPORATION.

The president of defendant, a wholesale drug company, purchased the capital stock of the bankrupt company, which was a customer and debtor of defendant. After about a year, during which time the indebtedness had increased, he resigned as president of defendant, and shortly afterward, on defendant's demand, the bankrupt paid the indebtedness; some

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

of the payments having been made within four months of the bankruptcy. *Held*, that defendant was not chargeable with knowledge of the facts learned by its president as a stockholder of bankrupt with respect to the latter's solvency or insolvency, and that, in the absence of other evidence to charge it with knowledge of insolvency at the time the payments were made, it could not be held to have had reasonable cause to believe that a preference was intended to render them voidable as such.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

In Equity. Suit by J. D. Benner as trustee of the Wynkoop-Vaughan Company, bankrupt, against the Blumauer-Frank Drug Company. On exceptions by defendant to report of special master. Exceptions sustained, and decree for defendant.

This is a suit brought by the trustee in bankruptcy to set aside an alleged preference, within the four-months period, consisting of the payment of \$900 to the defendant, Blumauer-Frank Drug Company. It is now before the court upon the defendant's exceptions to the report of the special master, finding such payments to be voidable preferences. The controlling facts are as follows:

W. F. Fleidner was president of the defendant company from 1907 to January 15, 1910. On February 13, 1909, Fleidner bought all of the stock of the Wynkoop-Vaughan Drug Company. Upon this purchase it was estimated by the parties to the sale that the assets amounted to \$30,000 and the debts to \$20,000. At that time the defendant was a creditor of the bankrupt to the amount of \$10,280.89. In November, 1909, Fleidner installed as manager of the Wynkoop-Vaughan Company Isaac Korn, formerly a salesman of the defendant company. He also installed his (Fleidner's) sister as treasurer and cashier of that company.

On January 15, 1910, Fleidner resigned as president of the defendant company. Upon his resignation, the defendant company virtually ceased its sales to the Wynkoop-Vaughan Company, demanded payment of its account, and informed Fleidner that they would look to him for payment, in case the Wynkoop-Vaughan Company did not pay. On January 19, 1910, the Wynkoop-Vaughan Company borrowed \$10,000 from Fleidner and paid that amount to the defendant on account. There is no evidence that the defendant knew that it was so borrowed. On March 8, 1910, a further payment was made to the defendant of \$700, and on May 10, 1910, another payment of \$200.32 was made, entirely paying defendant's account. It is to set aside, as voidable preferences, the last two payments that this suit is brought, under section 60 (a) and (b) of the Bankruptcy Act of 1898.

Prior to July 5, 1910, a receiver was appointed for the Wynkoop-Vaughan Company in the state court and its retail drug business conducted for a time by such receiver. On July 5, 1910, a petition was filed in this court, praying that the company be declared an involuntary bankrupt. On July 26, 1910, such company was declared an involuntary bankrupt, and on August 3, 1910, the plaintiff in this suit was appointed trustee. Proofs of claims were filed, amounting to \$38,925.34. The trustee conducted the retail drug business of the bankrupt for a considerable time, and at length, at judicial sale, disposed of its stock and assets for \$4,516.06.

G. P. Fishburne and Raymond J. McMillan, for complainant.
William H. Pratt, for defendant.

CUSHMAN, District Judge (after stating the facts as above). By section 60 (a) and (b) of the Bankrupt Act (Act July 1, 1898, c. 541, 30

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stat. 562, U. S. Comp. St. 1901, p. 3445, 1 Fed. Stat. Ann. 672, 674), it is provided:

(a) "A person shall be deemed to have given a preference, if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other such creditors of the same class."

(b) "If a bankrupt shall have given a preference within four months before the filing of a petition * * * and the person receiving it, or to be benefited thereby, or his agent acting therein shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

The special master's findings are excepted to by the defendant, upon the ground that the evidence does not show the bankrupt to have been insolvent at the time of the payments to the defendant, and that it does not show that the defendant, at the time of these payments, had "reasonable cause to believe that it was intended thereby to give a preference."

In the sale by the Wynkoop-Vaughan Company to Fleidner it was provided that payment of the purchase price, \$10,000, that being the amount its estimated assets exceeded its liabilities, should be made at the rate of \$250 a month. It was further provided that the stock should remain with the seller as security, but that no personal liability should accrue from Fleidner to the seller, but that the seller should, at all times, be relegated to the said security for the payment of the amount due.

It is contended that the terms of this sale and the facts above recited show insolvency at the date of the payments to the defendant, and, further, that the defendant then had "reasonable cause to believe that a preference was intended." Assuming, but not deciding, that the bankrupt was insolvent in March and May, 1910, the latter question remains for determination.

Both the master, in his report, and plaintiff's counsel, in their brief, rely, to establish that the defendant had reasonable cause to believe the bankrupt then insolvent, upon the fact that Fleidner, the president of the defendant company to within two months of the time of the first of these alleged preferential payments, was the sole stockholder of the bankrupt for more than a year prior thereto; that, therefore, the defendant must have known of the bankrupt's insolvency; that Fleidner is shown to have consulted with other officers of the defendant company, which, together with the steps taken by the defendant to secure payment of its account, upon Fleidner's resigning as its president, show the same thing. In the brief of plaintiff's counsel it is said:

"The sole question, therefore, under this element of preference is this. Should Fleidner, as president of the Blumauer-Frank Drug Company, acting as a reasonably prudent man, be charged with the facts and circumstances with respect to the financial condition of the Wynkoop-Vaughan Company that Fleidner, as the sole stockholder of that company, is conclusively chargeable with? It may be claimed that the situation is changed by reason of the fact that Fleidner severed his connection with the defendant a few months prior to the payments in question. However, the evidence clearly shows that, long prior to January 15, 1910, the bankrupt was hopelessly insolvent,

a fact which Fleidner is certainly chargeable with knowing, and there is nothing in the record to indicate any change in that condition between the 15th of January, 1910, and the 10th of May, 1910."

It is not pretended that Fleidner in any way took over the stock in trust for, or to protect, the defendant. The fact that he loaned the bankrupt \$10,000, to pay the greater part of defendant's claim, six months before the petition praying that the Wynkoop-Vaughan Company be adjudged a bankrupt was filed, and at a time it is now claimed it was insolvent, establishes that he was not. The peculiar terms of the sale, and what Fleidner then or thereafter learned, is not the knowledge of the defendant, nor to be presumed to be communicated to it, for Fleidner was then acting for himself, and not the defendant. Under such circumstances, the law does not presume knowledge upon the part of the principal. This has been often decided. It will suffice to refer to the one case of *American Surety Company v. Pauly*, 170 U. S. 133, at page 156, 18 Sup. Ct. 552, at page 561 (42 L. Ed. 977):

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations, not in the execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to commit some fraud against the principal. In such cases, the principal is not bound by the acts or declarations of the agent, unless it be proved that he had at the time actual notice of them. * * *"

The fact that, during the time Fleidner was connected with both companies—11 months, during all of which time plaintiff contends the Wynkoop-Vaughan Company was insolvent—the debt of that company to the defendant was not reduced, or any effort made to reduce it, but was increased from \$10,280.89 to \$10,900, warrants the presumption that the defendant was not apprised of the insolvency of the Wynkoop-Vaughan Company, if it was in fact insolvent. The mere fact that the defendant sought payment of its account upon the resignation of Mr. Fleidner, its president, is not enough to charge it with a "reasonable cause to believe a preference was intended."

The court finds that the complainant has not, by a preponderance of the evidence, established this necessary element of his case. The exceptions are sustained, and the defendant prevails.

Findings and decree will be prepared in accordance with this opinion.

In re GLOBE LAUNDRY.

(District Court, M. D. Tennessee. May 31, 1912.)

No. 2,479.

BANKRUPTCY (§ 342*)—RE-EXAMINATION OF CLAIMS—TIME FOR RE-EXAMINATION.

Under Bankr. Act July 1, 1898, c. 541, § 57k, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), which provides that "claims which have been allowed may be reconsidered for cause * * * before, but not after, the estate has been closed," reconsideration should be allowed as a general

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rule, when asked by the trustee at any time before the estate has been closed, and a delay of more than a year, without other facts appearing, and where a dividend has not been declared, is not of itself such laches as to bar a re-examination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529; Dec. Dig. § 342.*]

In the matter of J. G. Brown and others, individually and as partners under the name of the Globe Laundry, bankrupts. On petition of trustee for review of order of referee. Order reversed.

Petition in involuntary bankruptcy against J. G. Brown and others, individually and as partners engaged in business under the name of the Globe Laundry. A claim of the American Paper Box Company, by note signed by Brown and another partner, was filed and allowed against the individual estate of Brown. Thereafter, more than a year after the claim had been so allowed, the trustee in bankruptcy moved to re-examine and disallow said claim against the individual estate of Brown. This motion having been overruled by the referee in bankruptcy, the trustee filed a petition to review the order of the referee.

Thos. G. Kittrell, of Nashville, Tenn., for bankrupt.

Wm. L. Talley, of Nashville, Tenn., for American Paper Box Co.

Lee Douglas and L. R. Campbell, both of Nashville, Tenn., for trustees.

SANFORD, District Judge. The referee was of opinion that the trustee's motion to re-examine and disallow the claim of the American Paper Box Company as a claim against the individual estate of J. B. Brown should be overruled on the ground merely that the objection and motion for reconsideration was filed too late, that is, more than twelve months after the claim had been filed. I am of opinion that this was error. Section 57k of the Bankruptcy Act provides that claims which have been allowed may be reconsidered for cause "before, but not after, the estate has been closed." This provision indicates that as a general rule reconsideration should be allowed before the estate has been closed, there being no other limitation expressed in the Act as to the time within which such reconsideration may be made.

It is true that in Loveland on Bankruptcy (4th Ed.) § 349, p. 721, it is said that:

"A trustee has been held to be barred by laches to petition for a re-examination of a claim once allowed."

Two cases are cited in support of this proposition. In one, *In re Hinckel Brewing Co.* (D. C.) 123 Fed. 942, it was held that where the claim of a landlord for rent of premises occupied by the bankrupt's receiver had been filed against the estate and allowed without objection, and so stood until after the receiver had settled his accounts and been discharged and no claim therefor could be made against him, the trustee was precluded by reason of laches from thereafter having the allowance reviewed; the basis of this decision being that to allow a review at that time would aid in the perpetra-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of a fraud upon the claimant, who, relying upon the allowance of the claim, had changed his position for the worse and lost remedies he might otherwise have asserted. In the other, *In re Hamilton Furniture Co.* (D. C.) 116 Fed. 115, it was held that, where one creditor petitioned for the re-examination and disallowance of a number of claims after they had been allowed and participated in a dividend, and the trustee appeared and objected to the re-examination of such claim, the petitioning creditor was barred by his laches.

I am of opinion that these cases rest upon entirely different principles from that involved in the present case. In the only one of these cases which deals with a petition of the trustee for re-examination of claims, namely, the *Hinckel Brewing Co. Case*, the trustee's petition was disallowed for laches that if not held a bar would have worked great prejudice to the creditor whose claim had been allowed, by reason of the change of status. No such state of affairs is shown here. The claim in question on its face appeared to be a claim against the individual estate of Brown. It is virtually conceded, as I understand from the briefs, that no dividend has yet been declared. There is no element of estoppel or of prejudice to the American Paper Box Company by change of status which should prevent the trustee, upon ascertaining the facts in reference to this claim, from asking for its re-examination and disallowance as a claim against the estate of Brown. At least no such state of affairs appears from the record, which presents merely the question of whether a delay of more than one year, without other facts appearing, and before a dividend has been declared or paid, is of itself such laches as to bar a re-examination. I am of opinion that on the facts now appearing such laches is not shown.

The petition for review will accordingly be allowed, the order of the Referee overruled, and the case remanded to the Referee for further proceedings in accordance with this opinion. The costs incident to the petition to review will be paid by the American Paper Box Company.

AMES REALTY CO. v. BIG INDIAN MINING CO. et al

(District Court, D. Montana. August 16, 1912.)

No. 66.

EQUITY (§ 437*)—DECREE—ENFORCEMENT—LIMITS OF COURT'S JURISDICTION.

A decree adjudicating priority among conflicting claimants to water rights and quieting titles thereto, which establishes the status of the parties and property involved, is self-executing; and the court has no further power to appoint commissioners to compel rotation in the use of the water, which is an administrative and not a judicial act.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1053, 1054; Dec. Dig. § 437.*]

In Equity. Suit by the Ames Realty Company against the Big Indian Mining Company and others. In the matter of administrative orders relating to the use of waters after final decree adjudicating priorities therein. Prior orders vacated for want of jurisdiction.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

O. W. McConnell, for applicant
Massena Bullard, for objectors.

BOURQUIN, District Judge. This action was one to adjudicate priorities amongst conflicting water rights and to quiet title thereto. Final decree was rendered on the 5th day of October, 1911. It was in usual form, but contained a provision that the court reserved jurisdiction over the parties and rights involved and to appoint water commissioners to compel rotation in use of the waters—in effect to apportion and supervise the use thereof.

On the 15th day of April, 1912, some of the parties moved the court to appoint, in exercise of the jurisdiction so reserved, two water commissioners for the purposes aforesaid. The motion was granted and the appointment made. These commissioners have filed reports of their labors and move the court to apportion their compensation, fixed in the order of appointment, amongst the users of water for the time being, and to notify each water user of the amount so assessed against him. Some of the parties who did not join in the application for said appointment object, and contend that those securing said appointment are alone liable for the accrued expense. The court, doubting its jurisdiction, asked for briefs thereon. None have been submitted.

I am of the opinion that the court has no jurisdiction to administer the waters involved, and to that end appoint commissioners, and the orders appointing such commissioners, improvidently made, are vacated and set aside. The commissioners' compensation is taxed against those who applied for their appointment. The final decree, rendered as aforesaid, established the status of the parties and property involved. It was self-executing, in that it required no further act to carry it into effect. For this reason the jurisdiction of the court over the parties and property was exhausted and terminated when the decree was rendered.

This does not militate against the authority of the court to punish, as for contempt, any violation of the ancillary injunction incorporated in the decree. The insertion in the decree that the court would reserve jurisdiction over the parties and rights involved, and to appoint water commissioners to compel rotation in use of the water, goes for nothing. A court cannot thus enlarge, extend, or continue its jurisdiction. (If it can, it can also abandon the jurisdiction so assumed.)

To apportion the water and supervise its use, once the priorities are settled by the decree, is purely administrative, and not judicial, and not within the court's duty or powers. As well might the court, on quieting title to land amongst cotenants, reserve jurisdiction to collect and apportion rents or to keep in repair and apportion the expense. The court will assume no such labor, and moreover, if it could and did, in the end it might find itself absorbed in conducting a large part of the business of the people.

Where a decree is not self-executing, a court may retain jurisdiction to execute it—to clear away impediments that may arise to complete execution. *Railroad v. College*, 208 U. S. 55, 28 Sup. Ct. 182, 52 L. Ed. 379. But that is not this case.

Order as aforesaid.

G. & C. MERRIAM CO. v. SAALFIELD.

(Circuit Court of Appeals, Sixth Circuit. July 17, 1912.)

No. 2,097.

1. *LIS PENDENS* (§ 25*)—BAR OF JUDGMENT—PERSONS IN PRIVACY.

Where, pending a suit for unfair competition, another purchased and continued the business of the defendant, he became from that time in effect the defendant, and is bound by and entitled to the advantages of the decree; and where the court refused the complainant an accounting, he cannot be required to account in a subsequent suit against himself for any acts of his prior to the decree.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 47-57; Dec. Dig. § 25.*]

2. *TRADE-MARKS AND TRADE-NAMES* (§ 98*)—UNFAIR COMPETITION—ACCOUNTING FOR PROFITS.

Where unfair competition is established, an accounting should be ordered, unless it is made clearly and certainly to appear that neither upon the existing record nor upon any record which complainant can make before the master could there be any substantial recovery.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 112; Dec. Dig. § 98.*]

3. *TRADE-MARKS AND TRADE-NAMES* (§ 53*)—INFRINGEMENT—NATURE OF INJURY.

The entire substantive law of trade-marks, excepting statutory provisions and their construction, is a branch of the broader law of unfair competition; the ultimate offense in infringement suits being that defendant has passed off his goods as and for those of complainant.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 61; Dec. Dig. § 53.*]

4. *TRADE-MARKS AND TRADE-NAMES* (§§ 11, 13*)—UNFAIR COMPETITION—EXPIRED PATENT OR COPYRIGHT—SUBSEQUENT USE OF NAME.

On the expiration of a patent or copyright, the situation arising with respect to the use by others of the name of the patented article or copyrighted book cannot be differentiated from that arising with respect to the use of any other descriptive word. While any subsequent maker of the article or publisher of the book has the right to use the name, because it has come to be a word of apt description, if by reason of its long and exclusive use by the original maker or publisher it has come to be indicative of his product, and he continues its use, he is entitled to protection against unfair competition in such use, and the right of another to use it is qualified by the requirement that he must accompany it with an explanation which will unmistakably inform the public that the article or book is of his production.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 15, 16; Dec. Dig. §§ 11, 13.*]

5. *TRADE-MARKS AND TRADE-NAMES* (§§ 66, 78, 98*)—UNFAIR COMPETITION—DAMAGES AND PROFITS RECOVERABLE.

The right to protection in the exclusive use of a trade-mark or against unfair competition, unlike that to protection from infringement of a patent, is incidental only to an existing business, and there can be no damage in connection with the violation of such right, except as there is injury to the business and good will through loss of sales or damage to the reputation of the goods. Hence complainant in a suit for unfair competition can only recover profits on the ground of such loss of sales; but it may be presumed that the simulation of complainant's goods by defendant was one of the causes which induced his sales and prevented

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sales by complainant, and where it is impossible to determine whether that or some other cause induced a sale defendant may be required to account for the profit made.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 88, 112; Dec. Dig. §§ 66, 78, 98.*

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

On rehearing.

For opinion on former hearing, see 190 Fed. 927, 111 C. C. A. 517.

W. B. Hale, of New York City (F. F. Reed and E. S. Rogers, both of Chicago, Ill., on the brief), for appellant.

George F. Bean, of Boston, Mass., and Lawrence Maxwell, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Pursuant to the reservation in the opinion filed October 28, 1911, a rehearing has been had upon the sole question whether or not an accounting should be ordered. As reasons why this should not be done, defendant urges the Massachusetts decree as being an adjudication upon this subject, and also urges the decisions and the arguments recited by Judge Putnam and referred to in our former opinion, to the effect that, in a situation like this, an accounting can result in nothing but expense and confusion. In favor of an accounting, complainant urges: (1) That such is the usual and almost invariable practice; (2) that Judge Putnam's comments on this branch of the subject were dicta, and the legal rule is not as he thought it should be; (3) that the rule of accounting, in a case like this, should be, and is, the same as in a trade-mark case.

In addition to these matters, and in answer to the insistence of defendant's counsel that defendant has not infringed since the Massachusetts decree, complainant's counsel asserts himself to be in possession of proof showing unquestionable violations of the rule since that time, and on a considerable scale, and further asserts that, as such an accounting extends up to the date of the master's report, it is not essential that the record, on an appeal taken before an accounting is had, should disclose all of complainant's proof entitling him to an accounting, but that he may, under the prevailing practice, withhold such proof until after the interlocutory decree, or it may not come into existence until after the interlocutory decree.

[1] We have first to consider the direct effect of the Massachusetts decree. That decree was entered by the Circuit Court on April 21, 1909, pursuant to the opinion of the Court of Appeals as reported in 170 Fed. 167, 95 C. C. A. 423. The defendant in this case, Saalfeld, succeeded the defendant in that case, Ogilvie, in the business, in December, 1908. That decree speaks as of its date, and, in connection with the opinion, it is an adjudication that, by reason of complainant's former misconduct, it was not entitled to an accounting against the defendant for anything done by the defendant up to that date.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

We think it is the proper conclusion on this record, and we interpret our former opinion to be a conclusion, that after December, 1908, Saalfeld was, in substantial effect, the defendant in the Massachusetts case, and it follows that he may take advantage of that adjudication, just as he is bound by it, and that for his alleged misconduct upon this subject-matter, committed prior to April 21, 1909, there can be now no accounting ordered against him.

[2] What, then, is the general rule as to an accounting, to be applied to defendant's acts after April 21, 1909, and under such a situation as that here disclosed? In so far as Judge Putnam's discussion is founded upon the rule in patent cases, it finds its essential support in *Garretson v. Clark*, 111 U. S. 121, 4 Sup. Ct. 291, 28 L. Ed. 371. This case has often, if not commonly, been understood as laying down the rule that, where it is impossible to apportion the infringer's profits between those resulting from the patented and nonpatented features of his device, it was, therefore, impossible for complainant to sustain the apportioning burden placed upon him by the rule, and hence, in such cases, that only nominal damages could be recovered. That this decision should not be so broadly interpreted is made apparent by *Westinghouse Co. v. Wagner Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, announced by the Supreme Court June 7, 1912. The rule is there stated, apparently by way of a deliberate and careful effort to clarify some of the existing confusion on the subject, that complainant satisfies the burden when he establishes that the infringer has so conducted the affair as to make impossible even an approximate or fairly estimated apportionment, and that, in such case, the infringer must account for and pay over all the profits earned upon the entire structure. If, therefore, the analogy between patent cases and cases like the present is as close as Judge Putnam supposed, and if, as he feared, the difficulties of apportioning profits or damages are here insoluble, the complainant is entitled to recover all the profits resulting from those publications by defendant which were characterized or materially affected by false indicia of origin.

The only decision in an unfair competition case which is relied upon against the propriety of an accounting in such a situation, is *Ludington v. Leonard* (C. C. A. 2) 127 Fed. 155, 62 C. C. A. 269. We are satisfied that such case presented a very different problem of accounting from that now involved. On the other hand, the Circuit Court of Appeals in the Second Circuit has recently ruled that an accounting must be had in an unfair competition case, where the difficulty was perhaps as great as it may be here (*Florence Co. v. Dowd*, 189 Fed. 46, 110 C. C. A. 608); and, applying the rule there recognized, it is sufficient for the purposes of the present case to say that the usual practice contemplates an accounting and that such practice should be followed, and an accounting ordered, unless it is made clearly and certainly to appear that neither upon the existing record, nor upon any record which complainant can make before the master, could there be any substantial recovery. If there remains any fair probability that the complainant can produce the necessary proof, or that, upon final hearing, and as aided by all such proof, the

trial court or the reviewing court may think that complainant is entitled to a recovery of damages or profits (beyond the amount of any which may be tendered, if a tender is made), then the complainant should have the opportunity to make and present his case.¹

Applying this conclusion to this record, we find that since the final Massachusetts decree defendant has continued the publication of his books and of his advertisements in a manner which he claims fully conforms to the decree, but which complainant insists is a continued evasion, and hence violation, of the decree. The record does not purport to show defendant's conduct in this respect later than December, 1909; and complainant, if proceeding in good faith, as we are bound to presume it is proceeding, is entitled to show such later or other conduct of defendant as may be different from that developed by the record. Upon the question whether such new or other forms, differing from those shown by the present record (if any there are), are in compliance with the decree, complainant has a right to be heard.

We do not doubt that the respective rights of the parties are fixed and declared by the Massachusetts decree. This is just as much an adjudication that the complainant is not entitled to that general character of relief which it sought by its bill and failed to obtain by the decree, or to the specific items of relief contained in its draft decree proposed and stricken out on settlement (in so far as such items are not otherwise covered by the decree as settled), as it is an adjudication that complainant is entitled to the relief granted.

[3] The questions which will arise on this accounting are incidental to the application of the decree to situations subsequently existing, and such application necessarily calls for interpretation. In the decisions upon this case in the First Circuit, the opinions of the courts only undertook to apply to the facts of the case rules and adjudications that were assumed to be familiar. The interpretative conflicts which have arisen seem to make it advisable to ascertain, somewhat more completely than those courts thought their statement necessary, the principles which underlie those decisions. A trade-mark is a trade-mark because it is indicative of the origin of the goods. The original right to its exclusive use was not based upon any statute, but upon principles of equity; and the right is acquired, not by discovery or invention or registration, but by adoption and use. The entire substantive law of trade-marks (excepting statutory provisions and construction) is a branch of the broader law of unfair competition. The ultimate offense always is that defendant has passed off his goods as and for those of the complainant. *Capewell Horse Nail Co. v. Mooney* (C. C. A. 2) 172 Fed. 826, 97 C. C. A. 248; *Elgin, etc., Co. v. Illinois Watch Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365. More or less confusion has arisen because it happened that the specific of-

¹ This court's refusal of an accounting in *National, etc., Co. v. Century, etc., Co.*, 183 Fed. 206, 105 C. C. A. 638, and failure to award that relief in *Dietz v. Horton Mfg. Co.*, 170 Fed. 865, 96 C. C. A. 41, are not inconsistent with the rule now announced. In the former case, the court was satisfied there could be no substantial recovery; in the latter, the point was not considered.

fense and the specific rule were recognized and a body of law grew up concerning the same before the broader and inclusive offense was recognized and defined; but this does not prevent proper classification after both are understood.

Primarily, it would seem that one might appropriate to himself for his goods any word or phrase that he chose; but this is not so, because the broader public right prevails, and one may not appropriate to his own exclusive use a word which already belongs to the public and so may be used by any one of the public. Hence comes the rule, first formulated in trade-mark cases, that there can be no exclusive appropriation of geographical words or words of quality. This is because such words are, or may be, aptly descriptive, and one may properly use for his own product any descriptive words, because such words are of public or common right. It soon developed that this latter rule, literally applied in all cases, would encourage commercial fraud, and that such universal application could not be tolerated by courts of equity; hence came the "secondary meaning" theory. There is nothing abstruse or complicated about this theory, however difficult its application may sometimes be. It contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark. So it was said that the word had come to have a secondary meaning, although this phrase, "secondary meaning," seems not happily chosen, because, in the limited field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning. Here, then, is presented a conflict of right. The alleged trespassing defendant has the right to use the word, because in its primary sense or original sense the word is descriptive; but, owing to the fact that the word has come to mean, to a part of the public, something else, it follows that when the defendant approaches that same part of the public with the bare word, and with nothing else, applied to his goods, he deceives that part of the public, and hence he is required to accompany his use of the bare word with sufficient distinguishing marks normally to prevent the otherwise normally resulting fraud.

The fact that a defendant is required to take this precaution demonstrates that in a very true sense his use of the word has become the secondary one; otherwise, he need not carry the burden. In this particular field, the word naturally indicates the product of the complainant, and hence defendant must do something to remove the natural impression. This view may be illustrated by reference to the *Singer Case*. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. It was established as a fact that to those buying and using sewing machines the word "Singer" had come to import that the machine on which it was used was made by the Singer Company; in other words, when that part of the public saw a

sewing machine marked "Singer," its first and natural thought was that the machine was made by the Singer Company. If one who saw a sewing machine marked "Singer" would primarily and naturally accept the word as referring only to the mechanical construction of the machine according to the Singer patents, then the June Company committed no fraud by using the word without explanation, and the burden would have been upon the Singer Company further and particularly to identify its goods; but this was not the result. The whole burden was put upon the June Company.

[4] The situation arising under an expired patent or copyright cannot be differentiated from that arising with reference to any other descriptive word. There can be no trade-mark or similar exclusive right in what has been, during the life of the patent or copyright, the name of the patented article or copyrighted book, not because of any particular rule of trade-mark or patent law, but because the word, during the term of the monopoly, has come to be a word of apt description. It has come to be the name of the thing, and hence any one who later makes the thing may call it by its true name. Neither is there anything peculiar in the application of the secondary meaning theory to this class of cases. It is to be applied just as with reference to any descriptive word, and if, after the word comes into existence and becomes free to the public as the name of the thing, it is used by one manufacturer so long and so exclusively that it comes to be, to that part of the public, indicative that it is his product, he is entitled to protection for the same reasons, in the same way and to the same extent as held with reference to "camel's hair belting" (*Raddaway v. Benham*, App. Cas. 1896, p. 199), "Glenfield starch" (*Wotherspoon v. Currie*, L. R. 5 H. L. 508), "Elgin" or "Waltham" watches (*Elgin Co. v. Illinois Co.*, supra; *Am. Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263), or "Hall's safes" (*Herring, etc., Co. v. Hall, etc., Co.*, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616).

Exactly so, and of necessity, with regard to this copyrighted book. During the term of the copyright the proprietor has a monopoly of the article—of the book, as well as of the name. When the copyright expires, both name and book pass into the field of public right. Any future right by the publisher in the title, as against the public, must rest upon public acquiescence. As to a geographical or commonly descriptive word, this period of public acquiescence begins as soon as the proprietor adopts the word for his goods; the word being then free to the public. As to a word of which the proprietor has a monopoly by express grant, like the name of a copyrighted book, it may well be that the necessary public acquiescence cannot begin to run until the name becomes free to the public; but, however that may be, and in either case, when the acquiescence has been continued long enough and has been exclusive enough, the word comes to be indicative of origin through its thus acquired "secondary meaning." Whether it is the name of a formerly (but no longer) patented article, or is the title of a book with expired copyright, it has become the maker's or the publisher's token, and differs from a technical common-law trade-

mark mainly, if not wholly, in the fact that the proprietor's right is not of absolute, but of qualified, exclusion.

So it is wrong, in such a case, and when this "secondary meaning" is once established, to start with the premise that defendant is entitled to use the word; *prima facie*, viewed from this point, he is not. The right, for the purposes of such a case, is primarily vested in the complainant.² Defendant may not use the word at all, unless he accompanies it with the explanation; he must neutralize an otherwise false impression; he must "unmistakably inform" the public that the article is of his production (*Singer Mfg. Co. v. June Mfg. Co.*, *supra*, 163 U. S. 200, 16 Sup. Ct. 1002, 41 L. Ed. 118); he must so distinguish that "no one with the exercise of ordinary care can mistake" (*Saxlehner v. Eisner & Mendelsohn Co.*, 179 U. S. 19, 41, 21 Sup. Ct. 7, 45 L. Ed. 60); he must give "the antidote with the bane" (*Herring, etc., Co. v. Hall, etc., Co.*, *supra*, 208 U. S. 559, 28 Sup. Ct. 350, 52 L. Ed. 616).

Returning from this discussion of underlying principles, let us see how they have been applied and are to be applied in this controversy. We think it clear, both from the necessities of the situation and from what was said by the courts of the First Circuit in their decisions, that their decree was based upon an application to these facts of the secondary meaning theory. It was found that the term "Webster's Dictionary" had in the minds of the dictionary public the meaning that the book so named or marked was the Merriam book; and this finding may well rest upon sufficiently exclusive use, with public acquiescence, from 1889, when the copyright expired, till 1904, when Ogilvie published. In that same connection, it was found that when the copyright expired, in 1889, any one had the right to publish a Webster's Dictionary, and to call it by that name, and, as matter of course, that the defendant might justify as licensee under this public right. It was also found as a fact that the book published by defendant was a book which, under this rule, he was entitled to call Webster's Dictionary; and this finding, like the remainder of the decree, must be accepted by both parties. It was also found that he did not have a broad and unqualified right to publish his book by this name; but his right in this respect was secondary to that of complainant, and that, consequently, when he called his book "Webster's Dictionary," *he*, the defendant, must qualify and distinguish.

The effect of the decree is not to be confined to the two styles, "Universal" and "Imperial," then published; its general terms extend as well to any other forms the defendant may publish; and it follows that in this accounting, his books, called "Inter-Collegiate," "Adequate," and "Sterling," are subject to scrutiny under the same rules as the "Imperial" and "Universal." Nor is it to be overlooked that the decree does not merely prescribe a notice for the title-pages; it forbids publishing or issuing the title-pages and backs "in their present form, or in any other form in any way calculated to deceive pur-

² Lord Westbury, in *Wotherspoon v. Currie*, *supra*, at page 522, says that the geographical name had, for the purposes of the case, become the property of the manufacturer.

chasers" into purchasing this dictionary in the belief that it is a Merriam Webster's Dictionary; and this prohibition (except so far as it may be interpreted and applied by the other parts of the decree) must be interpreted in the present accounting with reference to defendant's books. Again, the provision that the notice shall be "plainly printed" is not necessarily satisfied merely because the prescribed words are printed in legible type; it is not "plainly printed" if the page in its entirety indicates an intention to conceal the notice rather than to make it plain.

Further than this we cannot go at this time in construing the decree. We must reserve, for decision after proofs and arguments, the specific questions indicated with more or less distinctness by the present record, among which are: Whether the exterior of the book, in its use of the title or in other inscription, or in decoration or ornament, was "calculated to deceive"; whether the notice properly printed on the title-page would cure any misleading otherwise naturally caused by the exterior (if any would be so caused); whether the notice was "plainly printed" by defendant in the instances where it was used by him; whether the title qualification is required in connection with each use of the title, and in what juxtaposition; and whether "Inter-Collegiate" is of itself a violation of complainant's rights. The question to what extent, if at all, defendant's good or bad faith in what he has done in purported observance of the decree will affect the ultimate equitable liability for profits, must also be reserved.

[5] Upon the subject of profits: We think the controlling question must be whether a sale was the result of the misleading. In a patent case, and in determining the patentee's right to the infringer's profits, the loss of the sale by the complainant patentee is not vital. He may recover profits, even if he had not been manufacturing and would have been then unable to make the sale; and this is because he had a monopoly in the article itself. Not so, regarding a trade-mark and the right to protection against unfair competition; these rights are only incidental to an existing business; they cannot be independently injured or suffer damages; they do not create any monopoly in the article itself; there can be no damage in connection with violation of these rights, except as there is injury to the business and good will; and this damage can be only through loss of sales which otherwise would have accrued to the injured business (or, indeed, damage to the reputation of the goods—another subject). It follows, as applied to these books, that if the purchaser, immediate and ultimate, knew that he was not buying the Merriam book, but something different from, and claimed to be better than, the Merriam book, and thus deliberately made his choice, there is no room for any inference that complainant lost a sale as the result of defendant's misleading, and so no room for the inference that it lost any profits or that defendant received any profits as trustee for complainant.

Where the title was not qualified as the law and the decree required (if such cases appear), and it further appears, by direct proofs or by necessary inference, that it is impossible to determine whether this unlawful title use was the inducing cause of the sale—in other words,

when it appears that such title was one of the causes, and it is impossible to apportion between that and other causes, the credit for the sale—then (and if we are to adopt the analogy of the patent cases) there must be a presumption that the sale results from the unlawful use of the name. The defendant has confused the marking and dress, which he had a right to use, with those which, as against complainant, he had no right to use. The latter part is a material, if not the major, part of the whole. If the history of the sale cannot be more definitely ascertained and followed, and so it is impossible to say which part of the dress exercised the predominant influence, then under the principle of *Westinghouse Co. v. Wagner Co.*, the defendant must respond.

The correlative is equally true. If books which offend only by bearing the title bear also the required qualification, there could, from their dress alone, be no inference that their sale was the result of unfair competition. Nevertheless, if it could be shown that such a book was in some other effective manner represented to be complainant's book, and was bought by reason of such misleading, such sale would be equally an invasion of complainant's rights.

Not only does this result follow from adopting the analogy of the patent law, but we take this to be the rule also of the trade-mark cases; and when some of them declare that the defendant must respond for his profits on every article which bore the trade-mark stamp upon it, they intend to go no further than to say that such marking raises a presumption that the sale thereof was effectuated by this false marking or unfair competition. They are not inconsistent with the disputable character of this presumption. In many cases, probably in the typical case, it would be practically impossible to dispute the presumption, because, even if it appeared that the first purchaser, like the wholesaler or dealer, knew what he was buying, this would not, of itself, affect the presumption of a fraud upon the ultimate consumer or user; but, even in the case of a technical trade-mark, if every purchaser, immediate and ultimate, knew that he was getting the counterfeit, and not the genuine, and bought it because he preferred the counterfeit to the genuine, there would be no liability for profits. We find nothing inconsistent with this limitation in the reported trade-mark cases.³

It follows that, except for the question of ultimate liability above reserved, the complainant will be entitled to defendant's profits upon sales of books which did not substantially comply with the decree, if

³ *Saxlehner v. Eisner & Mendelsohn Co.* (C. C. A. 2) 138 Fed. 22, 70 C. C. A. 452; *Fairbank Co. v. Windsor* (C. C.) 118 Fed. 96. See 124 Fed. 200, 61 C. C. A. 233. In *Atlantic Co. v. Rowland* (C. C.) 27 Fed. 24, it was found as a fact that complainant would have made the same sales. If *Regis v. Jaynes*, 191 Mass. 245, 249, 77 N. E. 774, is to be taken as holding that in such a case defendant is not entitled to show that the ultimate purchaser deliberately and intelligently selected defendant's goods as against plaintiff's, such holding is not supported by the cases cited, and is inconsistent with the underlying principle stated by Chief Justice Fuller to be that "the essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another." 179 U. S. 665, 674, 21 Sup. Ct. 270, 274 (45 L. Ed. 365).

it is made to appear, and in the instances where it is made to appear, that it is impossible to apportion the credit for the sales, as well as in those instances where it does sufficiently appear that the sale was due to such noncompliance. In this connection it is apparent that defendant will not be liable, even where the books did not comply with the decree, in so far as he may show that the final purchasers intelligently and knowingly intended to buy defendant's book and not the plaintiff's.

Complainant will also (with the same exception above reserved) be entitled to recover defendant's profits upon sales, if any there be, of books which did not violate the decree directions, but which sales were the result of a belief that the books were the Merriam publication, actively induced by defendant through some misleading means beyond the mere use of the name. Upon this subject, the burden must be on complainant to establish such misleading and the reasonable probability that the sale resulted therefrom.

Complainant may show upon the accounting, if it can, that excepting for the misleading, it would have made specific sales which defendant did make, and show its damages by way of loss of profits. If such cases are established, the question of the proper disposition of defendant's profits and complainant's lost profits on the same sales can be disposed of in regular course.

The present record sufficiently indicates that there is no computable basis, if there is in fact any basis, for damages to the reputation of complainant's books by reason of defendant's publications, and the accounting should not attempt to cover that subject.

With the views which we have expressed concerning the book itself and the theory of recovering profits in such cases, we do not now see that the general advertising, if tested by the rules adopted, and if found unfair, can constitute any independent basis of recovery; but it may serve as evidence tending to show, generally or in specific instances, whether purchasers were misled by defendant, or whether they were fairly informed as to the identity of the book. Whether it may prove a sufficient basis for any conclusion on this subject cannot now be determined.

In the former opinion, the injunction was directed to be in the same form as that finally entered in Massachusetts. It was, of course, intended that such modifications should be made as to fit the form to this case. So modified, it will read as follows:

"That a perpetual injunction issue in this suit restraining defendant, Arthur J. Saalfeld, his agents, attorneys, servants, employes, and all persons claiming or holding through or under him, from using as the name or title of his said dictionaries described in the bill herein, to which this litigation relates, the words 'Webster's Dictionary,' or 'Webster's Imperial Dictionary,' or 'Webster's Universal Dictionary,' or 'Webster's Inter-Collegiate Dictionary,' or 'Webster's Adequate Dictionary,' or 'Webster's Sterling Dictionary,' or any equivalent thereto upon the title-page or upon the back or cover of said dictionaries, or in any advertisement, circular, notice, or announcement referring to said dictionaries, unless accompanied by the following statement plainly printed upon the title-page and in each said advertisement, circular, notice, or announcement, viz.: 'This dictionary is not published by the original publishers of Webster's Dictionary or by their successors'—and especial-

ly from publishing or issuing in the form used by George W. Ogilvie with reference to certain of said dictionaries the title-pages and backs of said dictionaries and the circulars and advertisements adjudged misleading or deceptive by the United States Circuit Court for the District of Massachusetts, in the suit wherein the complainant herein and George W. Ogilvie were parties, or any other form of title-page, back, circular, or advertisement that is in any way calculated to deceive purchasers into purchasing defendant's dictionary under the belief that it is a Webster's Dictionary published by the complainant."

RUSHMORE v. BADGER BRASS MFG. CO.

(Circuit Court of Appeals, Second Circuit. May 31, 1912.)

No. 231.

1. TRADE-MARKS AND TRADE-NAMES (§ 79*)—UNFAIR COMPETITION—IMITATING DRESS OF COMPETITOR.

Where it appears that a competitor has unnecessarily and knowingly imitated his rival's goods in nonfunctional features, a court of equity is justified in interfering by injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. § 79.*]

Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. TRADE-MARKS AND TRADE-NAMES (§ 98*)—UNFAIR COMPETITION—ACCOUNTING.

Defendant *held* chargeable with unfair competition in imitating in shape, appearance, and general design brass automobile lamps made by complainant, but liable only for profits made on such sales, as it is shown by direct or presumptive evidence that complainant would have made but for defendant; it appearing that to a large extent defendant's lamps were sold on their merits and on defendant's reputation, without any reference to their resemblance to complainant's.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Samuel W. Rushmore against the Badger Brass Manufacturing Company. Decree for complainant, and defendant appeals. Modified and affirmed.

Appeal from a decree holding the defendant guilty of unfair competition in making motor lamps in imitation of similar lamps designed by the complainant and granting an injunction and an accounting.

Offield, Towle, Graves & Offield and Philip B. Adams (Charles K. Offield and Albert H. Graves, of counsel), for appellant.

Alfred Wilkinson, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We have examined the record with care to ascertain if there is any testimony which distinguishes this case from *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 939, 90 C. C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. 299, 19 L. R. A. (N. S.) 269, and *Rushmore v. Saxon*, 170 Fed. 1021, 95 C. C. A. 671.

In the *Manhattan Case* the Circuit Court found:

"That the shape, appearance, external attachments, and general dress of the *Rushmore lamp* are not functional and are not elements of mechanical construction essential to the successful practical operation of the lamp as a lamp."

We agreed with this finding, and because of it affirmed the order, stating, however, that the conclusion carried the doctrine of unfair competition to its utmost limit. We think the doctrine should not be further extended, but there is no occasion for extending it so far as the case at bar is concerned. In all essential particulars the facts are the same.

Slight differences exist between the defendant's lamps and those of the complainant, but these differences are unimportant and are no more pronounced than in the cases above referred to. The ordinary purchaser of an automobile is often ignorant of the actual merits and value of the articles he purchases and is influenced largely by general appearance rather than details of construction. He sees a speedometer, a lamp, a clock, or some other of the numerous motor car attachments, which is pleasing to the eye, and, having ascertained the name of its maker, resolves to have it on his car. If the general appearance be the same, he does not examine further, and is entirely satisfied that the device he buys is what he intended to buy. This is true of the careless, credulous, and ignorant purchasers, who are certainly as numerous in this as in any other field of business, and depend largely upon the statements of local dealers and the chauffeurs who drive their cars.

[1] An expert and probably a great majority of automobile purchasers could not be deceived into taking the defendant's lamp, in evidence, for the *Rushmore lamp*, but the ignorant or careless purchaser looking to general effect, and not to what seems to him to be inconsequential details, would, very likely, be misled. Such simulations place in the hands of dishonest dealers and agents the materials for misleading and cheating the public. It is unnecessary to dwell on these considerations as they have been stated many times by this court and need not be repeated. When it appears that a competitor has unnecessarily and knowingly imitated his rival's goods in non-functional features, a court of equity is justified in interfering. Further than this we do not intend to extend the doctrine.

[2] The defendant asks that it be relieved from an accounting, or, at least, that the accounting be limited to the damages actually sustained and proved by the complainant. We are inclined to think that the latter request is reasonable and should be granted.

The defendant's brief states that it appeared at the hearing in the Circuit Court that the defendant "had long ceased making or selling any of the type of lamps in issue." The testimony that the defendant, or its agents, attempted to palm off its lamps as *Rushmore lamps*, is unsatisfactory and unconvincing.

We are also convinced that the great majority of the defendant's

lamps were sold on their merits and on the established reputation of the defendants, without any reference to the complainant's lamps. To award the entire profits made on the sales of defendant's lamps without proof of actual fraud on its part would be inequitable. An accounting covering the entire field of the defendant's sales would involve both parties in a long and expensive examination unwarranted by the probable results. It seems to us unfair that the complainant should recover profits on the sale of lamps by the defendant to persons who never heard of Rushmore, and were well aware that the lamps they bought were made by the defendant, and who bought them because they were so made. A decree for profits and damages does not necessarily follow a decree for an injunction.

In *Ludington Novelty Co. v. Leonard*, 127 Fed. 155, 62 C. C. A. 269, this court said:

"We see no reason to differ with the Circuit Court in its refusal to order an accounting. If we could discover any theory upon which a substantial recovery might be had, we would not hesitate to direct a reference, but it is plain that such a proceeding will prove abortive after subjecting both parties to large additional expense and the defendants to unnecessary annoyances. The master would be involved in an inextricable tangle from which it will be impossible to emerge with a substantial recovery based upon a rational rule of damages. The boards sold by the defendants and which they had a right to sell were intended to be used in connection with a large number of games in the description of some of which the word 'Carrom' might, in certain aspects, be used innocently. An attempt to segregate the profits, if any, resulting from the illegitimate use of the word would require an excursion into the realms of conjecture and speculation without hope of any tangible result."

See, also, *Fairbank Co. v. Windsor*, 124 Fed. 200, 61 C. C. A. 233.

We think the accounting should be limited to sales where it is shown by direct or presumptive evidence that the complainant would have sold the lamps but for the sale by the defendant.

As so modified, the decree should be affirmed, with costs.

In re ENNIS et al.

In re SHERWOOD.

(Circuit Court of Appeals, Second Circuit. May 13, 1912.)

No. 219.

BANKRUPTCY (§ 116*)—PROCEEDINGS TO RECLAIM PROPERTY—LACHES.

Where certain stocks which had been pledged by a bankrupt firm of brokers as collateral, some of which they held for customers under various arrangements, were released and turned over to their receiver, and an omnibus notice was published requiring all claimants to any of such stocks to file their claims by a time stated or they would be barred, the court is not required to consider a claim filed more than two years after the expiration of such time, in the absence of allegation and proof that the claimant did not have actual knowledge of the notice.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.*]

Coxe, Circuit Judge, dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Thomas A. Ennis and Charles F. Stoppani, bankrupts. On appeal by Frederick D. Sherwood from an order denying his petition to reclaim certain stocks. Affirmed.

See, also, 183 Fed. 859; 187 Fed. 720, 109 C. C. A. 468; 187 Fed. 726, 109 C. C. A. 474; 187 Fed. 728, 109 C. C. A. 476.

This cause comes here upon appeal from an order of the District Court, Southern District of New York, denying the petition of the appellant for an order directing the trustee in bankruptcy to turn over certain certificates of stock now in the possession of the trustee.

The petition was filed June, 1911. It alleges that appellant is the owner of these shares of stock, that the certificates were issued, and still stand, in his name, and that he appears as the owner on the books of the corporations issuing such stock. That he has never sold, assigned or transferred his interest in the said shares, nor parted with his property in the same; that previous to the year 1909 the certificates of stock without any indorsement of any kind or any transfer were intrusted by appellant to a third party; that appellant's name was forged to the transfers or assignments and the certificates pledged with Ennis & Stoppani as security for some transaction, the details of which are unknown to appellant. Subsequently these certificates were used by Ennis & Stoppani as collateral to a loan from the Mechanics' Bank. After bankruptcy the bank liquidated its loan by the sale of a portion of the collateral and after such liquidation there remained in its hands a number of securities including these certificates of stock, which were turned over to the receiver. The usual order was made directing the receiver to advertise for all claimants with notice that unless claims were filed on or before August 10, 1909, they should be barred.

The district judge was of the opinion that Sherwood was fully advised of the omnibus proceeding, and denied him leave to bring reclamation because he had "failed to assert his right for more than two years with his eyes wide open."

Wilmer Canfield & Stone (Karl T. Frederick, of counsel), for appellant.

H. H. Kaufman and Dix. W. Noel, for appellees.

Hays Hershfield & Wolf (Edwin D. Hays, of counsel), for trustee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). We do not find in the record before us anything to show whether appellant did or did not have actual knowledge of the omnibus proceeding. Had all the statements of fact presented to us upon the oral argument been submitted to the district judge, with a positive statement that Sherwood had no knowledge of the pending omnibus proceeding, it is probable that he would have given appellant an opportunity to prove them, and, if proved, would have administered suitable relief. Certainly under the circumstances thus asserted it would be inequitable to turn his property over to creditors who have no title to it. But the record which has been certified, being a transcript of the record in the District Court, neither proves nor tenders sufficient to call for a determination of the application other or different from that reached in such court.

The order is affirmed.

COXE, J. (dissenting). I am unable to concur in the opinion of the court. If the allegations of the opinion be true, 31 shares of stock, worth \$6,480 and owned by the petitioner, are about to be divided among the creditors of the bankrupts. It is alleged in the petition that these shares were stolen from the petitioner, his signature forged to blank assignments and the certificates pledged as security with the firm of Ennis & Stoppani, the bankrupts, without the knowledge, consent or approval of the petitioner, who received his first accurate information concerning the transaction in December, 1910.

The sole reason for refusing the petitioner the right to reclaim his property was that he did not prove his title at the hearing before the referee in the so-called "omnibus proceeding," notice of which was published in the New York Times. Whether or not he had actual notice of this proceeding does not appear.

Even if it be conceded that he was guilty of laches in this respect, it seems to me that he should be permitted to prove his title. If the property had been sold and divided without notice of his claim, a different situation would be presented. But the property is still in the hands of the trustee, and there can be no just ground of complaint if it be restored to its true owner. No one has been misled; no rights have been lost by the delay. I cannot avoid the conclusion that a great injustice may be done if this petitioner is denied the right to prove that the securities in question belong to him. All he asks is a fair hearing on the merits.

To state the proposition bluntly, stolen property belonging to the petitioner is about to be divided among creditors who have no shadow of title to it if the petition states the truth. That the District Court, exercising in bankruptcy the powers of a court of equity, is, because of alleged laches, precluded even from hearing the proof, is a proposition to which I cannot assent.

I think the testimony should be taken, and if it appears that the property was stolen from the petitioner, it should be restored to him without delay.

THE AURORA.

THE COLERAINE.

(Circuit Court of Appeals, Second Circuit. May 13, 1912.)

No. 211.

COLLISION (§ 95*)—TUGS WITH TOWS CROSSING—FAULTS—VIOLATION OF STARBOARD HAND RULE.

One of two crossing tugs with tows which was the burdened vessel under the starboard hand rule, art. 19, inland rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), but failed to keep out of the way, is in fault for a collision between their tows, and solely in fault where the other kept her course as required by article 21.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collisions with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by John H. Butler as owner of the barge Jack Butler, against the steamtug Aurora, Lehigh Valley Transportation Company, claimant, and the steamtug Coleraine, Thomas Tracy, claimant. Decree against both tugs, and the claimant of the Aurora appeals. Reversed and decree directed against the Coleraine alone.

On appeal by the Lehigh Valley Transportation Company, claimant of the steamtug Aurora, from a decree of the District Court for the Southern District of New York, holding the said tug, and also the steamtug Coleraine, in fault for a collision between a car float in tow of the Aurora and the barge Jack Butler, in tow of the Coleraine. The collision occurred in the East River on January 25, 1911, shortly after 5 o'clock p. m.

Harrington, Bigham & Englar and D. Roger Englar, for appellant Lehigh Valley Transp. Co.

Carpenter & Park, James Emerson Carpenter, and Henry E. Mattison, for appellee Tracy.

Herbert Green, for appellee Butler.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. We think the decision of the District Court holding the Coleraine, at fault for not keeping out of the way of the Aurora and her tow was clearly right. The preponderance of testimony is to the effect that she was the burdened vessel and it was her duty under the starboard hand rule, article 19 of the act of June 7, 1897, to keep out of the way of the Aurora and, if necessary, to slacken her speed or stop or reverse. The district judge finds that she was the burdened vessel and his decision is supported by the testimony. It was, therefore, the duty of the Aurora, under article 21 of the same act, to keep her course and speed. This she did, and we think the district judge was wrong in holding her at fault. If she complied with the law in all particulars affecting the collision, the fact that she had no lookout and no lights is negligible. If a lookout had been on the bow of the tow, he could have done nothing more than report to the pilot of the tug what he knew already, namely, that the Coleraine was crossing the river on an oblique course. The pilot of the Aurora was some three feet above the cars on the float, his view was unobstructed and he testified that he saw the Coleraine from her water line to the top of her smokestack. He also testified that looking over the cars he could see the water twenty feet from the float. A lookout could have given him no information that would have induced him to change his navigation. The sun set on the evening of January 25th, at 5:09, and the testimony is not clear that the collision occurred subsequent to that time, but even if it did, there is no doubt that the entire situation was seen by the pilot of the Coleraine. The absence of lights on the Aurora and

the float had no more to do with the collision than the absence of the necessary number of life preservers in her cabin. The Aurora could not at any time have changed her course or speed without violating the rule. Whether the maneuver which the district judge says she should have made would have resulted as he suggests, is problematical. He says: "A timely starboard helm by the Aurora might have cleared the sterns at the last moment." The answer to this suggestion seems to be threefold. First, a vessel is not responsible for an error made at the last moment, for such an error is made in extremis. Second, while such a maneuver might have eased off the sterns of the tows, it would have had precisely the opposite effect on the bows, with, probably, a more disastrous result than that which actually followed. The master of the Aurora was asked as follows:

"Q. If you had starboarded your helm it would have pulled your stern in towards New York?"

"A. Yes, sir; and the bow on to him.

"Q. What would be the greater, the effect on the stern or the effect on the bow?"

"A. The effect on the bow would be greater."

Third, the Coleraine in her answers charges as a fault that the Aurora sheered in towards the barge. The only way she could produce this sheer was by starboarding. She did not starboard and did not sheer in toward the canal boat. She kept her course and speed, but is held liable for not doing what the Coleraine charges she did do and was guilty of fault because she did it. In other words, the Coleraine asserts, in effect, that the accident happened because the Aurora starboarded at the last moment and the District Court holds her in fault because she did not starboard at the last moment but kept her course and speed.

The decree is reversed and the cause is remanded to the District Court with instructions to dismiss the libel as against the Aurora and to enter a decree holding the Coleraine solely in fault.

UNITED WIRELESS TELEGRAPH CO. et al. v. NATIONAL ELECTRIC SIGNALING CO.

(Circuit Court of Appeals, First Circuit. May 2, 1912.)

No. 953.

BANKRUPTCY (§ 391*)—INFRINGEMENT OF PATENT—BANKRUPTCY OF DEFENDANT—EXTENSION OF INJUNCTION TO TRUSTEE.

Where a defendant, adjudged to have infringed a patent, has been adjudged a bankrupt, and the alleged infringing apparatus or articles have passed into the possession of his trustee, he will be enjoined from selling or transferring the same pending an appeal to review the decree in the patent suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
198 F.—25

Appeal from the Circuit Court of the United States for the District of Maine.

Suit in equity by the National Electric Signaling Company against the United Wireless Telegraph Company and others. Decree for complainant, and defendants appeal. On petition by appellee for prohibition of sale. Granted.

See, also, *infra*.

Robert T. Whitehouse, of Portland, Me., for appellants trustees in bankruptcy.

Francis W. H. Clay, of Pittsburgh, Pa., for appellee.

Selden Bacon, of New York City, for reorganization committee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

PER CURIAM. We are of the opinion that pending this appeal, or until further order of this court, no further steps should be taken by the trustees in bankruptcy of the United Wireless Telegraph Company, or by any party appellant, in furtherance or consummation of such provisions of the contract for purchase and sale heretofore entered into between the said trustees in bankruptcy and Arthur P. West and others, as a committee of stockholders on reorganization, as may require a transfer by said trustees in bankruptcy of title in and to any apparatus or instruments, the property of the United Wireless Telegraph Company or its trustees in bankruptcy, and held by the decree of the Circuit Court to infringe the patent in suit; and it is so ordered.

UNITED WIRELESS TELEGRAPH CO. et al. v. NATIONAL ELECTRIC
SIGNALING CO.

(Circuit Court of Appeals, First Circuit. June 18, 1912.)

No. 953.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—APPARATUS FOR WIRELESS
TELEGRAPHY.

The Fessenden patent, No. 706,736, for apparatus for wireless telegraphy, if not wholly invalid, because of amendments of the application while pending in the Patent Office, must be restricted to the principle of operation described in the specification; as so construed, *held not* infringed.

Appeal from the Circuit Court of the United States for the District of Maine.

Suit in equity by the National Electric Signaling Company against the United Wireless Telegraph Company, Selden Bacon, receiver, and others. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 189 Fed. 727. See, also, 198 Fed. 385.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

Livingston Gifford, of New York City (Philip Farnsworth, of New York City, on the brief), for appellants.

Francis W. H. Clay, of Pittsburgh, Pa., and Melville Church, of Washington, D. C., for appellee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This is an appeal from the decree of the Circuit Court in a suit for infringement of letters patent 706,736 to Reginald A. Fessenden for apparatus for wireless telegraphy.

The appellant was found to infringe claims 6, 9, 10, 11, 12, 14, 19, 20, 21, 27, 28, 29, 30, 32, 33, and 35.

The nature of the Fessenden invention is thus set forth in the specification:

"The invention described herein relates to certain improvements in apparatus for the electrical transmission of signals from one station to another without the use of conductors connecting such stations, such apparatus being more especially designed for the carrying out of method described and claimed in application serial No. 740,429, filed December 15, 1899.

"In the methods heretofore employed the electromagnetic waves generated at the receiving-station produce voltages in the receiving-circuit. These voltages or currents, being impressed upon a suitable material normally non-conductive, render the same conductive, and thereby permit the passage of a current through a circuit in which said material, usually termed a 'coherer,' is included. After the passage of the voltages produced by each series of electromagnetic waves generated at the sending station, the coherer must be operated in some way to restore it to normal or nonconductive condition.

"The object of the present invention is to provide for the generation, by currents produced by electromagnetic waves, of induced currents in a second element or circuit, and by the reaction of the current in this second element or circuit on the field formed or produced by the currents in the receiving conductor to produce motion which is directly or indirectly observable.

"In general terms the invention consists in apparatus whereby the energy of electric currents produced by electromagnetic waves may be transformed into the energy of motion and the energy of such motion employed for producing intelligible signals."

Two of the forms of apparatus at the receiving station are thus described:

The first for producing visible movements or signals:

"At the receiving-station the receiving-conductor is conveniently formed by a wire or wires 6, projecting up vertically or at an inclination to a suitable height, which are also grounded. A coil or coils 7 are arranged in the circuit of the conductor 6, and an element or coil of wire 8, forming a closed circuit, is supported with a freedom of movement in such relation to the coil or coils 7 that the current produced by the electromagnetic waves will induce a current in the element 8. The element 8 is suspended, preferably, in such manner that a plane at right angles to its axis will form an angle of approximately forty-five degrees (45°) with a plane at right angles to the axis of the coil or coils 7, so that the reaction of the current induced in said element, with the field produced by the coil or coils 7, will cause the element 8 to move with reference to the coils 7. This motion of the element may be observable by means of a mirror 9, attached thereto, reflecting a beam of light on a scale, or said element may form a part of the circuit of a recording siphon, etc. As shown in Fig. 2, the coil 7 may be connected to the secondary coil 11 of a transformer, whose primary coil 12 is connected in series with the receiving-conductor."

The second for producing audible signals through the use of a telephone as a recording instrument:

"A desirable means for transforming the electromagnetic waves into recordable motion is shown in Figs. 3 and 4. The element 8 is balanced on supporting-rods or knife-edges 13, one of which is formed of a good electrical conductor, as silver, the element 8 being preferably formed by a silver ring. A carbon block 14 is so arranged that a portion of the ring between the supporting-rods will normally rest lightly thereon. This microphonic contact, the conducting pivotal support, and the portion of the ring between them form parts of an electric circuit, which also includes a generator 15 and a recording instrument 16, as a telegraphic sounder or the receiver of a telephone. When a current is produced, as above described, in the coil 7, the element or ring 8 will be caused to press on the carbon block, thereby increasing its conductivity. When using a telephone-receiver as a recording instrument, the generator 15 is preferably of a character capable of producing an alternating current, as such current causes a constant vibration of the diaphragm, the vibrations increasing in intensity with an increased flow of current in the circuit.

"This increase in intensity of action with increased flow of current is characteristic of this form of receiver and also of the form shown in Fig. 1. In this it is sharply differentiated from such devices as the coherer, which either give a strong indication or do not give any. This characteristic is advantageous in that if the signal sent—say a dot—be too weak to give an action of the full intensity it may still in most cases be read and not missed entirely, which is of value in sending code messages."

The features common to both forms of complainant's apparatus are the free grounded antenna wire to act as a receiving circuit, with a coil therein whereby a field is created, and the closed ring 8 so placed that oscillating currents are induced therein, and that such induced currents will react upon the field.

In the first form ring 8 acts as the indicator.

In the second form ring 8 is used to vary the resistance of a battery circuit containing a telephone.

Each form of apparatus is operative, but neither form has been used commercially.

It is desirable at this point to describe the defendant's apparatus in respect to such features as are here involved.

There is a free grounded antenna circuit, and an induction circuit. The induction circuit, however, differs from Fessenden's both in structure and in the mode of utilizing the currents.

There is in this circuit a perfectly passive piece of material, carborundum, which suffers no change of resistance or physical character like the coherer, and is a detector which will operate to give good signals, even though no local battery is used, showing that its valve action is such as to enable the incoming energy of the radiation itself to be the source of the signal.

The induction circuit with this carborundum detector has the characteristic of rectifying oscillating current, which by itself will not operate a telephone, into a series of direct impulses which will operate a telephone.

It receives electrical energy in such form that it is incapable of operating a telephone, and passes out electrical energy that will operate a telephone.

The detector interposed in the induction circuit is also in a local battery circuit which includes the telephone receiver.

The battery current, a direct current, is varied by direct impulses coming through the detector; these impulses, however, being in themselves sufficient to operate the telephone.

The free grounded antenna circuit, which is an "open door" to all the incoming radiations, was not new with Fessenden, but was in Marconi's patent of January, 1899, and in Lodge's patent of 1898, neither of which had the coherer in the antenna circuit.

Each, however, shows a coherer in the induction circuit.

The differences between the devices of the patent in suit and the alleged infringing devices, both in structure and in electrical action, are very great.

The defendant does not produce motion of a part by the reaction of currents upon the galvanometer principle, nor are its circuits capable of such electrical action as is characteristic of complainant's device.

Its induction circuit has neither low resistance, nor low voltage operation, but, on the contrary, has high resistance and requires high voltage. Defendant does not produce motion that is visible; neither does it employ the mechanical pressure of a moving part to vary the resistance of carbon or other part of a battery circuit. All these features of complainant's device are absent.

The patent states that "the apparatus employed at the sending station may be similar to that now in use for the generation of electromagnetic waves" and lays stress upon the apparatus at the receiving station.

Counsel for complainant say:

"The patent is on a receiver, and the essence of the receiver is not so much the detector as the detector circuits.

"The departure from the prior art was in the arrangement of circuits for a free current flow."

The complainant's argument upon the question of infringement treats as nonessential the reaction of the current in the second element or circuit on the field formed by the currents in the receiving conductor, although the patentee, as we have seen, states that the object of his invention is to produce motion by the reaction of an induced current upon the field formed by the currents in the receiving conductor.

In the defendant's apparatus there is no such reaction of induced current upon a field, and no motion is produced that resembles the mechanical motion which is produced by the patentee's arrangement of circuits.

The defendants do not in the obvious sense of the patent employ the "energy of motion"—i. e., of mechanical motion—to produce visible signals, or audible signals, by varying the resistance of a relay circuit wherein is a telephone.

The defendant is charged with infringement, not because it has what the patentee stated to be his invention, but because it is said

to have what experts and counsel say was in fact the true invention disclosed by the patent in suit.

It is said that in the prior art it was assumed that the coherer was necessary, and that—

"Fessenden's conception that it was not necessary was a new and startling departure from the prior art; that his invention lay in the 'idea conceived' rather than in special apparatus."

He introduced, it is said, the principle of the "open door receiver" whereby all waves were admitted and permitted to operate cumulatively or with a combined effect upon the signal indicating or recording devices.

His method, it is said—

"consisted simply in providing an always closed circuit for the incoming current of waves, extending from the top of the antenna way to the ground, and the same in any derived circuit. * * *

"The 'nub' of this new method * * * is the always-closed circuit (affording, of course, an always open electrical path) for the oscillatory electric waves or currents provided by the receiving conductor, or whatever circuit the detector was in."

It was also stated in argument that—

"the essence of Fessenden's invention is not so much the indication of the presence of oscillatory currents as the obtaining of oscillatory current to detect."

The departure of the complainant's counsel and experts from the patent is illustrated by the following extract from complainant's brief:

"The point to be remembered is that it does not matter how the current in the receiving wire makes its presence manifest, except that in the language of Fessenden's first and original application 'the energy of the currents generated by the waves at the receiving station [are transformed] into the energy of motion.' This motion, as we show later, may be the motion of a ring directly seen, or the motion of a ring indirectly felt, or the motion of a telephone diaphragm directly heard, or any other form of motion with any conceivable means for the motion making itself known to the senses."

It may be said in general of the complainant's case that the usual course of comparing complainant's and defendant's devices with respect to structure and mode of electrical operation is not followed.

The fundamental error in the argument is in excluding from the comparison the coil in the receiving wire, forming a field, and the reaction of the induced current in ring 8 upon that field. Were this omitted from the patent as completely as from the complainant's argument on infringement, there would remain no description of means for producing signals. The omission is of the principle of operation—of the only means indicated for using the energy received.

Fessenden states that this was the feature wherein his invention consisted.

Counsel for complainant say that this statement is a mistake, and propose various other statements of what the invention was.

We may recall the fact that complainant has said that the essence

of Fessenden's invention is not so much the indication of the presence of oscillatory currents as the obtaining of oscillatory current to detect, and also the sweeping terms in which it ignores all differences in the modes or the means of making manifest the presence of current.

We shall consider later the question of the mode of utilizing the currents for signaling and the soundness of the argument that ignores these differences.

There are two aspects of the matter, both essential to be considered:

- (a) The reception and accumulation of energy from radiations.
- (b) The application of this energy to use in signaling.

As to the reception of the radiations. The complainant's argument refers to Marconi's 1897 patent, wherein the coherer was in the antenna circuit, instead of to Marconi's 1899 patent, wherein, as in Lodge's 1898 patent, the antenna circuit was free as in Fessenden's patent.

So far the "open door principle" is in the prior art. In the induction circuit of Marconi's 1899 patent and Lodge's 1898 patent the induced current has to encounter the resistance of the coherer—i. e., its resistance to the oscillating current which it picks up (not its resistance to the battery current); but after it has overcome this resistance the received current continues to oscillate through the circuit which contains a condenser.

The means for getting and accumulating energy are shown both in Lodge and Marconi, with a single difference. Fessenden does not, in receiving current in his induced circuit, encounter the initial resistance of the coherer. If upon this difference it may be said that Fessenden has the "open door," while Lodge and Marconi have a "closed door," then the defendant, whose circuit with a carborundum detector has a higher resistance than the coherer, also has a "closed door," and does not follow the "open door" principle of Fessenden.

To the defendant's argument that it has the high resistance of the prior art and not the low resistance of Fessenden's induction circuit, complainant replies that—

"as pointed out by Dr. Kennelly the term 'low resistance,' as used by Fessenden, means low only as compared with the infinitely high resistance of a coherer."

Reference is also made to what Judge Townsend says about the resistance of the coherer being so high as to *prevent* passage of current in Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co. (C. C.) 138 Fed. 663, line 12. What Judge Townsend said is this:

"The powder in the tube *j*, when in its normal condition, offers such an amount of resistance that the local battery current will not pass through it."

Here is a fallacy; the substitution of the coherer's resistance to the battery current for the resistance of the coherer to the incoming waves—an entirely different matter. In picking up waves the coherer is made as sensitive as possible. It is not designed to offer

resistance to them, though it is designed to offer resistance to the battery relay current. In Lodge and Marconi the coherer, though of higher resistance than Fessenden's circuit, is not designed to offer resistance to the incoming waves, though it is designed to offer resistance to the battery current. The "open door" and "closed door" argument is fallacious, in making no clear distinction between the resistance to the admission of energy to the detector and the resistance in the path of the battery current.

So far as the admission of the radiations is concerned, the defendant follows the prior art, and not Fessenden. Its circuit, with a condenser, is in both the Marconi and Lodge patents. The means for the admission and accumulation of energy are in the prior art.

The argument that because Marconi used a coherer he had a "closed door," i. e., an open circuit, and that Fessenden, because he had no coherer, but a closed circuit, had an "open door," and that any one who has a device with an "open door" infringes Fessenden's patent, is in many respects unsound.

The apparatus at the receiving station must have two functions: It must receive impulses, and it must utilize these impulses to produce signals. The "open door" contention ignores the second function, and erroneously assumes that the open door by itself constitutes Fessenden's invention, irrespective of the mode of treatment of the impulses received, in order to perform the function of signaling, and irrespective of differences in apparatus and in electrical principles involved.

The application of the energy to use in signaling.

In the prior art Lodge and Marconi used it to operate a relay battery current. It may be said that it was used "to pull the trigger" and release a battery current that before the admission of radiations was obstructed by filings in the coherer.

Fessenden had the conception that this energy might be used in another way and without a relay to get motion "without the necessary interposition of a secondary or auxiliary generator for the production of such motion," as appears in claim 1 of his original application. He used it and got visible motion by the use of a well-known electrical device. He also used it, as Marconi had used it, to operate a relay; but he did not disclose in his patent more than one way of operating without a relay, which as apparatus was not of commercial value, and as illustrative of principle was practically a following of Hertz. This conception was not new with Fessenden, nor was it first described in Fessenden's patent. In the *Electrical World* of December 18 and 25, 1897, and March 2, 1898, were published articles by Northrup, Pierce, and Reichman and others, which constitute prior publications, that make the suggestion to dispense with coherers and to apply the principle of the galvanometer, and describe apparatus that was constructed upon this principle, and was substantially similar to one form of Fessenden's apparatus.

This visible motion apparatus is the sole justification for many of the arguments of counsel, and this is inoperative without the

reaction between the field and induced current. No abstraction which omits this is valid. In what counsel say is the preferred form of apparatus, Fessenden attempts to use the radiations for the purpose of changing the resistance of a battery circuit or relay. This broadly was the conception of Lodge and of Marconi. It is said, however, that with the coherer there is an interrupted operation, while with Fessenden there is a continuous operation. This argument, however, does not take into consideration the microphonic detector which it is conceded is not within Fessenden's patent.

The use of a telephone receiver in wireless telegraphy was not new with Fessenden, and after the Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863, decided in 1888, there was no room for a new conception of operating a telephone by an unbroken undulating current as distinguished from make and break. The problem was to find means and invent apparatus. Fessenden, upon the strength of his telephone receiver combination, could not claim the exclusive right to Bell's undulating current for use in wireless telegraphy and refer all other inventors to the art as it stood at the time of Reis. Fessenden's conception of means for operating by the wave energy and without a relay begins and ends with his visible motion device. When he makes his telephone combination he uses the relay, and shows no conception that a telephone can be operated solely by the energy received from electromagnetic waves. He uses the telephone as a "recording instrument" acting upon old principles. He seeks to vary the resistance of the telephone circuit in a new way by pressure of his ring 8. His telephone apparatus, like his visible motion apparatus, so far as can be discovered from the patent, is dependent upon the reaction of currents in the antenna wire and induction circuit.

Fessenden's method of using the current, therefore, in each form of apparatus, is a special and limited method. His principle is reaction of current upon a field. If it be said that he uses the currents continuously and not interruptedly as in the coherer, he nevertheless cannot claim broadly a continuous use of current, but at best a continuous use in the mode in which he applied it. He can claim broadly neither a closed circuit nor continuous current, because these alone are not inventions, and because further invention of apparatus and further discovery is essential to apply those features to practical use.

The statement that Fessenden taught that in the use of the coherer the art was on the wrong track, ignores the fact that in the prior art were many "detectors," other than the coherer, whose function was to receive energy from radiations and use it for signaling.

That Marconi's coherer was not self-restoring and required to be tapped in order to afford resistance to the battery current was regarded as a defect, and various attempts were made to provide a substitute for the coherer. The workers in the art did not need to be told that a substitute was desirable; the art was seeking substitutes, and various substitutes were invented.

Counsel for complainant say:

"The defendant may, if it pleases, use an imperfect contact device or coherer, or any other form of appliance, such as the Hughes device, as a detector, which provides a varying contact resistance in the detector circuit, and it will be free of the Fessenden patent."

In what are called the prior Hughes publications of May and June, 1899, there is described the use as a receiver of what is described as a "microphone," with a carbon and steel contact. The defendant has proved that this device, though described as a microphone, permits the operation of a telephone without any battery; and it is contended that the absence of a battery is conclusive evidence of some other action than that of a microphone. In other words, that the instrument is acting, not as a contact resistance varier, but to modify the received energy into such form that it will operate a telephone. This, of course, is not what is understood by microphonic operation, and the defendant is right in saying that the mere fact that the instrument was called a microphone is insufficient to show that without a battery it works upon what is known as the microphonic principle.

After Marconi's patent of 1899, with its free antenna circuit, the principal problem was, not how to receive the waves, but how and by what apparatus to utilize them to the best effect. At present the telephone is ordinarily used to detect the signals. A battery current is not essential; but the oscillatory current itself, if rectified, will supply all needed energy to operate the telephone.

We do not find, however, in the Fessenden specification, any disclosure of this fact, nor any suggestion that an oscillating current can be rectified into such a succession of direct impulses as will operate the telephone. If the contacts of a microphone can be so adjusted as to rectify the current, this is so foreign to the microphonic operation described by Fessenden, which requires the use of a battery current, that no contention can be built upon it by the complainants in this case.

The complainant concedes the right to use any contact except a good contact, but there is no reason for denying to the defendant the right to use any kind of a contact for the purpose of rectifying oscillating current into direct current or direct impulses. The contention that the defendant has borrowed nothing from Fessenden, but that its circuits are derived from the prior art, and that the problem was solved by substituting for the coherer a detector, which is superior to the coherer and operates upon a different principle is very satisfactorily established.

A comparison of the apparatus of the complainant and defendants in structure and in principles involved is enough to establish non-infringement of the Fessenden patent. The various generalizations whereby the complainant departs from Fessenden's invention and from his patent, and seek to hold the defendants as infringers by the test of abstractions, well illustrate the difference between such general conceptions as scientific speculation might draw as to the lines upon which an art might develop, and the definite, practical,

and useful applications of general principles which, when embodied in structure, are properly classed as inventions, and serve as proper tests for infringement by a fair comparison and a fair application of the doctrine of equivalents.

In *American Bell Tel. Co. v. National Telephone Co.* (C. C.) 109 Fed. 976, 1043, it was said:

"The patent statutes require the patentee himself to claim and define his invention, so that the public may know its rights, and so that there shall not be imposed upon the courts the burden of constructing upon a hearing new claims from the interpretations that experts may place upon language of the most sweeping and general character."

We find in Fessenden's application for his patent no evidence of a failure to disclose the nature and scope of his invention of apparatus. His invention is correctly described, and his claims, fairly construed, must be limited to apparatus operating upon the galvanometer principle.

Fessenden's original application was filed December 15, 1899, and his divisional application for the patent in suit, filed May 17, 1900, contained five claims.

June 6, 1902, and thereafter the specification was extensively amended, and a large number of claims were added of a most extreme and sweeping character, which ignored the original description of invention.

The subject of tuning was apparently an afterthought. It is conceded that not a word was contained in the original application on that subject.

It is true that in the original application is shown and claimed a condenser in circuit; but its function is not described nor claimed, nor is it shown to be adjustable, and that part of the specification and claims which relates to the subject of tuning is so clearly new matter and so clearly an enlargement that it comes directly within the principles of *Stewart v. Lava Co.*, 215 U. S. 168, 30 Sup. Ct. 46, 54 L. Ed. 139, and the many decisions following *Railway Co. v. Sayles*, 97 U. S. 563, 24 L. Ed. 1053.

It is, however, conceded that the tuning question is a subordinate question, and is dependent upon the soundness of the complainant's contention as to the scope of Fessenden's invention.

There was also introduced by amendment of the specification a new phrase, "current-operated wave-responsive devices," upon which a large part of the complainant's case is built.

As defined by the amendment this term—

"as used herein and by me generally is meant wave-responsive devices having all their contacts good contacts and operated by currents produced by electromagnetic waves. They are hence to be distinguished from wave-responsive devices depending for operation upon varying contact resistance."

This accompanied new claims in which the term was used in a breadth that would include the bad contact or microphonic contact, the antioherer, or self-restoring coherer, and even the tapped coherer of Marconi.

Read apart from the specification, certain claims are broad enough

to cover all devices using the energy of the oscillatory current. The expression "having all their contacts good contacts" is not descriptive of Fessenden's devices. The addition of this clause to the specification is remarkable. It is not descriptive of either form of Fessenden's device. His first form has no contacts, and his second form has only a bad contact, a microphonic contact. It is merely an arbitrary exception of all contact devices except good contacts—to be read in connection with the all-embracing expression, "current-operated wave-responsive device."

It defines the apparatus claimed by stating the kind of energy that is to be used to operate it, although the use of that energy, oscillatory currents, received from Hertz waves, is the foundation of the wireless art. All receivers must be current operated.

This is not a claim for described apparatus, but is a claim for the use of an electromotive force, and for all apparatus in which it can be employed.

In the specification, however, bad contact or microphonic apparatus is excluded by the expression we have quoted; and this is acknowledged to be outside of Fessenden's patent.

It is like a claim for a water current operated device, other than such devices as have been previously used, but inclusive of all subsequent devices which are not like those of the prior art. The fallacy of this mode of argument is that, while it does not claim what is clearly an anticipation, it covers everything else, irrespective of its resemblance in essential particulars to the Fessenden device.

"It is a familiar rule that a generalization or a definition that is too broad cannot be made good by making an arbitrary exception of each case that comes within its terms, but which should not have been included. A single contrary example destroys the generalization." *American Bell Tel. Co. v. National Tel. Co.* (C. C.) 109 Fed. 994.

A generalization so broad as to cover the prior art must be withdrawn, and a new one made that is narrower and is limited by the point of difference.

But it is said that Fessenden employs the term in a special sense—in a peculiar sense—that "he made his own dictionary" in his patent. In what sense?

The first distinction is as to the character of current in respect to voltage. He says:

"The receiving mechanisms are actuated by currents produced by electromagnetic waves, and not by voltages, as in case of the coherer.

The distinction, of course, cannot properly be drawn between current and voltage, but must be drawn between two kinds of current—high voltage currents and low voltage currents.

The distinction in apparatus which conforms to distinctions between high and low voltage current is high and low resistance.

His apparatus is to have low resistance as distinguished from the resistance of the coherer or of the microphonic contact.

The first "open door" to the incoming waves is the free antenna

wire grounded. Here is low resistance. Marconi and Lodge, before Fessenden, had this; and in this defendant takes from the prior art.

All the energy that comes is here received. It is sent into an induction circuit. In Fessenden this circuit has low resistance. In Marconi and Lodge there is such resistance to the induced current as is caused by the relatively higher resistance of the coherer in circuit.

Care should be taken to distinguish between the resistance of the coherer to the battery current in the local or relay circuit and the resistance to incoming waves. There is a "closed door" to the battery current. This has nothing to do, however, with the question of the initial resistance to the incoming energy from the Hertz waves.

The coherer has two properties. It will afford resistance or "close a door" to a battery current, and because of its sensitiveness it will pick up oscillatory current. But after the coherer has picked up oscillatory current, this current continues to oscillate through the coherer so long as the Hertz waves endure.

The only sense in which it can be said that Fessenden has an "open door" and Marconi and Lodge a "closed door"—i. e., closed to the incoming oscillatory currents—is that the induction circuit of Fessenden is of lower resistance than the coherer.

In that sense, however, the defendant's carborundum contact receiver has a "closed door," for it has a resistance higher than the coherer.

The complainant says that the essence of Fessenden's invention is not so much the indication of the presence of oscillatory currents as the obtaining of oscillatory current to detect.

But it must be remembered that the defendant's circuits are borrowed from Marconi and Lodge, and that the defendant's difference in structure is that, instead of a coherer, there is used a detector with a higher resistance.

Both Lodge and Marconi have a condenser in the induction circuit. They receive energy from a free antenna circuit. They pass it in oscillatory form to an induced circuit with a condenser, and after it has overcome the initial resistance of the detector it continues in the circuit.

If high-voltage currents are required for Marconi and Lodge, they are also required for defendant.

The distinction as to the voltage required in order that current be received seems, therefore, of no importance upon the question of infringement.

The complainant's contention that cumulative action of big and small waves was first used by Fessenden is disputed.

Professor Pierce says:

"There is absolutely no reason for supposing that the response of the filings coherer of Marconi was caused by the solitary effect of the first impulse that reached it in a wave train. The successive oscillations produced by a wave train follow each other through the coherer at intervals of about one one-millionth of a second; whereas, the indicating mechanism—the telegraph relay or sounder—of the Marconi apparatus required more than one-twentieth of a second to respond, and no one can say that the

coherence occurred at the arrival of the first impulse of the wave, or at some peak of the wave, rather than as the result of the integrative action of many trains of waves."

Counsel says, also, that current-operated means operated by the whole current, big waves and small waves, while voltage-operated means operated by some current, and not all of it.

"One is an interrupted operation, and the other a continuous operation—just exactly as in the Bell Case regarding the difference between Reis and Bell.

"Reis was in effect voltage-operated because he made and broke the circuit. Bell's was current-operated, because he operated a continuous circuit that was unbroken."

The continuity of the current depends primarily upon what is sent out at the sending station.

If dots and dashes are sent, oscillating currents corresponding in duration will be received.

When received upon the antenna of the receiving station, there will be induced currents of corresponding duration in the secondary circuit.

In Fessenden's visible motion device there is no interruption of the application of the received energy, but that all the energy received is usefully applied does not seem established, for the reason that, when the ring has moved under the impulse of received radiations, it must be restored to its original position in order to give by its motion a new signal. During the time of restoration there is an interruption of the useful application of the received energy, which corresponds somewhat to the interruption of the use of energy in the coherer.

But, even if Fessenden's apparatus shows the continuous application of the received energy, he is not for that reason entitled to claim an unbroken current under this patent. Fessenden's conception was no broader than the essential elements of his idea of means, and this was not broadly current operation, but specifically current operation on the galvanometer principle.

We are of the opinion that there is no infringement of the Fessenden patent. We are also of the opinion that the enlargement of the original application by the amendments which introduce the new subject of tuning was not justified. Whether in view of the prior publications any of the claims of the Fessenden patent are valid we do not find it necessary to decide. Restricted as they must be to include the principle of operation described in the specification, they are not infringed.

The decree of the Circuit Court is reversed, and the case is remanded to the District Court, with instructions to dismiss the bill; and the appellants recover costs in both courts.

PARSONS NON-SKID CO., Limited, v. ATLAS CHAIN CO.

(Circuit Court of Appeals, Second Circuit. June 7, 1912.)

No. 244.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHAIN TIRE FOR WHEELS.

The Parsons patent No. 723,299, for an armor for pneumatic tires, held valid and infringed on review of an order granting a preliminary injunction.

2. PATENTS (§ 283*)—INFRINGEMENT—DEFENSES.

When a defendant sells a device, the natural, usual, and preferential use of which constitutes an infringement, it is not a defense to a suit for infringement that it is possible by limiting its efficiency to so use the device as not to infringe, or that defendant has instructed its customers to so use it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452; Dec. Dig. § 283.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Parsons Non-Skid Company, Limited, against the Atlas Chain Company. Defendant appeals from an order granting a preliminary injunction. Affirmed.

Gifford & Bull (J. Edgar Bull, of counsel), for appellant.

Duncan & Duncan (Frederick S. Duncan, of counsel), for appellee.

Before COXE and NOYES, Circuit Judges, and HOUGH, District Judge.

COXE, Circuit Judge. [1] The device which is the subject of the patent consists of a network of rings or strips of metal or a series of small chains or bands fitting loosely over the periphery of the wheel or passing from side to side across the tire and prevented from coming off by two rings, hoops or their equivalent, such rings or one of them, being provided with means of attachment and detachment. The said rings are smaller in diameter than the periphery of the wheel and cannot come off accidentally. The rough surface provided by the network, chains or the like, will prevent the slipping of the tire on the road and the consequent skidding of the car.

It is probable that the genius of the inventor will yet devise a more simple and efficient method of preventing the skidding of rubber-tired vehicles, but, so far as the art has developed, Parsons appears to have been the first to provide means which minimizes the greatest danger which confronts the traveler in such vehicles.

The first claim of the patent which is typical of the other five is as follows:

"Antislipping or protecting means for the peripheries of wheels, pulleys, or the like, comprising attaching elements at opposite sides of the wheel, and an antislipping or protective medium secured to the attaching elements and extending across and around the periphery of the wheel, said parts being disconnected from, though retained on, the wheel, whereby the antislipping or protecting medium is free to move or shift its position around the periphery thereof."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Few patents have been so persistently and vigorously attacked, and in each instance, with one exception, it has been sustained. The Circuit Court of Appeals for the Seventh Circuit at first held the patent invalid, but, upon reargument, held it valid and infringed. There can be no question, therefore, upon this appeal as to the proposition that Parsons has made a useful and meritorious invention, being the first to construct a successful apparatus to prevent skidding, detachable from rubber tires. The Scientific American articles add nothing to what was considered by the courts in the Seventh Circuit. The Thompson patent on which the articles are based was there in evidence and was found to be irrelevant. From such an inadequate understanding of the Thompson machine as we are able to get from the present record, we are not disposed to differ with this conclusion.

In such circumstances it is the duty of the court to place upon the claim a construction commensurate with the invention. It is said that the words "fitting loosely over the periphery of the wheel," in the description, and the words "free to move or shift its position around the periphery thereof," in the claims, require a construction that the cross-chains shall be so loose that they must necessarily hang in loops from the supporting wires and be successively laid down upon the ground immediately in front of the tread of the tire. There is nothing in the prior art requiring such a construction, and, if adopted by the court, it will enable any chauffeur who has wit enough to contract the circumferential support so that the cross-chains are drawn more tightly across the tire, to evade the patent with impunity. *Loosely* is here used in contradistinction to *tightly*, and means that the cross-chains must be sufficiently loose to secure the advantages of the invention, viz., to creep and not pound the road as they would do if rigidly fastened to the wheel when traveling at a high rate of speed.

[2] That the defendant's grip creeps is expressly admitted, as is also the contention that if by use the cross-chains become loose, so that they are free to move or shift their position around the periphery of the wheel, the device becomes an infringement. It is also clear that the defendant's device may be so adjusted that the chains are held loosely, and if the driver of the car becomes satisfied that the best results can only be attained by a loose adjustment, it is more than probable that he will adopt that method. In other words the defendant places in the hands of the chauffeur an apparatus which may infringe or not, according to whether it is wound up loosely or tightly. Should it appear that the best results can be obtained only by a loose adjustment, it is hardly probable that a chauffeur will take the additional time and trouble to secure an inferior result. If experience shows that a loose adjustment prevents skidding and saves the wear and tear of the tires, it is safe to assume that it will be adopted, notwithstanding directions to the contrary. When the defendant sells a device the natural, usual and preferential use of which constitutes an infringement, it is no answer to assert that it is possible, by limiting its efficiency, to use innocently.

We cannot avoid the conclusion that the changes made by the de-

fendant are attempts to secure the fruits of Parsons' invention by alterations in non-essential details.

The history of the protracted litigation shows that, with few exceptions, the courts have regarded the Parsons invention as a meritorious one and have given it a construction sufficiently liberal to include all changes of form which accomplish the same result in substantially the same way.

The defendant was practically selling the patented grip in all its essential details, but in addition, it provided tension springs with directions to make a tight fitting grip. These springs may or may not be used, and the directions may or may not be followed, but even if they are followed, the same result is obtained, only in a less degree; the circumferential creeping of the cross-chains is not so marked.

Believing the invention to be a meritorious one, we decline so to limit the claims as practically to invalidate the patent.

The order is affirmed.

AMERICAN PATENT DIAMOND DOP CO. v. WOOD et al.

(Circuit Court of Appeals, Second Circuit. May 31, 1912.)

No. 189.

PATENTS (§ 328*)—INVENTION—DIAMOND POLISHING DOP.

The Loesser and Loesser patent, No. 573,672, for a dop to hold a diamond in position for polishing, is void for lack of invention; also, as limited by the prior art, *held* not infringed if conceded invention.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Suit in equity by the American Patent Dop Company against Rawson L. Wood, St. John Wood, and Harry S. Wood. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 189 Fed. 391.

Appeal from a decree holding valid and infringed letters patent No. 573,672, granted December 22, 1896, to Edward and Ernest Loesser for improvements in diamond polishing dops.

Prindle & Wright (Edwin J. Prindle, of counsel), for appellants.

Johnson & Galston (Clarence G. Galston, of counsel), for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, J. The object of the patentees was to provide a dop in which the diamond can be readily and quickly adjusted for polishing off the facets, table, or culet.

A dop is a tool for holding a diamond against a revolving skive while being polished. Prior to the patent the diamond had usually been held in place by solder and after a facet had been polished it was removed and soldered again in a different position for polishing a new facet. This process was repeated until the polishing was com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pleted. The patentees disclose a different method of holding the diamond in position during the polishing process. Instead of using solder, they hold it in position on the seat of the dop by a bifurcated finger, thus giving it a three-point contact.

The claims in controversy are as follows:

"2. A diamond polishing dop, comprising a head provided with an inclined seat and having means for applying it to a diamond-polishing tool, a bifurcated holding-finger adapted, in connection with said seat, to establish three points of contact with the diamond, and means for securing and adjusting the holding-finger, substantially as set forth.

"3. A diamond polishing dop, comprising a head having a recess and provided with means for application to a diamond polishing tool, a removable shoe having a flange fitting said recess and provided with a cavity, and means for engaging the diamond and holding the same in the cavity of said shoe."

We are of the opinion that the claims are invalid for lack of invention. The device is so simple that we cannot avoid the conclusion that had it been used for holding any other object than a diamond, no one would have imagined that it required the genius of the inventor to produce it. If, for instance, it had been a metal bead, or a glass ornament, which was held in place by a fork, so that the polishing disk could reach conveniently the faces to be polished, it is hardly probable that one who used means so obvious would be accorded the rewards of an inventor.

The method of polishing by means of a dop holding the diamond against the revolving skive was old at the time the patent was applied for. All that the patentees did was to provide different means for holding the gem. They were not, however, the first to substitute a metallic holder for the solder previously in use.

Two months prior to the date of the complainant's patent, Strasburger had obtained a patent for holding diamonds by similar means while being polished. He says:

"A gem *L* to be polished is mounted in the end of the gem-carrier. A facet of the gem is selected for the stone *N* to work upon. If the facet be at an angle to the horizontal plane, the setscrew *F* is manipulated to loosen the grip of the socket or adjusting-head upon the holder *G*, and the holder is thereupon swung until the desired inclination has been given to the gem-carrier. This inclination may be determined beforehand and the proper marks in the scale of the holder brought into registry with the indices of the adjusting-head. When the holder has been properly adjusted, the thumb-screw *F* is adjusted to clamp the said holder tightly in the adjusting-head *G*, so that the gem will be held in the proper position for polishing the facet selected. It will be noted that the gem may be carried in the gem-carrier in any suitable manner; but it is preferable in some instances to carry it by bringing the end of the prong *n* upon the 'table' of the gem and to screw the screw-collar *o* down tightly."

This device does not anticipate the Loesser claims, but it shows a method of holding the diamond in place, while being polished, by means of a metal finger or prong. It is argued that unless the socket in which the diamond is seated is made to conform to it with accuracy, the device will be deficient in security. It is argued, also, that the obvious way to remove this difficulty would be to embed the diamond in cement or other plastic material, but we think that another obvious way would be to divide the finger into two prongs at its end or, in

other words, to do what the Loessers did. If the Strasburger device did not hold the diamond with sufficient firmness it surely required only the skill of the calling to make it so hold. If one finger did not engage the diamond with sufficient firmness, ordinary common sense would suggest adding another finger, or a bifurcated finger, especially so as the use of a bifurcated clamp for such purposes was old in similar arts.

The Hessels patents do not relate to the art of polishing, but they do show a device for holding the diamond firmly while being cut which would be equally available for holding it while being polished. Hessels says:

"Heretofore it has not been believed to be possible to hold the diamonds in any other manner than by means of tin-solder; but I have discovered by practical tests that the diamonds may also be firmly and securely held in position by properly-constructed chucks, by the use of which the objections heretofore stated are fully avoided and a considerable saving of time and labor in cutting the diamonds obtained."

He also says:

"By means of these chucks the diamond to be cut may be exposed to the action of the upper cutting diamond in any desired position, so as to cut any of its facets, the back facets being first cut and finally the front facets. By the adjustability of the chuck sockets the proper angle of inclination for the facets and the proper direction of their grain toward the cutting-diamond is obtained, while by the chucks the setting of the diamond so as to cut one facet after the other is accomplished quickly and without the tedious soldering of the same into the old-style dops."

As we are, therefore, of the opinion that the claims in controversy do not disclose invention over the prior art, it is unnecessary to discuss the subject of the infringement. We may say, however, that if the claims can be sustained at all, they must be confined to the precise structure described, and the prior art does not admit of a broad construction. So limited, the defendants do not infringe. They do not have the bifurcated holding finger, or means for securing and adjusting the holding finger, as provided in the second claim. Neither do they have a removable shoe having a flange fitting the recess in the head and provided with a cavity, as stated in the third claim. If the claims be construed broadly enough to include the defendant's structure, they are fully met by the prior art.

The decree is reversed with costs.

WOOD v. KAHN et al.

(Circuit Court of Appeals, Second Circuit. May 31, 1912.)

No. 190.

PATENTS (§ 328*)—INVENTION—PROCESS OF DIVIDING DIAMONDS.

The Wood patent, No. 839,356, for a process of dividing diamonds, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by St. John Wood against Louis Kahn, Moses Kahn, and Sam Levy, doing business as L. & M. Kahn Company, and Philip Ferro and David Barsilay. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 189 Fed. 399.

Appeal from a decree dismissing the bill of complaint which was based upon letters patent No. 839,356, granted to complainant for a process of dividing diamonds.

Edwin J. Prindle (Arthur Wright, on the brief), for appellant.

Johnson & Galston (Clarence G. Galston, of counsel), for appellees.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We agree fully with the opinion of Judge Hough that the method of sawing a diamond described and claimed does not involve invention. The fact that the object to be divided is of great value does not change what would otherwise be mechanical skill into invention. It might, as pointed out, require unusual courage for the operator to risk such a process on so valuable an article, but courage is not patentable.

We deem it unnecessary to add anything to the opinion of the Circuit Court.

The decree is affirmed.

A. B. DICK CO. v. FULLER.

(District Court, S. D. New York. July 16, 1912.)

1. PATENTS (§ 202*)—ASSIGNMENT—COVENANTS—VALIDITY—DISCLOSURE OF FUTURE INVENTIONS.

A covenant by the assignor of a patent covering stencil paper to disclose all future inventions relating to stencil paper and processes or methods for preparing, reducing, and using same, construed as covering such processes as bear some relation to the patents or processes already discovered, is valid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281-289; Dec. Dig. § 202.*]

2. EQUITY (§ 223*)—BILL—DEMURRER.

A bill containing a general prayer for relief under defendant's covenant with complainant to disclose future inventions is good as against demurrer if the facts show that complainant is entitled to some relief, and the question whether the relief asked against defendant is so broad as to affect a third party cannot be raised by demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 502; Dec. Dig. § 223.*]

In Equity. Bill by A. B. Dick Company against Louis E. Fuller. On demurrer to the bill. Demurrer overruled.

Edmonds & Edmonds, for complainant.

Milne, Blake & McAneny, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAND, District Judge. I can see no ground for the allegation that the contract was unconscionable, or that it ought not to be enforced by a court of equity. So far as the bill shows, it was of Fuller's free will, and gave him \$7,500 outright. The agreement to pay \$3,000 a year to the Dermatype Company, for at least three years, only meant that Dwight should get about \$1,500 a year, for three years, for his stock alone. The balance of \$7,500 for Fuller's stock was what he got for the possibility that the company would continue. The covenant with the complainant to disclose all future inventions imposed substantially no new obligation upon him, as I construe it, in view of his prior engagements with the Dermatype Company. His covenant not to engage in business was the usual one under the circumstances, though I do not propose in this opinion to pass upon its legality.

[1] The chief objection raised is to the legality of Fuller's promise to disclose all future inventions relating to stencil paper. This was a direct covenant to the complainant. No question could arise of its legality had it in form been limited to improvements upon the original invention. *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Reece Folding Machine Co. v. Fenwick*, 140 Fed. 287, 72 C. C. A. 39, 2 L. R. A. (N. S.) 1094. That was in terms the covenant which Fuller had entered into with the Dermatype Company, and the only question which can arise is, first, whether his contract with the complainant should be construed more broadly; secondly, if it should, whether it is legal. The words are:

"All inventions * * * in or relating to stencil paper and processes, or methods for preparing, reducing and using same."

If necessary to sustain the agreement, I think I should construe it so as to limit it to improvements upon the inventions assigned, but I do not consider it necessary to go so far. The reasoning by which the assignment of future improvements is supported is that the improvement may so overlap the invention as to constitute a successful hostile competition. See *Putnam, J.*, in *Reece Folding Machine Co. v. Fenwick*, *supra*. The same reasoning applies to any subsequent inventions which relate to the same subject-matter. I think the covenant was intended to cover such processes as bore some relation to the patents or processes already discovered, and, so limited, it is quite clear that competition might arise hostile to the original grant of the complainant.

I have read a number of cases relating to this subject. In nearly all of them the covenant is expressly limited to improvements upon the original invention, and in every case the courts have upheld it. I have found no case in which a covenant of this character has been held invalid by the courts, except the first opinion of *Emery, V. C.*, mentioned below, and in several covenants have been upheld which were not limited to improvements, but to the same subject-matter as the main patents. The earliest and best of these is *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462, in which Sir George Jessel, on page 464, uses the following language:

"Persons, therefore, who buy patents from inventors are in the habit of protecting themselves from the utter destruction of the value of the thing purchased by bargaining with the seller that he shall not use any new invention of his for producing that product in which they are about to deal at a cheaper rate, because, if he were allowed to do so, he might, the day after he had sold his patent, produce something which, without being technically an infringement, and without being technically an improvement, might accomplish the desired object in some other way, and utterly destroy the value of that which they had purchased. They, therefore, not unreasonably, and not unusually, make it a part of their bargain that whatever the man discovers of the same kind in the shape of machinery or apparatus which will produce the product in which they are about to deal shall belong to them."

That language seems to me admirably applicable to the case at bar. Vice Chancellor Emery held the same thing in *Consolidated R. E. & L. Co. v. United States L. & H. Co.*, 77 N. J. Eq. 285, 78 Atl. 684. In that case the covenant first included "improvements and inventions" without qualification. This he held bad in an unreported opinion, but, when there was added to the habendum that the improvements and inventions related to the patents assigned, he said the question was only of the reasonable value of the covenant to the grant. In *Bates Machinery Co. v. Bates*, 192 Ill. 138, 61 N. E. 518, a covenant not limited in any way was construed by the court as intended to be limited to inventions of the same character. In *Birkery Manufacturing Co. v. Jones*, 71 Conn. 113, 40 Atl. 917, there were two inventions, one affecting improvements upon the patents assigned, and the other affecting inventions or improvements in any other article which the corporation was engaged in manufacturing. The bill claimed a subsequent invention which was not an improvement on the patents sold, but was an invention of other articles which the corporation was engaged in manufacturing, and the covenant was upheld. I do not think it is essential to go so far as that case, nor do I mean to be understood as agreeing with it, if it did not appear that the covenant in that case was a reasonable accessory to the grant. The sound rule, I take it, must allow only incidental protection to the grant, and not mere means of repressing the inventor's genius. In the case at bar the allegations clearly are that the invention discovered relates to the patents assigned, and the covenant is so limited. I do not, therefore, think that in the face of this authority I ought, contrary to good sense, to initiate an exception which would limit the validity of such agreements only to improvements, strictly speaking.

[2] There remains a question of whether the Dermatope Company is a necessary party. If the complainant was suing upon an assignment of Fuller's covenant with the Dermatope Company, I think that the latter might be a necessary party, since it still retains rights in reversion under paragraphs 16, 17, and 18 of the contract of May 2, 1911, and, if the Dermatope Company were made a party, it might have to be arranged as a party plaintiff, which would destroy the jurisdiction of this court. However, the complainant sues upon its own covenant, and in that covenant the Dermatope Company has no interest, for no decree in this suit would affect the Dermatope Company's claims under its own covenants against Fuller. The question

as to whether the relief asked against Fuller is so broad as to affect the Dermatotype Company cannot be raised by the demurrer, in view of the general prayer. The bill is good, if the facts show that the complainant is entitled to some relief. *Patrick v. Isenhardt* (C. C.) 20 Fed. 339. That is the function of a prayer for general relief. Moreover, no damage can come to the Dermatotype Company even if too broad a decree be entered, for they are not concluded by the decree, and, if subsequently they sue Fuller, who himself is embarrassed by the decree of this court enjoining him from doing any business, the complainant here would be a proper party to that suit. The character of the relief will be determined upon the hearing if the complainant gets a decree.

I will not take up the question of the validity of the covenant not to engage in business, or of the covenant against disclosing inventions to others, for it is sufficient that some relief is proper under the allegations, as I have just said.

The demurrer is overruled, with costs, the defendant to answer over.

In re NATIONAL BOAT & ENGINE CO.

In re FISHER.

(District Court, D. Maine. August 20, 1912.)

No. 271.

BANKRUPTCY (§ 140*)—PASSING OF TITLE—ARTICLES TO BE MANUFACTURED.

Claimant made a contract by which bankrupt's predecessor in business was to build for him two motor boats of specified construction and at stated prices. At the time of the bankruptcy, although the date for completion of the boats had long passed, they were not completed, and claimant had refused to accept them, but had made advances thereon, and had agreed that they might be sold by the builder to pay such advances. *Held*, that the title had not passed, and he could not reclaim them from the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*]

Contract for sale of things to be produced or manufactured, see note to *Star Brewery Co. v. Horst*, 58 C. C. A. 363.]

In the matter of the National Boat & Engine Company, bankrupt. On petition by Carl G. Fisher to reclaim property. Findings of referee against petitioner affirmed.

Williamson, Burleigh & McLean, of Augusta, Me., for petitioner. Woodman & Whitehouse, of Portland, Me., for trustee in bankruptcy.

HALE, District Judge. The claim of Carl G. Fisher, of Indianapolis, Ind., comes before me upon the report of Mr. Little, referee in bankruptcy. It is for two motor boats, now in the possession of the trustee, as a part of the assets of the bankrupt company. The boats were manufactured for Fisher by the Truscott Boat Manufacturing Company, before the sale of its assets to the bankrupt com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany. The petitioner bases his claim on two contracts entered into between him and the Truscott Company. The first contract is dated December 3, 1909. By it the Truscott Company agreed to construct a 75-foot motor boat for \$16,000, the boat to be ready May 30, 1910; the company to forfeit \$1,000 a week as liquidated damages for each week beyond said date. The second contract is dated February 8, 1910. By it the Truscott Company agreed to build for the petitioner a 45-foot motor boat for \$6,500. The petitioner says that the Truscott Company failed to build either of the boats according to specifications, and failed to have either boat ready for delivery on the date agreed upon. He gave the company until July 6, 1910, to complete the hull of the 75-foot boat. He then notified the company that he refused to accept the same if not completed on that date. It was not completed on that date. On July 12, 1910, he notified the Truscott Company that he refused to wait longer, and demanded the money paid by him. He claims that he should have credit for \$13,270.67, paid on the contract for the 75-foot boat.

He says that the 45-foot boat was not built in a workmanlike manner; that it leaked badly and was unsatisfactory in many other ways; that he notified the Truscott Company that he would wait until July 12, 1912, for them to remedy the defects; that thereupon he notified them of his refusal to accept the boat because of the inferior workmanship. He says he has paid \$4,500 on account of the 45-foot boat, and he demands the return of this money. He further claims that by contract thereafter between his attorneys and the Truscott Company it was agreed that the boat thereafter should become his property; that title thereby passed to him pursuant to this agreement; but that he gave the Truscott Boat Manufacturing Company until August 1, 1911, and extended said time to September 1, 1911, within which time the Truscott Company were to have the exclusive right to sell the boat, and, out of the proceeds, to pay him \$9,500; that any sums received by the Truscott Company in excess of this amount should belong to the company. The petitioner prays for an order directing the trustee to deliver to the petitioner the two boats in question. The referee denied the prayer of the petition, and ordered that the boats be not delivered to the petitioner as prayed for, but that they be transmitted to the assets of the bankrupt.

Had the title to the two boats passed to Fisher prior to the bankruptcy?

The petition shows that the boats were not built properly, and that Fisher refused them, and demanded his money back. The testimony of Fisher is to the effect that the boats were never completed, and that he refused to accept them, or to pay any more for them, and that he demanded the return of the money he had paid. He says that he never was notified in accordance with the requirements of the contract that either boat was ready for delivery, and that there never was any written communication by him accepting the boats. On examination of the correspondence, there appears to be no letter of Fisher tending to show acceptance of the boats. The letters show, on the contrary, that he expected the boats to be completed before they were

delivered to him. The whole testimony with reference to intention tends to show that there was no agreement to transfer the title to either of the boats; but that there was an oral agreement providing for the exclusive right to sell the boats. It seems to have been understood that the Truscott Company should have the selling of the two boats, but there does not appear to have been any agreement that the title to the boats was to pass to Fisher. The result of whatever agreement was entered into appears to me to have been that the company could not complete the boats, and Fisher could not obtain damages from the company by reason of its financial condition. As Fisher had an interest in the boats by reason of his advancing money, and as the company had an interest in the boats by reason of its labor in excess of the advances, it was finally agreed, as a solution of the matter, that the boats were to be sold for cash by the company, and to satisfy the claims of each party out of the proceeds. There is nothing in the correspondence of the parties, or in their conduct, to convince me that either party regarded the title to the boats as having been transferred to Fisher.

There having been no agreement that the title should pass, it is clear that it could not pass by operation of law. In *Tufts v. Grewer*, 83 Me. 407, 22 Atl. 382, it was claimed by the defendant that the manufacture of an article of a particular description, pursuant to a special order of the customer, transferred the title. The court held that this was not the law; but that there could be no transfer of title unless there was an acceptance on the part of the vendee. *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Bennett v. Platt*, 9 Pick. (Mass.) 560. *Tufts v. Grewer*, supra, is the leading authority among recent cases on this subject. In speaking for the court, Chief Justice Peters cited the old authorities, and traced the history of the law upon this subject. He referred to *Atwood v. Lucas*, supra, as the leading authority in Maine, where, in speaking for the court, Mr. Justice Walton said:

"It is laid down by Mr. Saunders that, to support an action for goods sold and delivered, the plaintiff must prove, not only such a delivery as will vest the property in the goods in the defendant, but such a delivery as will divest himself of all lien upon the goods, and enable the defendant to maintain trover for them without paying or offering to pay for them. *Saund. on Pl. & Ev.* 536."

In the case at bar the testimony shows that the boats had not been finished according to order. The Truscott Company had never given notice that the boats were finished. It had never presented any bill, nor made any agreement that it would keep the boats after they were finished; nor had there been any act that can be taken as an equivalent to an acceptance. The claimant of the boats steadily refused to accept them as being completed in accordance with the contract, but asserted at all times that the boats never fulfilled the requirements of the contract. It is clear that, under the doctrine of the Maine court, Fisher had not been vested with the title, and the Truscott Company had not been divested of it; certainly it had not lost its lien.

After an examination of the whole case, I am led to the conclusion that the title to the boats did not pass to Fisher prior to the bankruptcy. The finding of the referee is affirmed. It is ordered that the boats in question be not delivered to the petitioner, but that they be turned over to the trustee as a part of the assets of the bankrupt. The trustee recovers costs.

DEITSCH et al. v. GIBSON.

(District Court, S. D. New York. August 1, 1912.)

TRADE-MARKS AND TRADE-NAMES (§ 93*)—SUIT FOR INFRINGEMENT—EVIDENCE CONSIDERED.

Evidence *held* not to establish the right of complainants to the exclusive use of the name "Marguerite" as a trade-mark for toothbrushes, but to show its prior use by defendant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

In Equity. Suit by Charles Deitsch and Edward J. Deitsch, trading under the firm name of Deitsch Bros., against George R. Gibson. On final hearing. Decree for defendant.

Joseph L. Levy, for complainants.

William L. Marshall, for defendant.

PLATT, District Judge. The matters at issue upon the bill and answer were heard by me last April, when oral arguments were made by both counsel. There was much trouble about the record, and printed briefs were not at hand. I listened to the arguments with patience, and, after fixing a date for the sending of briefs and a revised record, came back to my own jurisdiction. Delay after delay has occurred, with my acquiescence, in carrying out the order made by me at the hearing. Now, it being an absolute necessity that I should take a rest, which ought to have been begun some time ago, I have obtained the briefs, records, and exhibits and am in a position to treat the litigants fairly.

This action was begun in July, 1907. Immediately thereafter a motion was made by complainants for an injunction *pendente lite*. This was heard by Judge Hough, who appears to have acted very kindly in the matter of granting of time for the presentation of affidavits, and had, as the record before me shows, pretty thorough information as to the facts upon which the complainants' claim of title rests. His reason for going into the matter so fully was that the fact that complainants owned a registered trade-mark put the burden upon the defendant to establish its contentions. He was satisfied that the burden was sustained, and that, on the testimony before him, the complainants could not carry their claim of title far enough back to be of avail to them against this defendant.

On the pleadings before me, the bill alleges the adoption of the name "Marguerite," applied to toothbrushes, "at least as early as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1883." The answer denies the material allegations of the bill, and sets up affirmatively the use of the mark by Gibson since 1885, challenges the title of complainants to the mark, and sets forth that the same has acquired a secondary meaning descriptive of the style of the brush upon which it is placed. The issue threshed out before Judge Hough on the affidavits was as to whether the complainants could follow their title back to 1883. Complainants' title depended upon the absolute ownership of the mark by Martin, after the failure of the firm of Willy Wallach, by some derivative right other than boldly appropriation. Judge Hough could not discover in the affidavits any evidence which would warrant him in finding that Martin got the title from the firm of Willy Wallach in any other way than by adopting and using it without opposition. He found, therefore, that complainants' title could not be traced further back than about 1890, and, since defendant's use of the same was shown clearly to go back as far as 1888, the complainants had no right which could be enforced against the defendant.

Just a moment here for a passing word, which may or may not be relevant, according to the way in which it impresses the listener. The defendant and its predecessor have been since 1876 the sole agent in this country of Charles Loonen, of Paris, France, a manufacturer of toothbrushes on a very extensive scale. A few months prior to the filing of this bill Loonen had brought suit in this court against the present complainants to enjoin them against the infringement of certain trade-mark rights in toothbrushes. The bill filed by Loonen was demurred to, and the demurrer overruled, April 10, 1907, and the defendants ordered to answer within 20 days. The opening of actual hostilities upon the bill filed by Loonen, and the filing of the bill in this suit, together with the motion for preliminary injunction, happen to be almost coincident in time. That is, at least, a curious thing, and particularly so when we remember that the complainants herein failed so disastrously before Judge Hough, and add that as defendants in the Loonen suit the failure seems to have been equally disastrous. *Loonen v. Deitsch* (C. C.) 189 Fed. 487.

Let us come back from this side excursion to the matter in hand. I have studied the record in this case with care, aided by notes taken at the oral hearing, and by the briefs now at hand from both counsel. I am unable to discover that the facts bearing upon the complainants' title have been in any way made better for the complainants. It seems, upon the final proofs, that the lack of title back of 1890 is more clearly shown that it was on the affidavits. In addition to that, defendant has established, with reasonable certainty, priority of use.

I have no time to discuss the question of the descriptive character of the word claimed as a trade-mark, or the laches of complainants. I have said enough to indicate that it is my conclusion that the bill should be dismissed, with costs.

GEORGE W. SIGNOR TIE CO. v. MONETT & S. W. CONST. CO. et al.

(District Court, E. D. Missouri, E. D. August 14, 1912.)

CORPORATIONS (§ 265*)—INSOLVENCY—LIABILITY OF STOCKHOLDERS FOR UNPAID SUBSCRIPTIONS—SUIT BY SINGLE CREDITOR.

Where there are a number of creditors of an insolvent corporation having no corporate assets, a single creditor cannot maintain a suit in equity against the stockholders to collect unpaid subscriptions for his benefit alone; but a bill must be filed by all the creditors, or in behalf of all who wish to join.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1101-1125, 2275; Dec. Dig. § 265.*]

Stockholders' liability to creditors in equity, see notes to Rickerson-Roller Mill Co. v. Farrell Foundry & Mach. Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

In Equity. Suit by the George W. Signor Tie Company against the Monett & Southwestern Construction Company and others. On demurrer to bill. Sustained.

The complainant seeks by this bill to recover from the defendant stockholders of their codefendant, the Monett & Southwestern Construction Company, which will be hereafter referred to as the Construction Company, unpaid subscriptions alleged to be due from them to the corporation, and also from the directors of the Construction Company for false and fraudulent statements in their articles of incorporation, in which they stated on their oaths that the stock had been fully paid up, when in truth and in fact only about 25 per cent. had been paid in by the stockholders.

The material allegations in the bill, so far as it is necessary to state them for a proper understanding of the case, are: That the Construction Company was organized under the laws of the state of Missouri, for the purpose of general contracting and the construction of railroads, and for other purposes; that the Construction Company purchased from the complainant \$100,000 Missouri Pacific Railway mortgage bonds, for which it agreed to pay the sum of \$72,000, of which \$40,000 was paid in cash, and for the balance it executed its promissory notes, depositing with the complainant, as collateral security for the payment of these notes, first mortgage bonds of the Construction Company; that, at the time these negotiations were had between the parties, the president of the Construction Company represented to complainant that the capital stock of the company, amounting to \$150,000, was fully paid up, and this also appeared from the articles of incorporation filed with the Secretary of State of the state of Missouri, which were verified by the directors of the company, who are among some of the defendants in this cause; that complainant also sold to the Construction Company ties of the value of \$5,484.20, which sum is wholly unpaid; that on the 5th day of December, 1910, the St. Louis & Oklahoma Railway Company filed its bill in equity in the Circuit Court of the United States for the Eastern District of Oklahoma, alleging the insolvency of the Construction Company, and asking for the appointment of a receiver, making the Mercantile Trust Company, which was trustee under the mortgage of the Construction Company, a party defendant; that, default having been made in the payment of the interest on the mortgage bonds, the Trust Company, at the request of the holders of the bonds, filed its cross-bill for the purpose of foreclosing the mortgage; that a receiver was appointed by that court, and a final decree rendered directing the foreclosure of the mortgaged property, and which constituted all the property of the Construction Company subject to execution; that the property was sold by the master in chancery, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amount realized was only sufficient to pay the expenses of the receivership and some preferred claims, leaving all of the mortgage bonds and complainant's judgment for \$5,484.20 wholly unpaid; that in that proceeding the complainant filed its claim for the amount due to it for the sale of the ties, which was allowed by the court as an unsecured claim against the Construction Company, but nothing was ever received on that claim by complainant; that the Construction Company is wholly insolvent, and has no property whatever subject to execution, except the unpaid stock subscriptions due from its codefendants.

The bill further alleges that the indebtedness of the Construction Company to various creditors exceeds \$100,000, and that the bill is filed by complainant for its own benefit solely, and not for the benefit of any of the other creditors.

To this bill the defendants filed their separate demurrers, upon the ground that there is no equity in the bill, and that it is multifarious.

Masterson Peyton and Carter, Collins, Jones & Barker, for complainant.

George Hubbert, for defendants.

TRIEBER, District Judge (after stating the facts as above). In view of the conclusions reached by the court, it is unnecessary for it to determine whether the bill is multifarious, or whether a creditors' bill can be maintained by a creditor who has recovered a judgment for part of his debt in a court of a foreign jurisdiction. But, see, as to that point, *National Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070. Nor is it necessary to decide in this case whether, when it is charged in the bill that the corporation has no property whatever subject to execution, the truth of which is admitted by the demurrer, an execution must first be issued and returned *nulla bona*, before a creditors' bill can be maintained.

The law has been well settled by a long line of decisions of the Supreme Court of the United States and the national courts generally, where there are a number of creditors, that a single creditor cannot maintain a bill in equity against the stockholders of an insolvent corporation, having no corporate assets, to collect unpaid subscriptions from the stockholders, and thus enable him to secure payment of his own debt to the exclusion of the other creditors.

A bill must be filed either by all the creditors, or in behalf of all the creditors who desire to make themselves parties to the action, and, if necessary, contribute their proportion of the expenses of the litigation. *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Brower v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. Ed. 265; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

Counsel for complainant in their brief refer to the statutes of Missouri, and to the decisions of the Supreme Court of that state construing those statutes, for the purpose of maintaining their contention that a single creditor may maintain an action of this nature. There are no allegations in the bill which indicate that this action is brought to enforce a liability under the statutes of that state; but, on the contrary, all the allegations in the bill show that it is an ordinary creditors' bill.

brought in conformity with the principles and practice of equity courts..

The demurrer to the bill will be sustained, with leave to the complainant to amend it within 30 days of the entry of the decree herein.

DRENNEN v. HEARD et al.

(District Court, N. D. Georgia. May 18, 1912.)

No. 68.

1. TRUSTS (§ 11*)—PURPOSE—TESTAMENTARY TRUSTS.

A provision of a will by which the testator directed his executors to divide his estate, except his home and contents, which were devised to his wife for life, as nearly as convenient into two equal parts and to convey the first half, which should consist as far as practicable of stocks, bonds, and cash, to themselves as trustees to manage and collect the income therefrom during the lifetime of his wife and to pay to her so much of the income as was necessary "for her support, benefit and comfort," with remainder over of the trust estate with all accumulations at her death to other legatees named, created a valid trust under the law of Georgia, which on the failure of the trustees to qualify would be administered by a court of equity.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 9; Dec. Dig. § 11.*]

2. WILLS (§ 663*)—CONDITIONS SUBSEQUENT—CONSTRUCTION.

A will, after creating a trust for the benefit of the testator's wife during her lifetime, provided that the proceeds of a certain life insurance policy payable to her should be turned over by her when collected to the executors and by them paid to the trustees to become a part of the trust estate, and that, if she should "fail and refuse to deliver the insurance money to the executors," then all the bequests previously made to her were revoked and annulled and the entire estate should go to others named. *Held*, that the retention of the insurance money by the widow with the consent of all of the remaindermen and alternative legatees, and no demand having been made for it by the executors, was not such a failure and refusal to turn it over as worked a forfeiture of her interest under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1559; Dec. Dig. § 663.*]

3. WILLS (§ 665*)—CONDITIONS SUBSEQUENT—CONSTRUCTION—CONTEST OF WILL.

Under a condition in a will that, if the wife of the testator should "take any legal steps to set aside this will and shall not succeed in such endeavor, then all the bequests to her are revoked and annulled," and in lieu thereof she should receive \$500, and the property bequeathed to her should go to others named, the widow did not forfeit her right to such bequests by filing a caveat against the will which was voluntarily withdrawn 10 days later and before any hearing thereon.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1561-1563; Dec. Dig. § 665.*]

4. TRUSTS (§ 147*)—RIGHTS OF BENEFICIARY—PURCHASE BY REMAINDERMEN.

A testator by his will directed his executors to convey to themselves as trustees substantially one-half of his estate to be held and managed by them during the lifetime of his wife and to pay the income to her so far as necessary for her support, etc., with remainder at her death to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant and five others share and share alike, provided complainant should at that time have a child living; if not, the same to be divided among the other five. Shortly after the testator's death, the widow sold and conveyed her interest in the trust estate to the five remaindermen other than complainant, in consideration of a lump sum in cash which was paid from such estate; the executors thereupon not qualifying as trustees. *Held* that, the parties to such sale and purchase being *sui juris*, the transaction was valid as between them and also as to complainant, whose contingent interest was not affected thereby, but would be protected by a court of equity, through a trustee or otherwise, until her right thereto under the will could be determined.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. § 147.*]

In Equity. Suit by Miriam Drennen against Frank A. Heard and R. E. Clements, as executors of the last will of W. L. Tillman, deceased. On exceptions to master's report. Exceptions overruled.

The bill was filed January 10, 1910, by Miriam (Minnie) Drennen, a citizen of the state of Arkansas, against Frank A. Heard and R. E. Clements, as executors of the last will of W. L. Tillman, who died June 3, 1906. The following findings are taken from the report of the master:

Conclusions on Demurrers.

Taking the opinion of the court, rendered at the time an injunction *pendente lite* was granted, in connection with the reference, disposition must first be made of the demurrers. These were general and special. At the opening of the case before the master, counsel for complainant took the position that the filing of the answer overruled the demurrers, and cited authorities to sustain their position, among others, *Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259, and *Crescent City, etc., Co. v. Butchers Union Live-Stock, etc., Co.*, 12 Fed. 225.

While this is undoubtedly the rule, I do not think the court intends by such to preclude a defendant from his defenses by demurrer, when, under an order of reference, it becomes necessary, as in this case, in order to perfect the pleadings, that an answer be filed after the demurrers. Though defendants may have filed an answer subsequent to the filing of their demurrers, it should not be considered or regarded as filed until disposition of the demurrers by the master, as directed in the order of reference. The court disposed of the special demurrer to the jurisdiction, and stated that he would refer the other grounds and all other questions to the master for consideration. This certainly did not preclude defendants from filing answer to perfect the case for a hearing.

The first, second, and third grounds of demurrer, while stated differently, are practically a general demurrer to the bill, in that such a case has not been stated as entitles complainant to relief in a court of equity. In the opinion of the master, these are not well taken and the same are overruled.

The remaining grounds are special, and were not insisted upon by counsel for defendants, but were withdrawn; they stating that the questions raised thereby were made by the defense set up in the answer.

Findings of Fact.

I.

So much of the will of the testator as is necessary to be referred to in the adjudication of the questions at issue is here set out, either in substance or in full, and I find the same as true:

By item 2 he gave to his wife, Hattie Tillman, for life, his dwelling and lot, being his home, and contents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

By item 3 the executors were directed, after payment of debts, to divide the balance of the estate (the home place and contents excepted) into two equal parts.

Item 4 named R. E. Clements, Dr. C. T. Drennen, and Frank A. Heard trustees for his wife, Hattie Tillman, and these, the executors, were to convey to themselves as trustees for the use and benefit of his wife, Hattie Tillman, for and during her life, the dwelling and contents and one-half of the balance of the estate, after the division had been made as provided in item 3. The trustees were to apply the rents and profits of this half, or so much as might be necessary, to the support, benefit, and comfort of the cestui que trust during her life.

Item 5 gave the remainder over of the trust estate and all unexpended accumulations, after the death of the wife, to the children of Mrs. A. A. Heard (Dr. Geo. P. Heard excepted) and to Minnie Drennen, formerly Minnie Ryan, provided the said Minnie should have living, at the death of Mrs. Tillman, children born to her, otherwise she was not to share in the property mentioned in this item. If no children were born to the said Minnie Drennen, or were not in life at the death of his wife, the whole of the remainder over at the death of the wife was given to the Heard children above named.

In item 6 he directed certain specific legacies (not necessary here to refer to) to be paid out of the other half of the estate, and the remainder of this half he gave unconditionally to the Heard children (Dr. Geo. P. Heard always excepted) and to Minnie Drennen, share and share alike; but Minnie Drennen was to be charged with about \$6,000 advancement and any future advancements.

Items 10 and 11 must be taken in connection with items 4 and 5, creating the trust. In these items, 10 and 11, testator directs that the trust estate, other than the dwelling, should, as far as practicable, consist of stocks, bonds, and cash, and the other half of the estate should consist of realty as near as practicable. The trustees were given power to sell and to reinvest. R. E. Clements was named as trustee, being brother of Hattie Tillman, so that he could look specially after the interest of his sister. Frank A. Heard was required, as trustee, to give a bond in the sum of \$10,000, and the bonds of the other trustees were to be fixed by proper tribunal. The trustees were required to make inventory and returns to the court of ordinary of Muscogee county, regardless of where the property was located and not elsewhere. They could fill vacancies in the trusteeship.

Item 12 named the executors and defined their powers, which were full. Bond was required.

Item 13 dealt specifically with a certain life insurance policy payable to his wife and children. He stated that for convenience it was his purpose to make his wife sole beneficiary, and, as soon as the proceeds of the policy should be paid to her, she should turn over the same to the executors to become a part of the estate, and the executors were to pay it over to the trustees of Hattie Tillman to be invested in stocks and bonds or realty, or loaned at interest properly secured, and the income was to be expended for the support, benefit, and comfort of Hattie Tillman during the term of her natural life, and at her death the corpus and all unexpended balance of the profits therefrom was to go to the Heard children. Should the wife fail and refuse to deliver the insurance money to the executors to become a part of his estate, then he revoked and annulled all the bequests previously made to her, and all the property and rents and profits therein so bequeathed was to go to the Heard children and Minnie Drennen, share and share alike.

In item 14 testator provides that, should his said wife take any legal steps to set aside his will and shall not succeed in such endeavor, then all the bequests to her are revoked and annulled, and in lieu thereof he gives her \$500, and all the property bequeathed to her, except the \$500, shall go to the Heard children and Minnie Drennen, share and share alike.

The will, dated April 19, 1906, was duly signed and properly attested. On May 23, 1906, testator attached a codicil, by the second item of which he

directed that the household and kitchen furniture bequeathed to his wife in connection with the dwelling could, at her option, be sold, the proceeds to be merged into the trust estate subject to the same uses and limitations as other property constituting the trust estate. A second codicil of June 1, 1906 was attached, but in no way bears upon the issues here to be considered.

This bill is seeking a money decree against the executors: (1) For the balance alleged to be due complainant for the one-sixth share of what is designated as the second half of the estate, devised to the Heard children and complainant after payment of debts and certain minor legacies. (2) For a one-sixth share of the first half of the estate, or that one-half which was apportioned for the widow's benefit. This last is asked because the widow took legal steps to set aside the will by filing a caveat thereto, and did not succeed in such endeavor, and because she collected the proceeds of a certain life insurance policy, and failed and refused to turn the same over to the executors to become a part of the testator's estate.

The defendants deny complainant's right to decree on the grounds: (1) That complainant is estopped from asserting that the conditions of the will had been broken because she, through her agent, participated in the transactions, and therefore cannot deny their validity. (2) That the widow being *sui juris*, no trust could be created for her benefit, so that, under the will, she took a legal estate which she was free to dispose of. (3) That the proceeds of the insurance policy belonged to the widow, who was under no obligations to observe the requirements of the will that the fund should be turned over to the executors to become a part of the estate, and further that, as complainant had no interest in this fund, she cannot be heard to question its application.

II.

The admitted facts, gathered from undisputed documentary evidence submitted, and so far as necessary for determination of the issues made by the bill, are here briefly stated, and I find as follows:

W. L. Tillman departed this life June 3, 1906, having left his will as heretofore set out, and leaving a large estate, which was duly appraised. This consisted of his house and lot in the city of Columbus, Ga., of the value of \$5,500, and other lands in the state of Georgia of the value of \$26,800, lands in Alabama of the value of \$1,000, and in Mississippi of the value of \$21,000. Total in realty of \$54,300. Personal property, in notes, bonds, stocks, cash, live stock, and other similar assets of the value of \$328,011.28. Total in realty and personalty of \$382,311.28.

The will was probated in common form on June 7, 1906.

The debts and special minor legacies (not here necessary to refer to) have all been paid. He named as his executors his nephew, Frank A. Heard, one of the legatees, R. E. Clements, a brother of his wife, Mrs. Hattie Tillman, who was another legatee, and Dr. C. T. Drennen, husband of Miriam (Minnie) Drennen, who was another legatee. The two first-named executors qualified, and are acting as executors in administering the estate. Testator left no children, or descendants of children, and his sole heir at law was his wife, Mrs. Hattie Tillman. The nephews and nieces referred to in his will as beneficiaries, and designated as children of Mrs. A. A. Heard, are Frank A. Heard, W. T., Ailee Heard, Ethel Heard Deloffree, and Mabel Heard Clarke. The other remaining legatee (other than certain specific legatees not necessary to be considered in this connection) was Miriam Drennen (Minnie Ryan), the complainant, who was taken at a very tender age by testator, treated as his daughter, reared to womanhood, and remained a member of his family till her marriage to Dr. C. T. Drennen. All of the above-named legatees are *sui juris*; Ailee Heard, the only minor legatee at death of testator, having attained majority before filing of the bill.

After the probate of the will in common form, and before letters testamentary issued, Mrs. Hattie Tillman, on July 2, 1906, filed her caveat and objected to the admission of the will to record. The grounds stated in the caveat are, in substance: (1) Unsound mind of testator; (2) undue influence; (3) improper execution; and (4) effort in one item (twelve) to dispose of

property belonging to caveator. This caveat is signed by "Stallings, Nesmith & Drennen and T. T. Miller, Attorneys for Caveator, Mrs. Hattie Tillman." It bears the following indorsement: "This caveat was filed in office July 2, 1906, but was withdrawn by consent. Wm. Redd, Ordinary, Muscogee County, Georgia."

On July 12th thereafter the will was probated in solemn form and admitted to record, the order reciting that the same was done on the petition of R. E. Clements, Frank A. Heard, and Dr. C. T. Drennen, after notice to the widow, Mrs. Hattie Tillman, sole heir at law of testator. The order directed letters testamentary issue to R. E. Clements and Frank A. Heard on their giving bond in the sum of \$200,000. The bond was duly filed.

On March 21, 1907, Mrs. Hattie Tillman conveyed to Ethel Heard De-loffree, F. A. Heard, Mabel Heard, W. T. Heard, and Ailee Heard, in consideration of \$60,000, all of her right, title, and interest which she has under and by virtue of the will of W. L. Tillman, deceased, and all of her right, title, and interest in and to the realty and personalty of every kind and character belonging to the estate of said W. L. Tillman. Then follows a description in detail of the property conveyed and to the same is conveyed an absolute title in fee, with warranty and with limitations only as to the house and lot known as the Home Place, on Broad street in Columbus, Ga., and as to that the grantor reserves and is granted the use and occupancy thereof as a home for and during her natural life; the same not to be used for any other purpose or otherwise disposed of. This deed is regularly executed and recorded, and is found in documentary evidence.

Contemporaneously with the foregoing deed, Mrs. Hattie Tillman executed and delivered to the same grantees a bill of sale for the same consideration of \$60,000 conveying all her right, title, and interest as a legatee in and to all of the personal property belonging to the estate of testator. Then follows a detailed statement of this personalty, being stocks and bonds.

On December 3, 1906, the two executors, Heard and Clements, divided the estate into two equal parts as directed by item 3 of the will, and the one-half, representing Mrs. Tillman's share and consisting of the home place and of cash, stocks, and bonds and notes, was valued at \$193,905.64, and of this the home place was valued at \$5,500, leaving balance in above item, \$188,405.64. On this return is the statement by the executors that said one-half has been sold to the children of Mrs. A. A. Heard (Dr. Geo. P. Heard excepted).

On July 12, 1906, the Heard children receipted the executors, Clements and Heard, for \$20,000 of the above, and on January 28, 1907, they receipted for \$40,000 of the above, in both of which receipts is reference to a writing of July 12, 1906 (called a "tentative agreement").

On January 28, 1907, Mrs. Hattie Tillman receipted Heard and Clements, executors, for the \$60,000, purchase price of her entire interest in the estate of her late husband, W. L. Tillman, sold by her to the Heard children, which amount, the receipt states, was paid her either as legatee under the will of her said husband, heir at law and for dower and year's support, each and all embraced in the sale referred to and in consideration for the same and the insurance policy, proceeds of which was \$5,000. This receipt refers to the agreement of sale of July 12, 1906.

III.

The oral evidence discloses that, two days after the death of testator, his will was opened and read in the presence of the executors, Heard, Clements, and Drennen, Hattie Tillman, the widow, and the complainant. All these persons testify that, with the exception of Heard, all present expressed dissatisfaction at the terms of the will, especially with the condition put upon the widow as to contesting the will and as to disposition of the insurance policy.

The evidence shows that Mrs. Drennen was taken by testator and his wife when three years old and was treated as a daughter; that she lived with these foster parents till her marriage to Dr. C. T. Drennen, in 1898, and knew towards them no other relation than that of parent and child. She came to see them in March preceding the death of testator, and left

Columbus about June 20, 1906, and went to Hot Springs, Ark. She admitted she discussed the provisions of the will with her husband, but denies positively that she instigated the filing of the caveat. She states that she did not suggest or originate the idea of attempting to break the will, but that R. E. Clements did, and she concurred as being for the best interest of her "Mamma," as she called Mrs. Tillman, and that she desired that "Mamma" be given what she wanted. She swears positively (page 106 of the record of evidence): "I have never constituted Dr. Drennen as my agent to represent me in any shape whatsoever as regards this will; never authorized him to negotiate with the Heard children about the sale of her interest, and never knew about the negotiations and never ratified anything he said or did." Dr. Drennen's evidence was to the same effect with reference to the question of agency. Mrs. Drennen states that Clements, one of the executors and trustees, stated to her: "Now, Minnie, don't you do a thing. You just let it alone. I will do the best I can for your Mamma, and I will take care of you." (Page 110 record of evidence.) On cross-examination she stated that she did not care to have the will set aside, but wanted done what was for the best interest of Mamma and she left it with Clements. All through her testimony runs the idea that she wanted the interest of her mother considered. While there is no direct evidence by her that she desired her mother to take the proceeds of the insurance policy, the evidence generally shows that it was conceded that Mrs. Tillman ought to have the insurance money. Some of the witnesses state positively that there was a general understanding that she need not pay this over to the executors. They and she testify no demand was ever made for it, and no refusal on her part to pay it over.

Dr. Drennen, husband of complainant, testifies that J. L. Drennen, his brother, was told by him that he wanted him to take such action as would best subserve the interest of Mrs. Tillman.

J. L. Drennen, an attorney of Birmingham, Ala., and a member of the law firm who, with T. T. Miller, attorney for Mrs. Tillman, filed the caveat, testified at length as to the facts of filing the caveat. It appears from the evidence that he was summoned to Columbus by his brother, Dr. Drennen, the day after the will was read, for the purpose of conferring with all the executors about employment of local counsel and executing the provisions of the will, and that he performed some service in this particular in the employment of Carson & McCutchen to represent the executors; that he returned to Birmingham and subsequently returned to Columbus and had interviews with Mrs. Tillman. It is not clear from his testimony that he was employed by her as counsel to file the caveat. He went, however, to confer with T. T. Miller, attorney, at suggestion of Clements (Record, p. 11). This witness states (page 12) that Mrs. Tillman was told by him that Mr. Miller agrees that "it is safe for you to go ahead, and he and Mr. Clements decided that they would file the caveat," and her reply was: "Well, Dick, I will leave that to you and Bob. Do whatever you think best for me." The caveat was filed that day (July 2, 1906) signed by Stallings, Nesmith & Drennen and T. T. Miller, attorneys for Mrs. Tillman. The evidence shows that this was subsequently withdrawn (July 12, 1906) by consent. No contest was had therein and no adjudication of the issues raised by the caveat. The will was at once admitted to record in solemn form.

This witness also testifies that Mrs. Drennen knew nothing of the settlement with the Heard children nor of the caveat and had nothing to do with either. He also testifies (page 15) that Mrs. Tillman stated to him just after July 12, 1906—referring to the "tentative agreement"—that she "was broken all up about the settlement, but that Bob (meaning her brother, R. E. Clements) thought it was best." And while the evidence generally leads to a strong implication that J. L. Drennen was looking after the interest of complainant and of his brother, Dr. Drennen, there is positive evidence that he was one of the attorneys for Mrs. Tillman in filing this caveat and in conferring about what was her best interest in attacking the will. He and T. T. Miller as attorneys rendered legal service in this and in making the settlement, and were paid fees therefor.

The evidence of Mrs. Tillman contradicts J. L. Drennen as to the filing of the caveat and employment of counsel, but she testified that she turned over all her affairs to her brother, R. E. Clements, as soon as the will was read. The attorney's fees were paid by Mrs. Tillman at instance of Clements.

With reference to the insurance policy, Mrs. Tillman testifies (page 39): "I never was asked to give up the insurance policy. All of them, Miriam (Mrs. Drennen), Dr. Drennen, Frank Heard, and all, said it was mine." This evidence was rebutted by no one. F. A. Heard testified that all agreed for Mrs. Tillman to have the insurance. No demand was ever made on her for it. No refusal by her to pay it. It was never taken or appraised as part of the estate. It is this witness (Heard), as well as Clements, who testified that Mrs. Drennen stated to them that she had to leave, but Dr. Drennen would look after her interest. Mrs. Drennen explained this statement as meaning that Dr. Drennen, as executor, would look after her interest. The conversation was before the caveat had been filed.

The oral testimony is very voluminous, and in many places contradictory; but, taken as a whole, it is clear to my mind that Mrs. Tillman and Mrs. Drennen had very little to do with any of the transactions. The chief actors in the matter of filing the caveat, and in effecting a settlement culminating in the deed and bill of sale executed by Mrs. Tillman, were Dr. C. T. Drennen and R. E. Clements; but there is no evidence that Drennen was the authorized agent of his wife, and while there is evidence that Clements was the authorized agent of his sister, Mrs. Tillman, she knew little or nothing of what was being done. However, the evidence shows that all the legatees of this will were sui juris.

Reconciling the contradictions as best I can, and looking at the effect of the evidence, both in its positive and negative character, I find the following to be facts:

First. As to the proceeds of the insurance policy referred to in item 13 of the will, I find that no demand was made on Mrs. Tillman for the \$5,000 proceeds from the life insurance policy, and that she did not "fail and refuse" to deliver said insurance money to the executors, and that the executors named in the will voluntarily consented for her to retain the same. I further find that the complainant did not object to this disposition of the insurance money, but acquiesced and assented thereto, and approved of Mrs. Tillman retaining the same.

Second. I find that Mrs. Drennen (the complainant) did not consent to, nor did she agree to, or advise or originate, the filing of the caveat; that she was no party to the transaction between Mrs. Tillman, and the Heard children, nor was she connected with, nor did she authorize or employ, any one to represent or act for her, either in the filing of the caveat or otherwise in contesting the will of testator, or in making the settlement between the Heard children and Mrs. Hattie Tillman, nor has she in any way ratified or confirmed the acts of any one purporting to represent her as agent in and about these matters as stated, although the circumstantial evidence justifies a conclusion that she had knowledge, through her husband, of the same before and at final consummation of negotiations.

Third. I find that R. E. Clements and F. A. Heard and C. T. Drennen have qualified as executors of the will in the state of Mississippi, and R. E. Clements and F. A. Heard in Georgia and Alabama, and that neither of these has accepted the trust imposed by the will.

Fourth. I find that all the parties named as legatees and affected by this litigation—that is, Mrs. Miriam Drennen, the Heard children, and Mrs. Tillman—were sui juris.

Fifth. I find, as a fact already found, but here more definitely stated, that the estate was divided as directed by testator into two equal parts, known as the first half and second half, and:

(1) The first, consisting of stocks, notes, bonds, and cash, and intended to represent the share of Mrs. Hattie Tillman (to be held in trust) was of the value, December 3, 1906, of \$188,405.64, to which should be added the house and lot valued at \$5,500; Total value of first half, \$193,905.64.

Pursuant to the agreement between Mrs. Hattie Tillman and the executors and the Heard children, the executors distributed the above as follows:

| | |
|---|--------------|
| To Mrs. Hattie Tillman, for account of the Heard children, cash..... | \$ 60,000 00 |
| The house and lot for account of the Heard children, and to be held by Mrs. Tillman for life, appraised value.... | 5,500 00 |
| Balance to the Heard children..... | 128,405 64 |
| | <hr/> |
| | \$193,905 64 |

(2) The value of the second half of the estate as appraised was not submitted in evidence. The schedule of assets filed as ordered by the court, and of date January 28, 1910, and the oral testimony of Heard, one of the executors, shows, and I so find:

That, after payment of debts and specific minor legacies, there was paid in cash out of this half of the estate as follows:

| | |
|---|--------------|
| To the Heard children ($\frac{5}{6}$)..... | \$136,500 00 |
| To complainant ($\frac{1}{6}$) including the \$6,000.00 advancement | 27,300 00 |
| | <hr/> |
| Total | \$163,800 00 |

That there now remains for administration in the hands of the two executors, Heard and Clements, all the property as specified in the said schedule filed, except the Mississippi property, and that remains in the hands of all three executors, to wit, Heard, Clements, and Drennen, and the total value of said remaining property of the second half at the date of the filing of said schedule, January 28, 1910, was \$57,265.53. Of this amount, subject to deductions in expenses and depreciation of value, after final administration, on final distribution, the Heard children would be entitled to five-sixths and the complainant to one-sixth.

I find that this balance is not ready for distribution because of the pending litigation and other complications which for the present prevents the final distribution thereof.

Conclusions of Law.

I.

The bill as to recovery against the defendant executors for a money decree for the balance due complainant out of what is known as the second half of the estate is premature. There has been no final administration of the assets of this estate. The facts as found show: That property to the estimated value of some \$57,000 is still in the hands of the executors, most of it under control of all three executors; the executor Drennen, husband of complainant, having also qualified in Mississippi, where the land representing the larger part of this balance is located. That the complainant has already received from this half of the estate cash to the amount of \$27,300 (which includes advancements named in the will), and that the balance in the hands of the executors, after certain litigation is concluded, will be ready for distribution after the necessary expenses of administration are deducted. That the balance due complainant cannot now be ascertained. That executors are under bond and can be made liable for any maladministration of the estate still in their hands for final distribution.

I therefore conclude that the value of the distributive share of complainant, under item 6 of the will, cannot be ascertained and no money decree therefor can or should be entered as a matter of right against defendants at this time as prayed for.

II.

I do not think that complainant is entitled, at this time, to a money decree against defendants for one-sixth of what is known as the first half of the estate, or for any part of what is designated the insurance fund, which she claims she is entitled to have under items 13 and 14 of the will.

However, from my conclusions of the law, as applied to the facts developed at this hearing, and my findings as before set out, I am of the opinion that as to that one-sixth share in the half of the estate set apart to Mrs. Hattie Tillman, complainant is entitled to equitable relief.

Estoppel: Defendants have invoked the doctrine of estoppel. The evidence fails to show that Dr. Drennen was the agent of complainant, consenting to and assisting, for her, in the filing of the caveat, and consummating the settlement. She denies his agency. He denies it. While it is sought to prove his agency by his declarations as to representations, this cannot be construed to mean other than his representation of interest of complainant and all other legatees as a named executor. But aside from that view, his declaration cannot establish the fact of agency. Nor can I conclude that complainant is estopped because of any act upon her part to deceive or mislead defendants. The evidence fails to show this, and under the findings of fact that she had no part in the filing of the caveat, or the settlement, she, as a matter of course, cannot be estopped from equitable right to protection of her interest in this estate. For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped. Georgia Code, § 5738; also, *Brant v. Virginia Coal Co.*, 93 U. S. 326, 23 L. Ed. 927, in the language of the Georgia statute.

As to forfeiture: While complainant is not estopped, as above found, in her right to assert protection, she is not entitled to recovery on the ground of forfeiture by Mrs. Hattie Tillman. The filing of the caveat and the failure of payment of the insurance money were no such violations of the conditions of items 13 and 14 of the will as would lead to forfeiture of all interests and thereby vesting absolutely in complainant a one-sixth interest in the first half of the estate and in the house and lot and insurance fund. Necessarily we will have to consider the two matters together; that is, the filing of the caveat and the failure to pay over the insurance fund.

What was the intent of the testator? Aside from payment of his debts and payment of certain minor legacies, the whole scheme of his testamentary intent was to provide for his wife, for certain Heard children, and for complainant. In order that he might provide for his wife, he directs to be set aside to her for life the house and lot and contents, and for her comfort, benefit, and support, all that is necessary of the income of the first half of the estate, to be reduced, as far as possible, to good securities and cash and ready paying investments. He includes the insurance fund in this interest. The whole may be designated a life interest, an annuity, or whatever term may be desired; it was, after all, only an equitable interest. The wife being provided for during her life, the Heard children and complainant, under a certain contingency, were to have this interest, less what the widow may have consumed. The title of the whole was to be placed in trust, for the twofold purpose of protecting both the corpus and the unused income, and to see that the widow had her proper portion, and complainant her proper portion in the event the latter had living a child at the death of the widow; otherwise this last to go to the Heard children. It was evident he did not want unseemly contests or litigation over the bequests so made, nor personal contentions nor strife.

Did the failure of Mrs. Tillman to pay over the insurance money, or did the filing of the caveat by her, produce a contest over this will, such as contemplated by the testator when he placed conditional limitations on her enjoyment of the interest bequeathed to her?

Taking the evidence as a whole, and looking at the conduct of all the parties interested, in their respective dealings with each other, I cannot conclude that there had been a defeat of the testamentary scheme.

In the construction of all legacies the court will seek diligently for the intention of the testator and give effect to the same as far as it may be consistent with the rules of law. Code, § 3900.

As to the insurance fund, while it was the intent of the testator to have this fund go into his estate, yet all parties, being *sui juris*, could direct it otherwise. The fact as found shows that all parties, including executors

and complainant, agreed otherwise, and this is not only the evidence of one, but all, of the witnesses. Mrs. Tillman was not put to her election with reference to the insurance policy. It is true the condition was incorporated in the will, and as such it was legal, and to that extent the numerous authorities cited by the learned counsel, and indicating careful research, are applicable; but she was not called upon to elect. The consent of all parties, as disclosed by the finding of fact, was not only tacit but positive that she could retain this insurance money, and, all legatees effected in the distribution of the estate being *sui juris*, such consent was legal.

But it is doubtful that complainant had any interest whatever in the proceeds of the insurance. By item 13 the proceeds of this insurance policy were to be turned over to the trustees to be held by them, and the rents, issues, and profits thereon were to be applied to the support, benefit, and comfort of the wife during her life, and at her death the corpus and unexpended profits were to go to the Heard children. If the wife failed and refused to deliver the proceeds to the executors, all bequests made her were revoked and were to be divided, with accumulations, between the Heard children and complainant. The only parties at interest in this insurance money in the first instance were the Heard children and Mrs. Tillman. There is no contingency provided for. The gift is absolute to them and to her, conditioned on her failing and refusing to turn over the proceeds. All the parties being of age and consenting, as the evidence shows, and the executors not requiring payment, and the trustees agreeing, as is shown by the evidence, there was under the facts no legal forfeiture of this fund, and therefore complainant had no interest therein.

But if she had an interest, did Mrs. Tillman fail and refuse to turn over this fund and thereby work a forfeiture in her (complainant's) favor? The language of item 13 is as follows: "In the event my said wife fails and refuses to deliver said insurance money to my executors to be and become a part of my estate, then the bequests to her are annulled."

I construe the language of this will, and the intent of testator, to imply willful failure and refusal, and I can find nothing from the evidence to justify a conclusion that there was any such element in the conduct of Mrs. Tillman. The words really mean omit to pay over, and, coupled with such omission, the idea of refusal on demand. To refuse means to deny on demand. *Shaler v. Van Wormer*, 33 Mo. 386; *Kimball v. Rowland*, 6 Gray (Mass.) 224; *Bowen v. Young*, 37 Misc. Rep. 547, 75 N. Y. Supp. 1027; *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541; and *Merifield v. Cobleigh*, 4 Cush. (Mass.) 178.

It is contended that there was a forfeiture by Mrs. Tillman of all bequests under the will except the sum of \$500 because of violation of the condition of item 14 of the will. This item provides that, if the wife should take legal steps to set aside the will and should not succeed in such endeavor, then she forfeits all bequests and takes only \$500, and all property bequeathed to her goes to the Heard children and complainant. It is contended that the filing of the caveat was such legal steps as would work a forfeiture, under this item. I cannot so conclude.

There is no question, as cited in (C. C.) 44 Fed. 518, 11 L. R. A. 567, by counsel for complainant, in *Brodhead v. Shoemaker et al.*, and as decided by Judges Pardee and Newman, that where the heirs are brought in and they contest the validity of a will and the capacity of the testator, in proceedings to probate a will in solemn form, the issue can be classified as a suit at law. Nor can there be question that in Georgia the court of ordinary is vested with exclusive jurisdiction in such cases, and that all legal steps to contest the validity of a will must begin in that court; nor is there any doubt but that the filing of a caveat is the institution of a suit at law, but the evidence discloses in this case that no final steps were reached. The legal steps in the mind of testator evidently meant a final suit at law, where the validity of the will was adjudicated after trial and judgment. The mere filing and almost immediate withdrawal, by consent of all parties, was no such suit. If this be true, the parties, each and all, were restored to

their original status. The act of probate could hardly be said to have been suspended.

"The real nature, design, and operation of a caveat is simply to suspend the act of probate until an investigation of the validity of the instrument may be had before the competent tribunal." 6 Amer. & E. Enc. (2d Ed.) 778; Maxwell, In re, 3 N. J. Eq. 614.

I construe the phrase "taking legal steps" in the will to mean that the testator contemplated a suit at law, involving a trial and adjudication against the caveator of the issue raised. It would be necessary in this view of the law to have a trial and adjudication before Mrs. Tillman could be held to the penalty of forfeiture under that condition of the will. The evidence shows withdrawal by consent before trial or the taking of any steps towards perfecting a suit, or action in its full meaning. Complainant was not necessarily, nor was she in fact, a party to this caveat. The executors propounded the will, and Mrs. Tillman filed objections to the probate. The executors were representatives of all the legatees, save the caveator. There is nothing peculiar about this case to take it out of the general rule that the executors represented complainant as well as other legatees, not joining in the caveat. Beall, Executor, v. Blake et al., 16 Ga. 136.

While this is true as to withdrawal of the caveat, the evidence does not sustain the contention of defendants that the executors could and did represent the complainant in the agreement had between Mrs. Tillman and the Heard children; nor do I find that complainant was in any way a party to the settlement. The findings of fact as to the nonagency of her husband relieves her of this contention in law, and there is nothing in the evidence to support the claim that Clements was her representative except as executor. Therefore she cannot be chargeable with having aided or advised either the caveat or the settlement. Hence the case of Donegan v. Wade, 70 Ala. 501, cited and relied on by defendants, is not applicable. Complainant neither actively interfered, nor took part, in either transaction.

As to the Validity of the Trust.

Mrs. Tillman not having forfeited her interest in the bequests by reason of retention of the insurance fund and because she filed, but withdrew, the caveat, it becomes important to ascertain how the settlement may have affected the interests of complainant.

Item second of the will bequeaths to the widow for her life the house and lot and contents.

Item third directs all the estate (except the above portion named in item second) to be divided by the executors into two parts after paying debts.

Item fourth names Clements, Heard, and Dr. Drennen as the three trustees for the wife, and the executors are to convey to these trustees, for the use and benefit of the widow for her life, the house and lot and furniture, and one-half of the balance of the estate and shall apply the rents, profits, and income, or so much as may be necessary, to the support, benefit, and comfort of the widow during her life. The remainder over, after the death of the wife, and unexpended accumulations, by item 5, go to the five Heard children and complainant, provided she shall have become a mother of children born to her, and living at the death of the wife; otherwise the whole remainder over goes to the five Heard children.

The most vital question in the case seems to turn upon the validity of the trust created by the preceding provisions of the will. If the trust was a valid trust, the legal title to the interest devised to the wife vested in the trustees immediately on the taking effect of the will. The will, of course, became operative immediately on the death of testator. Code Ga. § 3257. Though the legal title may have vested in the trustees, yet, if this be construed to be an executed trust and Mrs. Tillman was capable of taking and managing the property devised, then her equitable interest became immediately merged with the legal title and a perfect title vested in her as beneficiary to be held according to the terms of limitation of the trust. Code, § 3737. Was the trust, therefore, an executed trust? There is no question that the widow was capable of taking. Since the act of 1886, a

married woman sui juris and, not coming under any of the disabilities of incompetency to hold, as specially provided by the statute, can take.

But it has been held that a valid trust can be created in Georgia for the benefit of a person sui juris, for life, with remainder over in trust for another person sui juris. *Sinnott et al., Executors, v. Moore et al.*, 113 Ga. 908, 39 S. E. 415.

In answer to this, counsel for defendants with force contended that the remainder interest created by this will is contingent, and under the law of Georgia, as now obtaining, no particular estate is necessary to sustain a remainder, and the defeat of the particular estate for any cause does not destroy the remainder. Code, § 3675. They cite with confidence *Fleming v. Hughes*, 99 Ga. 448, 27 S. E. 791, where the court held that prior to the Code a trust was necessary to preserve a contingent remainder, but that such is not now the case. In connection with this authority, they confidently rely on the case of *Smith v. McWhorter*, 123 Ga. 290, 51 S. E. 474, 107 Am. St. Rep. 85, where the court held that, if there is no need of a trust to protect and preserve the interest of those who are to take by way of remainder, the trust will be limited to the life estate, and as to such it is executed. In the light of these authorities, it would seem that this trust is invalid, and that Mrs. Tillman takes the legal title and can dispose of her interest regardless of the rights of complainant as a contingent remainderman. But in the same case of *Smith v. McWhorter* the court continues discussion of this interesting question, and it would clearly appear that the testator had a right to, and in this will has made an executory devise, the nature of which is such that a trustee is necessary to carry out his intent. In this case cited the court, at bottom of page 290 of 123 Ga., page 475 of 51 S. E., 107 Am. St. Rep. 85 says: "Likewise a grantor, while not expressly conveying to the trustee the title to the remainder estate, may create a duty in the trustee with respect to the estate in remainder so as to convert the legal estate into an equitable one and make the trust executory until the duty may be performed under the terms of the trust. Thus, if the instrument creating the trust imposes upon the trustee the duty of making division among indeterminate remaindermen after the termination of a preceding life estate, the trust is executory pending the existence of the life estate. *Riggins v. Adair*, 105 Ga. 727 [31 S. E. 743]; *Cushman v. Coleman*, 92 Ga. 772 [19 S. E. 46]. Or, if the trustee is expressly empowered to act and manage the property for the life tenant, and for the infant or contingent remaindermen, the trust is executory until the life estate is determined. *Johnson v. Cook*, 122 Ga. 524 [50 S. E. 367]. Generally, where the title is conveyed to a trustee in trust for a life tenant, with a remainder over, where no express trust for those who are to take in remainder is created nor any duty imposed on the trustee with respect to the estate in remainder, such remainder is a legal and not an equitable estate. The mere fact that the remainder estate may be contingent does not necessarily convert it into an equitable estate. *Mitchell v. Turner*, 117 Ga. 959 [44 S. E. 17]. The contingency of the remainder, however, is always an important factor in construing the character of the estate passing to the trustee, in the effort to arrive at the true intent of the grantor."

In *Thomas & Co. v. Crawford, Trustee*, 57 Ga. 211, it was held that: "A bequest to George G. Crawford of certain property 'to be held by him in trust for the following purposes, to wit, the rents, issues, and profits, of the same to be paid over by him annually to William G. Howard during his lifetime, and at his death, the corpus of said property to be turned over by the said trustee to the children of the said William G. Howard, should he leave any children surviving him, and in the event of his death without leaving any child or children, then it is my will that said property shall be given to Margaret R. Crawford, if she is alive, and if she be dead, then to go to her children,' with discretionary power in the trustee to sell any part of the property during the trust, and to reinvest 'as in his judgment shall be for the benefit of said trust estate,' with option to make returns or not as he chooses, is a valid, subsisting executory trust, and the legal title to the corpus of the estate remains in the trustee to keep the corpus

secure for the contingent remaindermen to ascertain who they would be, and to divide the estate among them when they were ascertained, on the happening of the contingencies contemplated by the testatrix."

But the case of *Prince et al. v. Barrow, Executor, et al.*, 120 Ga. 810, 48 S. E. 412, is a decisive authority on the question in point. It involved the construction of the will of Gen. Henry R. Jackson, who devised and bequeathed his whole estate to his wife for and during her natural life, with the condition that she apply a designated portion of the annual income thereof to her own use, and the residue was to be taken, or such as was necessary, to the support of her sister, and such as she might see proper to the assistance of children or grandchildren of such sister, and the remainder was to be divided into three equal parts for distribution between his two living children and children of such deceased son. This sister died before the testator. The court held that upon his death the whole property became a trust estate during the life of the widow, to be held and administered by her in accordance with the direction of the will. In this case the court also held that where the amount of the beneficial interest to be taken by the cestui que trust was to be measured and determined by the discretion of the trustee appointed by the creator of the trust, a court of equity will not allow the trust to be destroyed by the refusal of the person nominated as trustee to accept the trust, or by his failure to execute it, if by any possibility it is capable of execution by the court. In this case, as in the case at bar, a contract was executed by and between the widow of the testator and his children and the children of his deceased son, Henry Jackson. In this contract the widow agreed to set at rest all claims which she might or could have under the will. It is unnecessary to go into the details of the agreement. In the opinion delivered by Presiding Justice Fish in this case, on page 817 of 120 Ga., on page 413 of 48 S. E., he said: "Undoubtedly the widow and the other heirs at law of testator could set aside this will, and by agreement settle the estate among themselves if they are the only parties who have any legal or equitable interest therein."

In this case the court also decides, after a very lengthy discussion of the question, with an admission that it has been the cause of much trouble and investigation, that a court of equity will undertake to administer or direct the administration of the trust sought to be established under the will, when the trustee named by the testator declines to accept the administration, or where it involves discretionary power on the part of the trustee. In settling that question the court takes up case after case, of both federal and state authorities, to sustain the decision rendered, which has heretofore been quoted, to the effect that the court will not allow the trust to fail for the want of a trustee. See 120 Ga. 821, 48 S. E. 412.

In view of these numerous authorities, I conclude:

- (1) That this bequest to Mrs. Tillman was an executory devise, and the trust was therefore valid and subsisting and the legal title to the part set aside for the trustees vested in trust eo instanti on the death of testator.
- (2) By the same authorities I conclude that all parties being sui juris and the trustees declining to accept, or stating that it was unnecessary for them to do so, the contract of purchase and sale between Mrs. Tillman and the Heard legatees, as to them, is a legal and binding contract; they having a legal right to contract and having actually contracted.
- (3) That complainant, not being a party to said contract, is not bound thereby, and has a contingent remainder interest in the house and lot and contents, and in the first half of the estate, said remainder subject to become vested in the event she have living a child or children born of her at the death of Mrs. Hattie Tillman, and if not the remainder becomes vested in the Heard legatees; that there is no evidence of a possibility of issue extinct, and pending the happening or not happening of the contingency named, her one-sixth undivided interest in said one-half (which, of course, is not to include the insurance fund) should be protected by the appointment of a trustee to hold and carry out the provisions of the trust as to said one-sixth.
- (4) That the one-sixth interest as referred to in the preceding paragraph is one-sixth of \$193,905.64, and is of the money value of \$32,317.60.

Recommendations.

The master recommends:

(1) That the executors, the defendants herein, be required to pay to such trustee as may be named by the court the aforesaid sum of \$32,317.60, and that the court frame such decree in accordance with these conclusions, if approved, as will protect said sum in the manner as provided under the provisions of the will creating the trust.

(2) That the injunction pendente lite be dissolved, and the executors be permitted to administer that portion of the estate undistributed.

(3) That a proper decree be made in favor of the executors in accordance with my conclusions (if approved) as to the second half of the estate.

(4) That the cost of this litigation (including master's fees and stenographer's services, but not including counsel fees) be taxed in such proportions as the court may determine; the master not assuming to make any recommendations as to assessing costs.

T. T. Miller, of Columbus, Ga., and Wimbish & Ellis, of Atlanta, Ga., for complainant.

A. W. Cozart and Carson & McCutchen, all of Columbus, Ga., and Spencer R. Atkinson, of Atlanta, Ga., for defendants.

NEWMAN, District Judge. This case is now before the court on exceptions to the report of the standing master, which have been argued and the matter submitted. Since hearing the argument I have gone over this case with much care, in view of the important and difficult questions involved.

There are exceptions by both sides, both before the master, to the draft of his report, and to the report as filed.

Complainant's exceptions are:

First, that the master erred in finding that, as a matter of fact, the widow, Hattie Tillman, did not fail and refuse to turn over to the executors the proceeds of the insurance policy, to become a part of the testator's estate, as required by the will. This exception is elaborated, but it goes to the question stated.

The second exception is that the master erred in finding and conclusion that the filing of the caveat to the will by Mrs. Tillman, and the failure to pay over the proceeds of the insurance policy, "were no such violations of the conditions of items 13 and 14 of the will as would lead to forfeiture of all interest, and thereby vesting absolutely in complainant a one-sixth interest in the first half of the estate, and in the house and lot and insurance fund."

In this connection it is claimed in the exceptions that the master erred in construing the language of the will to imply "willful failure and refusal" to turn over the proceeds of the insurance policy; the claim being in the exceptions that nothing in item 13 justifies the conclusion that the wife must be guilty of willful failure to make payment of the proceeds of the insurance policy to the executors, but that her omission to make such payment, without demand, deprived her of her legacy under the will other than the \$500.

It is further claimed in the exceptions that the master erred in concluding and holding that the phrase "taking legal steps" in the will means that a suit at law, involving a trial and adjudication against the caveator on the issues raised, was necessary.

The foregoing, as stated, is considerably elaborated in the exceptions; but this states the points involved in the exceptions.

The first exception of the defendants is that the master erred in holding that "the first, second, and third grounds of the demurrer, while stated differently, are practically a general demurrer to the bill, in that such a case has not been stated as entitles complainant to relief in a court of equity," and "in the opinion of the master these are not well taken and the same are overruled."

The second exception of the defendant is that the master erred in not finding that the complainant, Mrs. Drennen, was connected with the filing of the caveat "to this extent and in this way: That Mrs. Drennen was willing that the caveat be filed and assented to its being filed, provided R. E. Clements thought that it was for the best interest of Mrs. Tillman for the caveat to be filed, and upon that concerted action on the part of complainant and R. E. Clements the caveat was filed." Certain evidence is set out which, it is claimed, justifies this exception.

The third exception is that the master erred in finding that this bequest to Mrs. Tillman was an executory devise, and the trust was therefore valid and subsisting and the legal title to the part set aside for the trustees vested in trust *eo instanti* on the death of the testator, contending that the master should have found that the trust sought to have been created by the testator was illegal and void.

The fourth and fifth exceptions are that the master erred in recommending that a trustee be appointed to whom the executors should be required to pay the \$32,317.60, to be held for the benefit of the complainant pending the matter of the contingency provided for in the will.

The first matter that may be noted in passing on these exceptions is the objection to the master's finding on the pleading. No great stress was laid on this in the argument, and properly so, because I do not think the exceptions with reference to the pleading are meritorious.

The next exception in order, probably, is the exception of the defendants in that the master erred in not finding that Mrs. Drennen, the complainant, co-operated with Mrs. Tillman, or rather with her brother, R. E. Clements, in the filing of the caveat, and was such a party to it and co-operated in such a way that she is precluded now from raising the question she does by her pleading with reference thereto.

This has been a matter of some difficulty with me, and I have gone over the evidence with considerable care. But after full consideration of it, I am satisfied that the evidence justifies the master's conclusion on this subject. The familiar rule, so often controlling in questions of this sort, that where the master has the witnesses all before him, sees them, and hears their examination and cross-examination, and hears the case in the locality where the whole matter occurred, he can better judge of the value of the testimony than the court can from the written or printed record, is applicable here and should control. But, independently of this, I think that a careful examination of the

evidence, as it is before the court here, justifies the conclusion reached by the master "that Mrs. Drennen did not consent to, nor did she agree to, nor advise or originate, the filing of the caveat."

[1] The next exception that may be considered is the defendants' exception that the master erred in finding that the trust for Mrs. Tillman was properly and legally created by the will. In my judgment the master's finding and conclusion on this subject were correct. If a life estate in one-half of the testator's property had been given to Mrs. Tillman and a trust created for it, then a different question would be presented; but where, as in the present case, the trustees are given certain duties to perform with reference to the property, that is of managing it and collecting the income, and paying to Mrs. Tillman so much of the income, and only so much, as was necessary for her "support, benefit, and comfort," it makes an entirely different proposition. In addition to this, there was a contingency as to Mrs. Drennen taking in remainder any part of this first half of the estate, as stated in the fifth item of the will. The master, also, it seems to me, correctly found that the case of *Prince et al. v. Barrow*, 120 Ga. 810, 48 S. E. 412, is controlling, independently of the other authorities cited by him in his report. I have had no doubt from the beginning of the case that this trust was properly created under the law of Georgia.

The complainant's exceptions raise the most serious questions for consideration: First, with reference to Mrs. Tillman's failure to pay over the insurance money; and, second, the filing of the caveat to the will.

[2] As to the first matter, the \$5,000 of insurance money, the master correctly found that what occurred as to this did not work a forfeiture of Mrs. Tillman's legacy under the will. The evidence shows that every one interested in the estate agreed, and that it was a matter of unanimous consent, that Mrs. Tillman should retain this \$5,000. The master says on this subject:

"While there is no direct evidence by her (Mrs. Drennen) that she desired her mother to take the proceeds of the insurance policy, the evidence generally shows that it was conceded that Mrs. Tillman ought to have the insurance money. Some of the witnesses state positively that there was a general understanding that she need not pay this over to the executors. They and she testify no demand was ever made for it and no refusal on her part to pay it over."

There is no difficulty, under the evidence, in acquiescing in the master's conclusion that this retention of the insurance money by Mrs. Tillman, acceded to, and, under the evidence, practically agreed to, by everybody in interest, is insufficient to deprive her of her legacy under the will.

[3] The next, and most serious, question is the filing of the caveat by Mrs. Tillman, in the court of ordinary for Muscogee county.

On this question the master says:

"I construe the phrase 'taking legal steps' in the will to mean that the testator contemplated a suit at law, involving a trial and adjudication against the caveator of the issues raised. It would be necessary in this

view of the law to have a trial and adjudication before Mrs. Tillman could be held to the penalty of forfeiture under that condition of the will. The evidence shows withdrawal by consent before trial, or the taking of any steps towards perfecting a suit or action in its full meaning."

It may be unnecessary to go as far as the master does in construing this language "taking legal steps," that there must be a trial and final adjudication; but there should be shown, at least, some persistency by the caveator in contesting the will. The mere filing of the caveat on the 2d of July, and the voluntary withdrawal of the same on the 12th, would certainly not come within the meaning of the testator. He said in the will, "In the event my said wife shall take any legal steps to set aside this will and shall not succeed in such endeavor, etc." Conceding that the filing of the caveat was "taking legal steps," the almost immediate withdrawal of the caveat would hardly be "not succeeding in such endeavor," but would be a voluntary abandonment of the endeavor.

[4] The most important phase is that, as the result of this proceeding in the court of ordinary, the widow, Mrs. Tillman, received a lump sum down instead of a life support out of the estate, as provided by her husband in his will. The Heard children bought Mrs. Tillman's legacy, the caveat was withdrawn, and the will promptly admitted to probate, and the administration of the estate proceeded. This agreement was undoubtedly good between the Heard children and Mrs. Tillman; they were satisfied with it at the time, and it is apparently still satisfactory to them. How was Mrs. Drennen hurt by this agreement between the Heard children and Mrs. Tillman, which avoided a contest over the will and admitted it to probate? If the caveat had not been filed and the will regularly admitted to probate, and the estate been administered under it, her rights would have been measured by the will, and her participation in the first half of the estate, as it is called, would have been dependent upon the occurrence of the contingency provided for by Mr. Tillman in the will; that is, that she should take one-sixth of this one-half of the estate in remainder, provided she should have a child born to her and living at the time of Mrs. Tillman's death. As it stands now, she has the same right exactly, and that right must be protected, of course, in some way.

If the contest of the will had proceeded, and it had been set aside, of course Mrs. Tillman would have been the sole heir to the estate, and Mrs. Drennen would have received nothing. Her participation in the estate was only because of the will, and she has already received from the estate a large part of the one-sixth of the second half of the estate, which was given to her and the five Heard children.

As I have stated, it seems to me that the important feature of this branch of the case is this settlement between the Heard children and Mrs. Tillman, and if satisfactory to them, and good as between them, and Mrs. Drennen's rights are in no way affected by the same, I do not see how she can set up the claim made by this bill. If the caveat had not been filed by Mrs. Tillman and no steps of any kind taken to

contest the will, and the Heard children had bought Mrs. Tillman's interest of a life support in the estate, it would hardly be claimed that they violated the provisions of the will with reference to "taking legal steps," etc., to contest it. Mrs. Drennen would not have been affected in any way by this and would have had no cause to complain. Therefore the filing of the caveat and its almost immediate withdrawal was not "taking legal steps" to set aside this will, and, failing to succeed in such endeavor, neither was the purchase by the Heard children of Mrs. Tillman's right to a support for life out of the estate, nor were the two together, in my judgment, a violation of this provision of the will.

In the case of *Re Estate of John R. Hite* (Grove v. Cross, 21 L. R. A. [N. S.] 953¹), a contest was filed to a codicil to the will of Hite. The executor employed attorneys to meet the contest and filed his answer; motion was made by contestant to strike a portion of the answer, which motion was granted; the hearing of the contest was continued by consent several times, the case pending from April until January, when it was compromised. It was held that this amounted to a contest of the will, violating a provision of the will against contesting the same by any of the legatees. This made that case materially different from the present case, where nothing was done, as has been formerly stated, except to file a caveat and within a few days to withdraw it without any action whatever. The Hite Case, however, it may be conceded, is the strongest case cited by counsel for complainant.

Counsel for complainant has ably contended that the fact of this filing of the caveat to the will by Mrs. Tillman and the sale by her of her life support to the Heard children violated the "testamentary scheme" of Mr. Tillman. It is urged that the will discloses the fact that it was the testator's purpose that his wife should simply have a support for life out of the estate, and not a lump sum to be hers absolutely. It may be equally well urged that it was his belief that arranging his estate as he did was best for the comfort and happiness of Mrs. Tillman, that she would be relieved in this way of the care and responsibility of the property and have every comfort that she needed during life. But, however this may be, it could not interfere with the right of parties competent otherwise to contract.

The same suggestion might have been made as to the will in the case of *Prince v. Barrow*, supra. The first language used by the court in the opinion in that case is:

"Can the widow and other heirs at law of the testator set aside his will, and by agreement settle his estate among themselves? Undoubtedly they can, if they are the only parties who have any legal or equitable interest therein."

Would it not be equally true if the other parties having any interest under the will have their rights fully recognized and maintained by any agreement so made? Mrs. Drennen's rights under this will as the testator made it are certainly unaffected by the agreement between

¹ 155 Cal. 436, 101 Pac. 443, 17 Ann. Cas. 993.

the Heard children and Mrs. Tillman, or by the master in his findings and report. I am unable to reach any other conclusion than that the report of the master is correct, and that the exceptions by both the complainant and defendants should be overruled.

What has been said makes it unnecessary to consider or to discuss the contention of counsel for defendants that a court of equity will not, in any event, decree a forfeiture. It is an interesting question, but it need not be gone into here.

How Mrs. Drennen's contingent interest in this estate should be protected is a matter about which I am in doubt. Whether a trustee or trustees should be appointed by the court to hold the same for her benefit pending the contingency, or whether it is well protected as it stands in the hands of the executors, is a matter that may be determined on the taking of the final decree, when counsel can be heard, if they desire, with reference to the same.

GOINS v. SOUTHERN PAC. CO.

(District Court, N. D. California, Second Division. July 29, 1912.)

No. 15,546.

REMOVAL OF CAUSES (§ 103*)—PROCEDURE—NOTICE OF APPLICATION.

The provision of the federal Judicial Code (Act March 3, 1911, c. 231, § 29, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]) that in proceedings instituted in a state court for the removal of a cause "written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same," while not jurisdictional in the strict sense, nor intended to change the established procedure by vesting in the state court the power to pass on the right of removal if the papers are formally sufficient, is nevertheless one of substance, and, if not complied with and objection is duly made, the federal court cannot ignore it and retain jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221; Dec. Dig. § 103.*]

At Law. Action by John M. Goins against the Southern Pacific Company. On motion to remand to state court. Motion granted.

William J. Herrin, of San Francisco, Cal., for plaintiff.

George F. Buck, of Stockton, Cal., and A. A. Moore and Stanley Moore, both of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. This action was commenced in the state court since the taking effect of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), and in due time the defendant took certain steps to remove the cause here. It filed its petition, the formal sufficiency of which is not questioned, disclosing a controversy between citizens of different states, and that the amount involved is such as to give this court jurisdiction;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and it accompanied its petition with a proper bond, and duly procured from the state court a formal order of removal. But the defendant wholly failed, for what reason does not appear, to give notice to the adverse party of its purpose to take these proceedings to remove, as required by the Code (section 29), and, basing his motion solely on that ground, the plaintiff now asks that the cause be remanded, upon the theory that the omission of notice is fatal to the sufficiency of the proceeding.

As presented in the briefs, the question is made to depend upon whether the requirement of notice is fundamental and jurisdictional, as contended by the plaintiff, or is merely modal and formal and its omission but an irregularity, which will not defeat jurisdiction, as urged by defendant. I regard it as involving an inquiry somewhat broader than that. The requirement of notice of removal proceedings is new to the Code, not having found a place in any previous legislation upon the subject; and owing, perhaps, to the brief period elapsing since that act took effect, no question involving this feature has, so far as appears, before arisen. Its effect must therefore be determined largely, if not wholly, from a consideration of the purpose intended to be subserved thereby, and those considerations, in view of the history of the previous legislation and its construction by the courts, give rise to the uncertainty involved. In all respects other than the requirement of notice, section 29 is, in substantive effect, but a rescript of the provisions on the mode of removal as they existed at the time the Code took effect; the other changes being formal and in matters of detail. It provides, precisely as did the act of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]), for the filing in the state court within a given time of a petition for removal, to be accompanied by a bond, the conditions of which are the same in all respects as there required. This is followed by the provision as found in that act, that:

"It shall then be the duty of the state court to accept said petition and bond and proceed no further in said suit."

Then comes the provision in question, in these words:

"Written notice of said petition and bond for removal shall be given the adverse party or parties, prior to filing the same."

The remaining features of the section, relating to proceedings in this court, are in substance as found in the previous act.

The questions arising upon the provisions of the statute as they existed before supplanted by the Code had been mostly settled by judicial construction. Under those provisions, in the absence of any requirement of notice, the proceeding was treated as purely *ex parte*, and the functions of the state court were regarded as largely formal and perfunctory. Upon the filing of a petition showing a case for removal, accompanied by a proper bond, it was the duty of the state court upon application to make a formal order for removal and proceed no further; but, if it failed or refused to do so, the cause nevertheless stood removed, and the moving party could proceed to file

a copy of the record in the federal court. *Wabash Western Ry. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. No issues of fact upon the averments of the petition could be raised or tried in the state court, but all such questions were to be heard and disposed of in the federal court to which the cause was removed. And while the state court was not bound to surrender its jurisdiction upon a record which on its face did not in its judgment disclose a case for removal, its refusal was at the peril of having its judgment set aside by the Supreme Court of the United States, should its ruling prove erroneous. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962, and cases there cited. In other words, it may be stated broadly that, under the procedure obtaining before the Code, ipso facto, upon the filing of the requisite petition and bond, the state court was ousted of jurisdiction in the premises; and all questions as to defects or irregularities appearing in the proceedings were to be passed upon and determined by the federal court. Black's *Dillon on Removal of Causes*, §§ 191, 192. Of course, if an order of removal was procured in a case not subject thereto, or where the proceedings were so defective in substance as not to admit of the retention of the cause, then it was the duty of the federal court to remand it, upon the theory that the latter had not acquired jurisdiction by the order, nor the state court lost it.

Such being the settled state of the law, what was the purpose intended to be subserved by the requirement of preliminary notice of such proceedings in the state court? Plaintiff, as indicated, takes the extreme ground that it was intended to make the notice a jurisdictional prerequisite, in the absence of which the proceeding cannot be competently initiated. If by this is meant that it is jurisdictional in the same sense that a cognizable controversy is necessary, I cannot accede to the proposition, since manifestly, under well-settled principles, the requirement of notice may be waived. And if plaintiff intends to assert, as would seem to be implied by his argument, that by this new requirement Congress intended to work so radical a change in the effect of removal proceedings as vesting in the state, instead of the federal, courts the power to pass upon the sufficiency of such proceedings, to this I am equally unable to assent, since the provisions of the act in other respects, in the light of established principles of construction, do not sustain any such theory. Moreover, it is at variance with the rule of construction provided by the Code itself (section 294) for the interpretation of its provisions.

But I do not deem it at all needful to ascribe to Congress the intention to bring about a change in the established procedure so fundamental as that suggested, in order that we may perceive a sufficiently valuable purpose to be subserved by the requirement. The right of removal is justly regarded as one of great moment to the suitor, and its exercise not infrequently involves important changes in the aspects, if not the results, of the controversy; and the history of many cases involving the right tends to disclose the great desirability, if not the necessity, in order to fully protect the rights of the adverse party, by

avoiding expensive and unseemly delays and other inconveniences of a more or less serious nature that some notice of the proceeding be had. Appreciating this, courts in some instances have undertaken to supply the omission by a rule requiring notice (*Chiatovich v. Hanchett* [C. C.] 78 Fed. 193; *Creagh v. Equitable, etc., Soc.* [C. C.] 83 Fed. 849); and while they have eventually been compelled to hold that, no notice being required by the statute, none could be insisted upon as essential to the exercise of the right, no court has undertaken to belittle the value of such a provision in the law. The matter of surprise is, therefore, in view of the importance of the right, not that Congress should now have seen fit to make the requirement, but that it should not have earlier perceived the propriety of so doing. Without the effect of materially changing the method of procedure, it will tend to protect the parties and the courts as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed.

This view, however, does not aid defendant's position. Defendant relies solely upon cases to the effect that, the cause being one within the jurisdiction of the court, errors or irregularities in merely formal matters, directory in nature and not involving the substance of the right, will be overlooked or allowed to be corrected by amendment, and that the court will not for such a lapse remand the cause. *Deford et al. v. Mehaffy* (C. C.) 14 Fed. 381; *Bryant Bros. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *Northern Pacific T. Co. v. Lowenberg* (C. C.) 18 Fed. 339; *Woolridge v. McKenna* (C. C.) 8 Fed. 650. These cases do not meet defendant's necessities, for such is not this case. If it were a question of the formal sufficiency of a notice actually given, those cases would present some analogy; but it is an instance where a plain and unequivocal requirement of the statute has been wholly ignored, and it is now too late to supply the omission by amendment. The right of removal is purely statutory, and it has always been required that the statute be complied with in its substance. Can it be said that notice, prescribed as the initial step in the proceeding, is not of the substance? It matters not in such a case that the requirement be one not intended as jurisdictional in the extreme sense that it may not be waived. It has not here been waived, and must, I am satisfied, be considered as sufficiently of the substance that it may not be disregarded against objection. As I regard it, it is akin in its jurisdictional effect to the requirement of the statute involved in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164, that "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In analogy with the ruling made in the last case as to the effect of that requirement, if notice be waived, its lack will not prevent jurisdiction attaching; but if it be lacking, and the

objection duly insisted upon, the court cannot ignore it and retain jurisdiction.

But if I am at fault in the views expressed, the case must nevertheless be remanded. The question involved is obviously such as to give rise to a substantial doubt as to the right to retain this cause, and the established rule in such instances is that the doubt must be resolved against the jurisdiction here, which is purely the creation of the statute, and in favor of the state court as to whose jurisdiction no question can arise.

Accordingly the motion to remand will be granted.

In re WYOMING VALLEY CO-OP. ASS'N.

(District Court, M. D. Pennsylvania. August 21, 1912.)

No. 2,209.

1. STATUTES (§ 113*)—SUBJECTS AND TITLES—STATUTE AUTHORIZING CO-OPERATIVE ASSOCIATIONS.

Act Pa. June 7, 1887 (P. L. 365), entitled "An act to encourage and authorize the formation of co-operative associations, productive and distributive, by farmers, mechanics, laborers, or other persons," sufficiently expresses the purpose and subject-matter of the act in such title, which is sufficient to put any one reading it on inquiry as to the provisions contained therein with respect to the formation, government, and management of the associations authorized.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 141-144; Dec. Dig. § 113.*]

2. CONSTITUTIONAL LAW (§ 205*)—CORPORATIONS (§ 6*)—SPECIAL PRIVILEGES—ACTS AUTHORIZING CO-OPERATIVE ASSOCIATIONS.

A statute authorizing the formation of co-operative associations, productive and distributive, by "farmers, mechanics, laborers, or other persons," is not invalid as conferring special privileges or immunities because of a provision therein that "no credit shall either be given or taken" by such associations, and that any credit given in violation of such provision shall "cause a forfeiture of any credit thus illegally given."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205;* Corporations, Cent. Dig. §§ 30-34; Dec. Dig. § 6.*]

3. CONSTITUTIONAL LAW (§ 89*)—CORPORATIONS (§ 6*)—DUE PROCESS OF LAW—DEPRIVATION OF LIBERTY TO CONTRACT.

A statute authorizing the formation of a particular kind of corporation for specific purposes is not unconstitutional, as interfering with the right of contract, because of a provision that such corporations shall neither give nor receive credit.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89;* Corporations, Cent. Dig. §§ 30-34; Dec. Dig. § 6.*]

4. BANKRUPTCY (§ 76*)—INVOLUNTARY PROCEEDINGS—PETITIONING CREDITORS.

Persons who extended credit to a corporation, in violation of the express provisions of the statute under which it was organized that it should neither give nor receive credit, have no claims which could be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proved in bankruptcy against it, and cannot maintain a petition to have it adjudged an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.*]

In the matter of the Wyoming Valley Co-operative Association, alleged bankrupt. On motion to dismiss creditors' petition. Motion sustained.

D. O. Coughlin and B. W. Davis, both of Wilkes-Barre, Pa., for application.

Ralph W. Rymer, of Scranton, Pa., and Wm. N. Reynolds, of Wilkes-Barre, Pa., contra.

WITMER, District Judge. The Wyoming Valley Co-operative Association, incorporated under the act of 1887 (P. L. 365), is a corporation, and, if having committed acts of bankruptcy, may be adjudged a bankrupt under section 4b of the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), and its supplements, upon the petition of creditors having provable claims against it. Whether the claims of the petitioning creditors are of this class or character is the matter for determination. The claims are for merchandise sold and delivered on credit, wherefore the alleged bankrupt says they are not provable, in view of section 8 of the act under which the association was incorporated, and asks that the creditors' petition be dismissed. The section provides:

"That every transaction of said association shall be for cash, and no credit shall either be given or taken [except as therein enumerated], * * * and providing further, that any credit given to any such association in violation of the provisions of this act shall cause a forfeiture of any credit thus illegally given and that a notice to such effect shall be published, by such association, on its letter and bill heads, advertisements and other publications."

The claims of the petitioners do not fall within that class of debts which the act authorizes the association to incur. Being for merchandise sold and delivered at the special instance and request of the association, the debts are declared forfeited by the provisions of the section noted. If this legislation is constitutional, the claims of the petitioning creditors are not to be recognized, and being not provable the creditors cannot invoke the bankruptcy court to take charge of assets upon which they have no claim.

But it is contended that the act is unconstitutional, or that at least the portion exempting the association from liability for the debts incurred, and that the claims of petitioning creditors are valid and subsisting, and provable debts against such association. The attack is aimed at the title and body of the act. It is urged that: (1) The subject of the act is not clearly expressed in its title. (2) Special and exclusive privileges or immunities are thereby granted. (3) Abridgment of the right of persons to make contracts.

It is the duty of courts to construe statutes, and not assume the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

functions of the legislative in attempt to relieve the public of legislation regarded as unfavorable, except by mandate of the organic law. All statutes are to be so construed as to sustain the legislative intent. *Mauch Chunk v. McGee*, 81 Pa. 433; *Commonwealth v. Moore*, 2 Pa. Super. Ct. 162. The Legislature intended that the law on the subject-matter of the bill should be operative, and, if possible, it is the duty of the court to allow it this effect. All the presumptions are in favor of its constitutionality, and nothing but a clear violation of the Constitution will justify the court in pronouncing it void. Bearing these cardinal rules of construction in mind, is this aim well taken?

[1] 1. Is the purpose or subject-matter of the act clearly expressed in its title, and does it give reasonably clear notice of the matter to be found in it? If so, it is all that is necessary. This has been well settled in numerous cases in which the principle has been reiterated, as also that the title need not be an index of the contents of the act. The title, "To encourage and authorize the formation of co-operative associations, productive and distributive, by farmers, mechanics, laborers, or other persons," invites attention to a certain class of corporations thereby created, to be known as co-operative associations. The organization, controlling and governing of its acts, is necessarily embodied and implied in the use of the words employed. "It is not necessary that an act whose title designates the authorization and formation of a corporation shall, in the body of it, be limited to the creation of a corporate entity alone, but may include everything necessary to insure the existence of the corporation to attain the object of its formation and to carry on the business of the company." *Lewis' Sutherland*, *Statutory Construction*, vol. 1, p. 261; *State v. Wirt County*, 37 W. Va. 808, 17 S. E. 379.

The act was passed for the purpose, as expressed in the title, of encouraging and authorizing the formation of co-operative associations. It places upon its corporate association powers and limitations specifically set forth and provided, that its business shall be on a cash basis, whereof notice shall be given as therein provided, and that, in the event any person doing business with it, in violation thereof, the person so violating shall not be able to enforce any obligation growing out of the same. The provision is germane to the subject-matter expressed in the title of the act, from which notice or warning to the inquiring is inferred. The title is sufficient to place any person reading it upon inquiry, to discover what the act says in reference to the formation, organization, government, and management of the association authorized to be created and of its necessarily implied rights, privileges, and responsibilities. The title, thus inducing examination, accomplishes all that a more elaborate statement would furnish, by way of notice, and is therefore held sufficient. *Milvale Borough v. Evergreen Ry. Co.*, 131 Pa. 1, 18 Atl. 993, 7 L. R. A. 369; *Kelly v. Mayberry Township*, 154 Pa. 440, 26 Atl. 595; *Commonwealth v. Lloyd*, 2 Pa. Super. Ct. 6.

[2] 2. The act is not local or special, since its provisions apply any-

where and to any of the class created, excluding none. *Davis v. Clark*, 106 Pa. 377; *York School Dist.'s Appeal*, 169 Pa. 70, 32 Atl. 92. Nor does it confer on the corporation thereby created special or exclusive privilege or immunity, in that it provides that "no credit shall either be given or taken," except as therein provided, and furthermore that "any credit given to any such association in violation of the provisions of this act shall cause a forfeiture of any credit thus illegally given." The purpose of the act is to encourage the formation of co-operative associations, productive and distributive, by farmers, laborers, and others, for protection against those into whose hands are given the distribution of the necessities of life. Prices are constantly increasing as the desire for profit grows upon those who have succeeded in limiting the equalizing force of competition, and the toilers striving for a livelihood are by means of this act to be afforded an opportunity of minimizing the necessary living expenses, instead of diminishing the ratio of their comforts. The legislative intent is apparent and to be commended. Whatever may be the intent and purpose of the act, if in violation of any constitutional prohibition, it must not be tolerated. However, the provision forbidding credit and forfeiture of such extended was intended as a protection to the savings of those of limited means investing in the association for their mutual advantage. Rather than a privilege, the provision is intended, and in fact operates, as a restriction, taking away from the association one of the main powers and privileges which a commercial enterprise requires in order to establish and build up a lucrative business. Nor was it intended, or to be regarded, in the sense of an immunity against debt. The legislative intent was to discourage the transaction of the general business of the association on a credit basis, so as to prevent the extension of its business beyond its cash capital, endangering thereby all of its holdings. By the penalty provided for doing business with it otherwise than as stipulated, every person dealing with it is made an individual under the act to aid in observing strictly the provision that no credit shall be given or taken.

[3, 4] 3. The act creates a new corporate being, an association for a specific purpose. It is not an individual or person *sui juris* without limitation. The act creating it has itself limited the association in regard to its powers, and this the Legislature had a right to do. "The Legislature may declare the mode in which the contracts of parties shall be expressed and evidenced in order to be enforceable; it may deny validity to contracts of persons supposed to be incapable of contracting, as in the case of infants and insane persons, and to contracts contrary to good morals or public policy, as in the case of gaming contracts and contracts in general restraint of trade; it may interfere to regulate the contract of persons pursuing a public business, or who have voluntarily devoted their property to a public use, so that it has become affected with public interest." *Munn v. People*, 94 U. S. 113, 24 L. Ed. 77; *Commonwealth v. Brown*, 8 Pa. Super. Ct. 351. The right to acquire, hold, and dispose of property includes the right to make reasonable and proper contracts within the law. *Hooper v.*

People, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Story (5th Ed.) § 1590. This right is held, however, subject to such restraint as may be necessary for the common welfare, and of this the Legislature primarily is the judge. Its decision is not to be overturned by the courts upon the mere ground that the Legislature is unwise, or even unjust. The act being general, and calculated to aid and encourage a large body of people in an effort to better their condition, this court will refuse to interfere, since its duty to do otherwise does not clearly appear.

The cases cited by counsel, *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354, and others of its class, in which statutes were declared unconstitutional, since restricting the freedom of contracts, have to do with statutes relating to natural persons, or persons *sui juris*, wherein it appears that one class of citizens were singled out and denied rights which others enjoyed, without sound public reason, and do not here apply.

The credit extended by the petitioners seeking to declare the association in bankruptcy was in plain violation of the powers and prohibitions contained in the act of assembly, of which they were bound to take notice, and, notwithstanding the doings of the directors and managers of the association, their claims are not provable.

The petition of the creditors, asking that the association be declared a bankrupt, is dismissed, and the appointment of receiver is vacated. The costs to be paid by the petitioning creditors.

UNION OIL CO. v. CITY OF PORTLAND.

(District Court, D. Oregon. August 5, 1912.)

1. CONSTITUTIONAL LAW (§ 81*)—EXERCISE OF POLICE POWER.

The right to exercise the police power is a continuing one, and private property and business are always subject to such right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

2. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWER—EXERCISE OF POLICE POWER—REVIEW BY COURTS.

The courts will not inquire into the expediency of legislation passed in the exercise of the police power, nor the reasons which prompted its adoption, so long as it appears that the legislative authority acted in good faith, in the exercise of a reasonable discretion, and not arbitrarily; nor will they overthrow such legislation merely because they differ with the lawmaking power as to its efficiency, when opinion is divided on the question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

3. CONSTITUTIONAL LAW (§ 296*)—MUNICIPAL CORPORATIONS (§ 622*)—"DUE PROCESS OF LAW"—LEGALITY OF ORDINANCE.

The city council of Portland, Or., passed an ordinance designating certain locations in the city where fuel oil might be stored for sale and distribution, and prohibiting its storage for such purposes elsewhere. After complainant, an oil company, had purchased a tract of land in one of the localities where storage was permitted and prepared to build a storage plant thereon, the council repealed the ordinance and passed another, which left complainant's property within a restricted district. A hearing was given all parties, and there was no evidence that the council acted arbitrarily, or otherwise than in good faith. *Held*, that it was within the power of the council to reconsider the question after the passage of the first ordinance, and that the new ordinance was not unconstitutional as depriving complainant of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-829, 836-838, 840-846; Dec. Dig. § 296;* Municipal Corporations, Cent. Dig. § 1370; Dec. Dig. § 622.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

In Equity. Suit by the Union Oil Company against the City of Portland. On final hearing. Decree for defendant.

Cake & Cake, of Portland, Or., for complainant.

Frank S. Grant, City Atty., and L. E. Latourette, Deputy City Atty., both of Portland, Or., for defendant.

BEAN, District Judge. The complainant is now, and for some time has been, engaged in the sale and distribution of crude petroleum and its products for fuel purposes in the city of Portland. Prior to June 27, 1911, it had a storage and distributing plant on East Water street, which, on the day named, was destroyed by fire under such circumstances and with such results as to cause public discussion of the question whether the storage of oil for sale should be permitted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at all within the corporate limits of the city. A committee of the council was thereupon appointed by the mayor to examine into the question and report by ordinance. On August 30th the committee reported to the council and recommended the passage of an ordinance particularly describing certain locations in the city where oil might be stored for sale and distribution, defining the character of structures that might be erected therein, and prohibiting the storage of fuel oil elsewhere in larger quantities than 50 gallons, except by gas companies for the manufacturing of illuminating gas. The ordinance was immediately placed on its final passage, and adopted without discussion or a dissenting vote.

Fifteen days before the committee made its report, or the ordinance had been drafted, the complainant secured an option to purchase a tract of land in South Portland, subsequently described in the ordinance, and soon after its passage and approval took up such option, obtained a building permit from the city authorities, and purchased a portion of the material for its plant. When, however, it began grading the ground preparatory to the erection of its buildings and tanks, the citizens residing in the neighborhood first learned that the land purchased by it was one of the permitted districts, and were very much agitated thereby. They immediately brought the matter to the attention of the council, and it, after due consideration, repealed the ordinance and revoked the building permit previously issued to the complainant. At the same time one of the standing committees was directed to prepare and report to the council a new ordinance regulating the storage of oil within the city. This committee, after considering the matter and giving interested parties an opportunity to be heard, reported an ordinance which was adopted in January, 1912, and is known as Ordinance No. 24,652. This ordinance permits the storage of oil for fuel purposes in buildings for the use of such buildings, and the then existing storage facilities maintained for private use by railroad, gas, and power companies, to the extent of the reasonable requirements of such companies for the operation of their respective railroads and plants, but prohibits storage for the purpose of distribution, except by special permit of the council, and then not within 500 feet of any adjacent building, or within 3,000 feet of the harbor line, or 1,000 feet of any other distributing plant. The property purchased by complainant, and upon which it proposed to erect its plant, is within the restricted district, and it therefore seeks to enjoin the city from enforcing the ordinance repealing the districting ordinance and Ordinance No. 24,652, on the ground that they deprive it of its property without due process of law and deny it the equal protection of the law.

By its charter the city is given authority to regulate or prohibit the storage, manufacture, or sale of oil within the city limits. Section 73, subd. 36. The storage of fuel oil and its products is therefore within the police power of the city, and a proper subject for municipal regulation or prohibition. The determination of the city as to what is a proper exercise of its powers in this respect is, of course, not final or conclusive, but is subject to the supervision of the courts,

and will be disregarded when there has been an arbitrary and unwarranted interference with constitutional rights. *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169. The presumption, however, is in favor of the validity of the action of the council. The only question the courts will consider is whether the means adopted are reasonably adequate to the accomplishment of the purpose, or whether the police power has been used for the protection of the public, or for the mere spoliation and destruction of private property and rights; in short, whether the municipal authorities, under the guise of protecting the public interests, have arbitrarily interfered with private business, or imposed undue or unnecessary restrictions upon lawful occupations. As said by Mr. Justice Brown in *Holden v. Hardy*, 169 U. S. 366-398, 18 Sup. Ct. 383, 390 (42 L. Ed. 780):

"The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

[1] Now, the evidence in this case does not show that the council, in repealing the districting ordinance, acted arbitrarily and not in the exercise of a reasonable discretion. On a reconsideration, it found that the ordinance was adopted without full information as to the facts, and that it was a mistake, and hence corrected the error by repealing it. The contemplated construction of complainant's plant was no doubt the immediate cause of repeal; but it was not done to oppress or discriminate against the complainant, but for what the council deemed the public welfare. By the passage of the ordinance the council did not exhaust or bargain away the police powers of the city, or deprive itself of the right to repeal such ordinance if, in its judgment, the public interest required. Nor was it estopped from doing so because the complainant had taken up an option previously acquired and expended money in making preparations for the erection of its plant within the territory described therein. The right to exercise the police power is a continuing one, and private property and business is always subject to a legal exercise thereof. *Portland v. Cook*, 48 Or. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733; *City of Portland v. Meyer*, 32 Or. 368, 52 Pac. 21, 67 Am. St. Rep. 538.

[2] The courts will not inquire into the expediency of legislation of this kind, nor the reasons which prompted its adoption, so long as it appears that the legislative authority acted in good faith, in the exercise of a reasonable discretion, and not arbitrarily; nor will they overthrow such legislation merely because they may differ with the law-making power as to its efficiency, when opinion may be divided on that question. *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515.

[3] I am clearly of the opinion, therefore, that the complainant was not deprived of its property without due process of law, within the meaning of the federal Constitution, by the repeal of the districting ordinance. Nor do I think Ordinance 24,652 is open to the objection that it denies the complainant the equal protection of the law. The

equal protection clause of the fourteenth amendment does not take from the states the power to classify in the adoption of police laws. On the contrary, it admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore purely arbitrary. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that will sustain it, the existence of that state of facts at the time the law was enacted must be assumed. The burden is on one who assails the classification to show that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369. The ordinance in question, although somewhat indefinite, divides the storage of oil into two classes: (a) For private use; and (b) for general sale and distribution—and makes regulations applicable to all parties of the same class under like circumstances. This, I take it, is a classification resting upon a reasonable basis, and one the council could legally make. Every presumption is in favor of the ordinance, and this continues until the contrary clearly appears. *Powell v. Penn.*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

There was evidence tending to show that there is no more danger to the public from the storage of oil for sale and distribution than for private use; but whether such storage and the use made of the oil differs in degree to such an extent as to require different regulations is, in my judgment, a question of fact, and of public policy, which belongs to the legislative, and not the judicial, department. If the regulations adopted by the city are unwise, or unnecessarily oppressive to those engaged in the sale and distribution of oil, their appeal must be to the legislative branch of the government, and not to the courts. *Jacobson v. Mass.*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765.

The complaint is dismissed.

HAMILTON v. LEVISON.

(Circuit Court, S. D. New York. October 13, 1911.)

1. CORPORATIONS (§ 563*)—INSOLVENCY AND RECEIVERS—ENFORCEMENT OF LIABILITY OF STOCKHOLDERS—EFFECT OF DECREE MAKING ASSESSMENT.

A decree of a state court entered on petition of a receiver for a Minnesota corporation containing a list of its stockholders and stating the amount held by each, which decree provides that an assessment of \$100 shall be assessed "upon or against the persons or parties liable as stockholders of said defendant," constitutes an assessment against each stockholder named in the petition who has made default, and, if the court had jurisdiction, under Laws Minn. 1899, c. 272, § 5, is conclusive "as to all matters relating to the amount of and the propriety of and necessity for the said assessment."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2280, 2280½; Dec. Dig. § 563.*]

Rights and liabilities of pledgees of stock, see note to *Frater v. Old Nat. Bank of Providence*, R. I., 42 C. C. A. 135.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CORPORATIONS (§ 244*)—INSOLVENCY AND RECEIVERS—STATUTORY LIABILITY OF STOCKHOLDERS—PLEDGE OF STOCK.

Under the law of Minnesota a pledgee of stock of a corporation whose name is unconditionally entered on the books as a stockholder is liable to assessment at least for debts incurred while his name so remains on the books, and such liability may be enforced under Laws Minn. 1899, c. 272, on the insolvency of the corporation at any time thereafter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960-977; Dec. Dig. § 244.*]

Liability of transferrors and transferees of corporate stock for assessment, see note to *Campbell v. American Alkali Co.*, 61 C. C. A. 322.]

At Law. Action by Charles E. Hamilton, as receiver, against Benno Levison, Jr. On motion by plaintiff for directed verdict. Motion granted.

James E. Trask, for plaintiff.

Charles H. Fuller, for defendant.

HAND, District Judge. There are two material questions in this case: First, did the decree of the Minnesota court purport to assess the defendant in respect of his stock? Second, did that court have jurisdiction over him? If both these questions are answered in the affirmative, none of the other objections of the defendant are good, because in such case he may not raise collaterally any irregularities in the Minnesota proceedings. For example, it is of no consequence, even if his assessment ought to have been limited to a sum sufficient to pay the debts incurred while he was a stockholder, or if he was only secondarily liable in any case, because all such questions are necessarily before the court which makes the assessment, and, if that court once acquired jurisdiction, its decision of them is final, whether it is right or wrong. The defendant's only relief in such a case was to appear in that proceeding, or, if he was already in default, to apply for a reopening of the decree of assessment. Section 5 of the act of 1899 (Laws 1899, c. 272) provides that the assessment shall be conclusive "as to all matters relating to the amount of and propriety of and necessity for the said assessment." All that is open to dispute is that the defendant is not a stockholder at all, or that he does not hold as many shares as is alleged, or that he has discharged his liability, or that he has a counterclaim or personal defense. *Straw, etc., Co. v. L. D. Kilbourne, etc., Co.*, 80 Minn. 125, 83 N. W. 36. This is also the effect of *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

[1] The first question therefore is whether the true meaning of the decree is that the defendant shall be assessed \$100 on 30 shares of stock. The decree is informal, but its meaning is plain, I think. The words are that an assessment of \$100 shall be assessed "upon and against the persons or parties liable as stockholders of said defendant for, upon and on account of such shares of stock." It is quite true that the decree nowhere says who the stockholders are that are liable; but the receiver's petition states them in detail and so does the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

original complaint in the action. In each of those pleadings the defendant appears as a stockholder who is liable, and the decree certainly must be read with the whole roll. No one taking up the roll as a whole and remembering that the decree was entered upon a default can fail to understand the defendant to have been included within the term "stockholders liable." The petition alleged that the defendant was and now is a stockholder. Upon a default this must be taken as *pro confesso*, and amply supports the decree, so that its meaning is perfectly apparent. Moreover, the decree follows the statute, and in several of the cases in Minnesota the decree was in precisely the same words as this; e. g., *Bernheimer v. Converse*, *supra*. It is urged that the allegations of the petition as to the defendant's holdings are incorrect; but that is of no consequence, for the only material consideration here is as to the meaning of the decree. I agree that the plaintiff must prove the fact of stockholding dehors the record, and that the roll is not an estoppel of itself alone. But even if the facts are incorrectly alleged, the decree is none the less conclusive upon the propriety and necessity for the assessment, if the defendant was in fact under a stockholder's liability. There can be no doubt therefore that the decree does purport to assess the defendant upon 30 shares of stock and as a stockholder.

[2] The next question is whether there actually existed these jurisdictional facts, and to determine this I may not look at the record at all. If there was any jurisdiction, it was because the defendant was a stockholder in the sense contemplated by the statute. I shall assume to be true, without deciding, the story as he gives it, which is that he accepted the stock as collateral to a claim against the company; that he never signed any subscription paper; that the claim was subsequently paid; and that he then in good faith delivered up the certificate for cancellation. On the other hand, it is conceded that he accepted and kept a certificate for 30 shares in his own name from April 23, 1902, until August 18, 1904; that his name was duly entered upon the stock register during that period without any qualifying words; and that during that period there were incurred some debts which were not paid at the time of the decree here sued upon. Upon these facts he became and remained liable under the Minnesota statute for those debts until they were paid. *Gunnison v. U. S. Investment Co.*, 70 Minn. 292, 73 N. W. 149. Nor does the amount of this liability in the least affect the jurisdiction of the Minnesota court to bring him before it without personal service. Even if it be necessary to that jurisdiction that at least some debts so incurred remain unpaid, which I do not mean to decide, in this case there were some, and their amount is of no consequence now, though it was of the greatest consequence in that court when the question arose of the extent of the defendant's liability. Assuming, therefore, as I must, that he was liable to some extent at least secondarily, his was a liability in substance like that of any other stockholder and conferred an equal jurisdiction on the Minnesota court. The assessment proceedings, once instituted regularly under the statute, therefore became

as conclusive upon him in the respects mentioned as any other adjudication without any other service than what the statute provided.

However, he insists that, as he held the stock only as collateral, he is not liable. Had that fact been noted upon the stock book, it would apparently have freed him from liability. *Marshall Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 118 N. W. 55, 19 L. R. A. (N. S.) 249. At least it would have required me to consider the truth of the testimony regarding his subscription to the stock. But it was not so entered, and it is settled in Minnesota that a pledgee whose name is unconditionally entered as a stockholder is liable under the statute. *State v. Bank of New England*, 70 Minn. 398, 73 N. W. 153, 68 Am. St. Rep. 538. It is not pertinent to inquire into the principle of the distinction because the decisions of the Supreme Court of Minnesota are authoritative upon the question.

Therefore the defendant was liable from the time when he actually accepted the stock, and when, as a natural result of that acceptance, his name was entered unconditionally as a stockholder. He could only escape such liability by seeing to it that the character of his holding appeared upon the books of the corporation. Moreover, he remained liable until at the earliest his name was struck off, if it can be said to have been struck off by the entry made after he delivered up the stock. The intermediate liability between these two dates did not expire at the end of one year, as in the case of the liability of bank stockholders, in Minnesota, but it endured and was open to assessment when the corporation became insolvent. It could form the basis of a jurisdiction, not personal, quite as much as though he remained a stockholder at the time of the insolvency. The amount, propriety, and necessity of the assessment are all concluded by the decree under section 5 above mentioned. The plaintiff has shown that there was an existing liability on 30 shares and that is all that he need do.

I direct a verdict for the plaintiff for \$3,000, with interest.

ALLEGAR v. AMERICAN CAR & FOUNDRY CO.

(District Court, M. D. Pennsylvania. August 21, 1912.)

No. 288.

MASTER AND SERVANT (§ 92*)—MASTER'S LIABILITY FOR INJURY TO SERVANT— MEDICAL TREATMENT OF INJURED EMPLOYÉ.

An employer, who from motives of charity had an injured employé taken to a public hospital for treatment, cannot be held liable for the negligence of the physician or surgeon who treated him, and who is not shown to have been selected by the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 92.*]

At Law. Action by David Allegar against the American Car & Foundry Company. On motion by plaintiff for new trial. Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Paul J. Sherwood, of Wilkes-Barre, Pa., for plaintiff.
Sprout & Cupp, of Williamsport, Pa., for defendant.

WITMER, District Judge. The plaintiff's leg was broken on August 20, 1911, about 3 o'clock in the morning, while engaged at work at the defendant's works, at Berwick. The defendant's employes, immediately after the accident, took the plaintiff to the company's emergency hospital, and from thence to the public hospital of Berwick, for medical and surgical aid. The plaintiff says that he protested against being so taken, and requested to be carried to his home, a quarter of a mile away, and there have the services of his own physician, living some 9 or 12 miles distant. His limb was set and treated at the public hospital by a physician, and, after remaining there a short time, he was taken to his home. The limb at present shows some deformity and occasions suffering.

It appears that whatever was done at the time the plaintiff was taken to the public hospital was prompted by the purest motives of charity, and intended for the plaintiff's own comfort and personal benefit. It has not been made to appear that there was negligence in the selection of the place and the means for treatment of the plaintiff. Nor is negligence to be inferred from the present condition of the plaintiff's leg. This may have resulted from the physician's negligence, even though due care was exercised in his selection. That it was the lack of due care in the employment of a prudent physician, occasioning the suffering, was not made to appear. Even where it is shown that an employer undertakes, as a pure matter of charity, to furnish medical treatment to sick or injured employes, due care need only be exercised in the employment of a prudent physician. The employer is not liable beyond this for the negligence of the physician employed. Then, again, there is no evidence warranting the jury in finding that the plaintiff was treated by the doctor in charge at the public hospital at the request or by consent of the defendant.

Too much has been left for inference. Where the charge of negligence is relied on for recovery, as in this case, it must be clearly shown that the one called upon to answer has been at fault. In this the plaintiff has failed, and the motion for new trial is denied. An exception is here noted for the plaintiff.

BRANDT et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1912.)

No. 3,589.

1. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—FRAUD—EVIDENCE.

What constitutes such fraud as will invalidate a homestead entry is a matter to be determined from the facts and circumstances of each particular case.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—SUIT FOR CANCELLATION OF PATENT—FRAUD—CONCLUSIVENESS OF FINDING.

Findings by a Circuit Court, on conflicting evidence, that a homestead entry was fraudulent, and that subsequent purchasers bought with notice of it, are presumptively right, and will not be disturbed by an appellate court, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from the Circuit Court of the United States for the District of Wyoming.

Suit in equity by the United States against Samuel Brandt, William H. Bonsell, and Sarah R. Henry. Decree for complainant, and certain defendants appeal. Affirmed.

William B. Ross, for appellants.

Timothy F. Burke, U. S. Atty. (William A. Riner, Asst. U. S. Atty., on the brief), for the United States.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. This suit is by the government to set aside and cancel a patent to 160 acres of land in Converse county, Wyo., issued to the defendant Samuel Brandt, February 25, 1904, upon a commutation of a homestead entry made by him upon the land, upon the ground of the alleged fraud of said Brandt in making such entry and in procuring such patent.

From the record it appears that on October 12, 1900, the defendant Samuel Brandt, a citizen of the United States, made application in the proper land office in Wyoming under sections 2289, 2290, of the Revised Statutes of the United States, as amended, for a homestead entry upon 160 acres of the public lands of the United States, subject to homestead entry, situated in Converse county, in that state, and received from the receiver a receipt evidencing such entry. On making such application Brandt made and subscribed to the required affidavit, which he filed with the land office, as follows:

"That my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—29

person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself; and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself."

April 26, 1902, Brandt claimed that a mistake had been made in the description of one 40-acre tract of the land described in his entry, and filed in the proper land office an application to correct the same, which application was supported by his own affidavit and by that of the defendant Bonsell. The application was granted, and the entry corrected to describe the land which Brandt claimed was actually entered by him.

May 9, 1903, Brandt filed with the land office notice of his intention to make final proof on June 20, 1903, of his entry upon and cultivation of said land, and of his intention to pay the minimum price therefor, under section 2301 of the Revised Statutes, as amended, which notice was duly published as required by law. On said June 20, 1903, such proof was made by him before the proper land office pursuant to said notice, and in giving his testimony he was asked: "Have you sold, conveyed, or mortgaged any portion of the land, and if so to whom and for what purpose?" To which he answered: "I have not." He also made and subscribed to the final affidavit required of homestead claimants, in which he said: "I am the sole bona fide owner as an actual settler upon said land." He then paid to the receiver \$200, as the purchase price of said land at \$1.25 per acre and received from him a receipt therefor, and from the register a certificate that he had purchased the land and was entitled to a patent therefor; and a patent was accordingly issued to him for the land on February 25, 1904.

It is alleged by the government that the entry of and payment for said land by Brandt was not made by him in good faith for his own benefit and for the purpose of acquiring the same as a home for himself, but was made at the instance of the defendant Bonsell, and for the purpose of acquiring the land for him (Bonsell); and that he (Brandt) was to receive and did receive from Bonsell the sum of \$150, in addition to the \$200 advanced by Bonsell and paid by Brandt for the land; that on July 6, 1903, Brandt by warranty deed conveyed the land to Bonsell for the recited consideration of \$400; that on April 18, 1904, Bonsell and wife mortgaged the land, together with other lands and certain personal property, to the defendant Sarah R. Henry, who was the aunt of Bonsell, for the recited consideration of \$20,000; that the defendant Henry knew the circumstances under which the land was acquired by Brandt and conveyed to Bonsell; and that she was not a good-faith holder of the land under said mortgage.

The defendants Bonsell and Henry answered the bill of complaint,

and denied that the property was wrongfully or fraudulently acquired by Brandt for the benefit of Bonsell, and averred that the defendant Bonsell was a good-faith purchaser thereof from Brandt, and that the mortgage to Mrs. Henry was made in good faith, and that she had no knowledge of any wrongful or fraudulent practices upon the part of Brandt or Bonsell in acquiring the land, if any there were.

Brandt did not answer the bill, and it was taken pro confesso, and a decree entered setting aside and canceling the patent as against him. Upon final hearing the Circuit Court found as a fact against the other defendants that "the patent for the land was obtained by fraud, in that the defendant Samuel Brandt made entry of said lands and perfected the same in the interest of and for the use and benefit of the defendant William H. Bonsell, and not for his own sole use and benefit, and that the defendants William H. Bonsell and Sarah R. Henry were knowing of said fraud at the time of entry and proof, and when said patent was issued," and entered a decree setting aside and annulling said patent, and the deed of Brandt to Bonsell, and the mortgage by Bonsell and wife to the defendant Henry, so far as it related to said lands, at defendants' costs. The defendants Bonsell and Henry prosecute this appeal.

[1] The principal errors assigned and relied upon by the appellants are: That the court erred in finding that the land was fraudulently entered, and the patent thereto procured, by the defendant Brandt in the interest of and for the benefit of the defendant Bonsell, and that the mortgage of the defendant Henry was not in good faith.

These are purely questions of fact, to be determined from the testimony adduced upon the final hearing. The testimony is conflicting, and it would serve no useful purpose to recite or review it at much length, for it would interest no one but the immediate parties to this controversy, and would not establish a precedent for future cases. The defendant Brandt was a witness for the government, and he testified in substance:

"I worked for Bonsell in the summer of 1900, herding sheep; that about September of that year Bonsell asked me to take up a homestead for him, and offered me \$150 if I would do so. I told him I did not want to do it, but he kept at me until I finally decided to do so. He showed me the corner stone, and located me, and I filed on the land in October. Bonsell paid the filing fee. Later he wanted me to change the filing, because one of the 80's was better land, and it was amended in May, 1902. I built a 'dugout' on the land, continued to work for Bonsell, and visited the land at least once every six months. As time went on I thought about it, and decided to keep the land and run some stock of my own; but Bonsell kept crowding me to keep my promises and turn the land over to him—said he would make trouble for me if I did not do so. I made commutation proof on the land in June, 1903. Bonsell furnished me \$200 to pay for the land, and I deeded it to him in about two weeks after I made the proof. I never had the patent in my hands. It went to Bonsell. I never cultivated or improved the land, but built a 'dugout' upon it about 12 by 12, with a dirt roof, in which I lodged a few times and took meals there occasionally, and Mr. Castro, who was one of my witnesses when I proved up, took a meal there with me. During the time between when I entered the land and made the proof, Bonsell and myself had the use of this land. We let the stock run on it."

Bonsell denied that there was any agreement between him and Brandt whereby Brandt was to enter and procure the land for him, but admits that he made payments to Brandt from time to time from which Brandt might have paid the land office the government price for the land, and that Brandt deeded the land to him on July 6, 1903, some two weeks after the final proofs were made.

That Brandt never cultivated any part of the land is entirely clear; that he made no improvements thereon of any kind, except to construct a "dugout" of about 12 by 12 feet in size, with a dirt roof thereon, in which he lodged at times, and occasionally took his meals, is equally clear. In other words, the proof shows without any doubt that he never resided upon nor made any improvements upon the land, in the sense of making it a residence or home, and that this "dugout" was wholly uninhabitable as a place of residence.

It also appears that the defendant Mrs. Henry is an aunt of the defendant Bonsell; that she lived near the land in question, and that she and Bonsell both well knew of the extent of Brandt's occupancy and cultivation thereof; that she was interested with Bonsell as partner or joint owner in certain sheep and cattle transactions; that she sold out to him and took a mortgage in the sum of \$20,000, in April, 1904, upon this and other lands and certain personal property to secure this indebtedness.

There is some other testimony, but none that materially changes the facts as above stated.

In *McCaskill Co. v. United States*, 216 U. S. 504, 510, 30 Sup. Ct. 386, 389 (54 L. Ed. 590), Mr. Justice McKenna, in speaking of the requirements of the law in a case quite similar to this in its facts, said:

"It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the 'application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person'; that applicant will honestly endeavor to comply with the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a home, and to secure the gift the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses. Residence and cultivation of the land are the price that is exacted for its payment. It is in the power of the settler to modify the terms somewhat. He may substitute for a residence and cultivation for five years a residence and cultivation for not less than fourteen months; but he must make 'proof of settlement and of residence and cultivation for such period of fourteen months,' and pay the price provided by law for the land entered. This is known as the 'commutation' of his homestead entry."

See, also, *Gilson v. United States*, 185 Fed. 485, 107 C. C. A. 584.

Courts and Legislatures do not attempt to define with exactness what shall constitute fraud in all cases. Should they do so, "unscrupulous ingenuity" would devise some other method of committing it, and then claim that what was done was not within the definition. It is therefore left to be found from the facts and circumstances of each particular case.

[2] This case falls within the rule frequently held by this court, and recently in the case of *De Laval Separator Co. v. Iowa Dairy Separator Co.* (C. C. A.) 194 Fed. 423, where Judge Sanborn, speaking for the court, said:

"When the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively right; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand."

A careful reading and consideration of the entire testimony in the case, all of which, except the affidavits and other documentary evidence, was taken orally in the presence of the court, fails to convince that any error of law or mistake of fact intervened in the consideration or decision by the Circuit Court of the questions presented, and we find no ground upon which to disturb the decree under review.

Some other errors are assigned, but it must suffice to say that we have carefully examined and considered the record relating to them, and reach the conclusion that they are not sufficient to warrant a reversal of the decree. It must therefore be affirmed, and it is accordingly so ordered.

Affirmed.

LAMON et al. v. SPEER HARDWARE CO.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1912.)

No. 3,530.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 323*)—NECESSARY PARTIES—INTEREST.

All parties to joint judgments and decrees alike interested in their reversal must join in an appeal or writ of error, or be detached from the right to review them by some proper proceedings, or by their renunciation.

But when the interest of a defendant is separate from that of other defendants he may appeal or sue out a writ of error without them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1798-1805; Dec. Dig. § 323.*]

2. APPEAL AND ERROR (§ 323*)—DEBTORS IN AFFIRMED JUDGMENT FOR ATTORNEY'S BOND—SURETIES—JOINDER WITHOUT NOTICE—NECESSARY PARTIES TO APPEAL OF EACH OTHER.

The interest of the original debtors in a judgment which affirms a judgment below against them and, without suit on their supersedeas bond, joins the sureties on that bond with them in the affirming judgment without legislative authority so to do, is so separate and different from the interest of the sureties in that affirming judgment that the latter are not necessary parties to the writ of error to review it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1798-1805; Dec. Dig. § 323.*]

3. PRINCIPAL AND AGENT (§§ 99, 103*)—APPARENT AUTHORITY—SALE OF MACHINERY—PROMISE TO OPERATE.

A principal is as conclusively bound to innocent third parties by the acts of his agent in the exercise of the apparent authority within the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

scope of his agency with which his master clothes the agent as he is by the actual authority he confers upon him.

B., the agent of A. to sell a cotton gin plant and appurtenant machinery, agreed with the purchaser, in order to make the sale, to set it up and put it in running order.

Held, upon a consideration of the evidence, that there was substantial testimony for the consideration of the jury of the apparent authority of the agent to make the promise and of the fact that he made it.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 254-261, 278-293, 353-359, 367; Dec. Dig. §§ 99, 103.*]

4. DAMAGES (§ 23*)—BREACH OF CONTRACT—REMOTENESS.

In the absence of proof aliunde of knowledge by the defaulting party at the time the contract is made of special circumstances which make damages other than those that are the natural and probable effect of the breach likely to flow, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only, may be recovered.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58-62; Dec. Dig. § 23.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action by the Speer Hardware Company against W. A. Lamon and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions to grant a new trial unless plaintiff remit a specified sum from the judgment; otherwise affirmed.

See, also, 190 Fed. 734, 111 C. C. A. 462.

N. B. Maxey (George F. Haid and Maxey, Campbell & Beall, on the brief), for plaintiffs in error.

James F. Read (James B. McDonough, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

SANBORN, Circuit Judge. The Speer Hardware Company, a corporation, sued W. A. Lamon and J. W. Wallace for the purchase price of a cotton gin and other machinery and recovered a judgment of \$8,073.82 on April 2, 1906, in the United States Court for the Western District of the Indian Territory. The defendants sued out a writ of error from the United States Court of Appeals in the Indian Territory to reverse this judgment and gave a supersedeas bond dated September 29, 1906, with A. C. Miller, Fred Walker, B. A. Brunson, John W. Gibson, and William C. Edwards as sureties. The United States Court for the Eastern District of Oklahoma, to which this case had been transferred under legislation enacted subsequent to the rendition of the judgment, affirmed the judgment below in the year 1910 and rendered a judgment against Lamon and Wallace that the judgment of the court below was affirmed, that it appeared that that judgment against them below was for \$8,073.82, that the interest thereon was \$2,159.42, that it also appeared that they had executed a super-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

seedeas bond with A. C. Miller, Fred Walker, B. A. Brunson, John W. Gibson, and William C. Edwards as sureties, and that the Speer Hardware Company was entitled to \$807.30 damages, and that the Speer Hardware Company should recover of all these parties \$11,039.72 and costs. Thereupon Lamon and Wallace sued out a writ of error without joining the sureties and at the September term, 1911, this writ was dismissed on the ground that the sureties were necessary parties to the writ, and that they had not been separated from the right to review the judgment by any proper proceeding, or by renunciation. *Lamon et al. v. Speer Hardware Co.*, 190 Fed. 734, 111 C. C. A. 462. At the December, 1911, term of this court its attention was first called to the fact that the liability of Lamon and Wallace under this judgment is conditioned by their liability to pay for the merchandise which they bought to the amount of the judgment against them in the court of the Indian Territory, while the liability of the sureties is measured by the bond and by the jurisdiction of the United States Circuit Court to render a judgment against them without suit upon the bond or notice to them of the contemplated judgment, for the record discloses neither of these in this case. When these facts came to the attention of this court, it set aside the dismissal of the writ of error on the ground that the sureties were not necessary parties to it because their interest therein was separate from that of Lamon and Wallace. At the final hearing at this term counsel for the Speer Hardware Company renewed and again argued their motion to dismiss the writ, and that motion has again been considered.

[1] The rule upon this subject is stated by the Supreme Court in these words:

"The rule which requires parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established. But the rule only applies to joint judgments or decrees. In other words, when the interest of a defendant is separate from that of other defendants he may appeal without them." *Winters v. United States*, 207 U. S. 564, 574, 28 Sup. Ct. 207, 210, 52 L. Ed. 340.

[2] The liability of Lamon and Wallace to pay the judgment below depends entirely upon their liability to pay for the machinery for the purchase price of which this suit was brought. It is not in any way dependent upon the supersedeas bond. On the other hand, if the bond had not been given by the sureties, or if the court below was without jurisdiction to render a summary judgment against them on the bond, they are not bound by its judgment. A statement of the course of legislation pertinent to the liability of the sureties here may make the relative interests of these parties more evident.

Prior to March 3, 1905, appeals to the Court of Appeals of the Indian Territory were governed by the laws of Arkansas set forth in Mansfield's Digest (Act March 1, 1895, c. 145, § 11, 28 Stat. 693, 698). Those laws provided that a supersedeas should be allowed upon the giving of a bond conditioned "that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on appeal; also that he will satisfy and perform the judgment

or order appealed from in case it should be affirmed, and any judgment or order which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding in amount the original judgment or order, and all rents or damages to property during the pendency of the appeal, of which the appellee is kept out of possession by reason of the appeal" (Mansfield's Digest, § 1295); and that upon the affirmance of a judgment, order, or decree, judgment should be entered up against the sureties, and the court should award execution thereon (section 1312). *White v. Prigmore*, 29 Ark. 208. But on March 3, 1905, Congress enacted that thereafter all appeals and writs of error should be taken from the United States courts in the Indian Territory to the United States Court of Appeals in the Indian Territory "in the same manner as is now provided for in cases taken by appeal or writ of error from the Circuit Courts of the United States to the Circuit Court of Appeals for the Eighth Circuit." Act March 3, 1905, c. 1479, 33 Stat. 1081, § 12; *Morrison v. Burnette*, 154 Fed. 617, 620, 83 C. C. A. 391. The condition of the supersedeas bond required in such cases is simply that the plaintiff in error "shall prosecute his writ or appeal to effect and if he fail to make his plea good shall answer all damages and costs." Revised Statutes, § 1000; U. S. Comp. Stat. 1901, p. 712. The bond in the case before us was not given under the laws of Arkansas, but it was given on September 29, 1906, under and in the form prescribed by these laws of the United States. On November 16, 1907, the Indian Territory became a part of the state of Oklahoma, the laws of Arkansas ceased to operate therein (*Moore v. United States*, 85 Fed. 465, 468, 29 C. C. A. 269), and when, on September 19, 1910, the judgment here challenged against the sureties was rendered, the laws of the United States and of the state of Oklahoma were in force therein.

No law of the state of Oklahoma has been called to our attention which empowers any court of that state to render a judgment against sureties on a supersedeas bond without a suit against them upon the bond, except in cases of appeals to the district courts from probate courts and courts of justices of the peace (Compiled Laws of Oklahoma, § 6398), so that there does not appear to have been any authority to enter the judgment below under the Act of Conformity (Revised Statutes of United States, § 914 [U. S. Comp. St. 1901, p. 684]). There is no act of Congress which expressly authorizes such a judgment, and while cases may be found where, upon a notice of motion, or an order to show cause duly served upon the sureties, such judgments have been rendered under the Act of Conformity where a state statute empowered the courts of the state to follow that practice (*Egan v. Chicago Great Western Ry. Co.* [C. C.] 163 Fed. 344, and cases there cited), no case has challenged attention where a judgment against sureties on a supersedeas bond without any suit upon it against them, without any notice to the sureties of the contemplated judgment and without express legislative authority to enter it without such notice, has ever been sustained. The record in this case discloses such a judgment, a judgment that appears by this record to be *coram non iudice* and void as to the sureties. And the conclu-

sion is that the interest of the original debtors in a judgment which affirms a judgment below against them and, without suit on the bond, or notice of the contemplated judgment to the sureties on the debtors' supersedeas bond, joins them in the judgment against the debtors without legislative authority so to do, is so separate and different from the interest of the sureties in that judgment that the latter are not necessary parties to the writ of error of the original debtors to review it and the motion to dismiss the writ is again denied.

[3] Returning to the merits of the case: At the close of the argument in this court counsel for Lamon and Wallace, the defendants below, and counsel for the Speer Hardware Company, the plaintiff below, stated that the only questions to be considered by this court were whether or not the court below had erred in withdrawing any of the counts of the counterclaim in the answer from the jury. One of the causes of action of the plaintiff was for the unpaid balance of the purchase price of a cotton gin plant, which included a 70-horse Nagle Engine, an 80-horse Nagle Boiler, a 4-70 Lumus Saw Huller Gin System R. H. Pneumatic Distributor, Cleaning Feeders, 1-40 Unloading Fan and Separator, shafting, pulleys, belting, and other machinery. The price of this machinery was about \$4,700, and the ninth count of the defendants' answer was that it was one of the terms of the contract of purchase of this plant that the plaintiff should furnish plans and specifications for it and for the building to contain it, and should set it up and put it in good running order, that the plaintiff provided the plans and specifications, the defendants constructed the building in accordance with them, the plaintiffs set up the plant and machinery therein but could not make them operate properly, that thereafter the defendants were compelled to and did expend \$3,015.14 in rearranging the building, tearing out and replacing the machinery under the direction of an agent of the plaintiff whom it sent to put the machinery in proper running order and make it satisfactory. The testimony on the subject of this counterclaim was conflicting. Fred C. Kobel was conceded to be the agent of the plaintiff to sell the machinery. He and Mr. Speer testified that he had no authority to agree to furnish plans and specifications or to agree to set up the machinery, or to agree to put it in good running order. But he did in fact furnish the plans and specifications, and he went to the defendants' place of business and spent about 30 days setting up the machinery, and tried in vain to make it operate properly. A month or two after the machinery had been started, Mr. D. Speer went to the place where it was located, examined the plant, and he testified that he told Mr. Lamon that it was too late then to undertake anything that season and that when the season was over the plaintiff would try to adjust the matter satisfactorily. A Mr. Wills, who was present, and Mr. Lamon and Mr. Walker, each testified that at that time Mr. Speer said that the plaintiff would fix the plant up and make it satisfactory the next year.

A principal is as conclusively bound to innocent third parties by the act of his agent in the exercise of the apparent authority within the scope of his agency with which his master clothes him as he is by

the actual authority conferred upon him. *Dysart v. M., K. & T. Ry. Co.*, 122 Fed. 228, 230, 58 C. C. A. 592, 595; *Chicago, St. Paul, Mpls. & Omaha Ry. Co. v. Bryant*, 13 C. C. A. 249, 253, 65 Fed. 969, 973; *Mechem on Agency*, § 283; *Austrian & Co. v. Springer*, 94 Mich. 343, 349, 54 N. W. 50, 34 Am. St. Rep. 350; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *Foster v. Railway Co. (C. C.)* 56 Fed. 434, 436; *Inglish v. Ayer*, 79 Mich. 516, 44 N. W. 942. It is within the scope of the agency of one authorized to sell a cotton gin plant to agree for his principal, in order to sell it, to set it up and put it in running order, and Kobel's agency to sell the plant and the other evidence to which allusion has been made were sufficient to carry to the jury the question of his apparent authority to make such an agreement.

The witnesses Walker and Lamon testified that the latter told Kobel that he knew nothing about the gin plant, that he would buy it if Kobel would furnish the plans and specifications, put up the machinery, and make it run, and Kobel agreed to do so. Upon this issue of the terms of the contract Kobel testified that he never made any agreement to make the plans and specifications, to set up the machinery, or to put it in running order, and there were therefore two witnesses that the contract claimed by the plaintiff was made, and the facts that the plaintiff after the sale sent his agent to the defendants' place to set it up, and that after it was started it promised and endeavored to make it satisfactory.

The gin was started the last of September, 1901; there was substantial evidence that it would not operate properly; about the 15th or 20th of October, Mr. Speer went to the defendants' place of business and examined the plant, ordered a new set of suction pipes, and promised to fix it the next season. The next season a Mr. Johnson went to the defendants' place of business, overhauled and rebuilt the plant, and on his orders the defendants paid the expenses thereof, which amounted to \$3,015.14; but they paid Mr. Johnson nothing. The plaintiff furnished to the defendants a new engine in place of that which it had sold to them the year before, and it also furnished to them a new boiler. But Mr. Speer testified that the plaintiff sold them the new boiler and agreed to allow them \$700 for the old boiler on condition that they would pay what they owed. He also testified that Mr. Johnson was a man sent to the defendants at the plaintiff's request by Lumus & Sons Gin Company, the manufacturers of the plant, to look over the machinery, under a custom that if the machinery was found defective the Gin Company would pay, and if it was found without defects the Speer Hardware Company would pay the expense of sending the agent. He testified further that the plaintiff authorized Mr. Johnson "to go up there and look the machinery over and do anything he could to assist them and get the matter in good condition," but that he gave him no authority from the plaintiff to change the buildings, or to buy machinery, or to buy attachments, or to do anything more than to overhaul the machinery. After Mr. Johnson had examined the plant, he returned with Mr. Lamon to Mr. Speer and had a conversation with him in which Lamon testified that Johnson told Mr. Speer that the old boiler positively was not of suffi-

cient capacity to furnish the steam that would be required of the plant and there would have to be a larger boiler, and Mr. Speer "told him that if it was necessary it was all right, that he wanted the plant made satisfactory and to go ahead and use his own judgment and fix it in any way that it could be fixed, to make it a first-class plant," and that thereupon Johnson rebuilt the plant, and the defendants, on his orders, paid the \$3,015.14 for the materials and labor to do it. There is testimony in this record which tends to contradict or to modify many of the statements of the witnesses which have been recited. Nevertheless, there was certain substantial, though not conclusive evidence here of Johnson's authority to order the work and the materials for the plaintiff in order to make the plant satisfactory, and that on his orders the defendants paid for this work and for these materials on behalf of the plaintiff, so that the questions whether or not Johnson had authority from the plaintiff to do these things, and whether or not the defendants paid for the work and materials on the orders of Johnson for the plaintiff should have been submitted to the jury. The result is that the answer of the defendants states facts regarding their claim for the \$3,015.14 sufficient to constitute a counterclaim and that there was substantial evidence in support of it, so that it was error to withdraw that claim from the jury.

A careful reading of the testimony has also convinced that there was substantial evidence at the trial in support of the seventh count of the answer to the effect that the defendants were compelled to and did pay \$50 to hire men to handle the cotton during the year 1911, because the plaintiff failed to furnish and set up the machinery for unloading the cotton as it had agreed to do.

[4] No error has been discovered in the refusal to submit to the jury the counterclaims set forth in the third, fourth, sixth, eighth, ninth, tenth, and eleventh counts of the answer. The damages claimed in these counts, which were not submitted to the consideration of the jury, were not the natural or probable effect of a breach of the contract, and no notice that they would or might be caused by such a breach was given to the plaintiff before or when the contract was made. They are therefore too remote and are not recoverable under the established rule that in the absence of proof aliunde of knowledge by the defaulting party at the time the contract is made of special circumstances which make damages other than those that are the natural and probable effect of the breach likely to flow, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only, may be recovered. *Central Trust Co. v. Clark*, 92 Fed. 293, 297, 34 C. C. A. 354, 358; *Northwestern S. B. & Mfg. Co. v. Great Lakes E. Works*, 181 Fed. 38, 42, 43, 104 C. C. A. 52, 56, 57. Nor was there any error in the submission of the claims set forth in the counts of the answer to which reference has not been specifically made. The result is that the judgment below must be reversed and the case must be remanded to the proper court below with instructions to grant a new trial, unless plaintiff within

45 days from the date of the filing of this opinion shall remit from the judgment below \$3,065.14 principal, interest thereon at 6 per cent. per annum from the 8th day of May, 1903, to the 2d day of April, 1906, the date of the first judgment, interest on the amount of the foregoing principal and interest from April 2, 1906, until September 19, 1910, the date of the second judgment, and the \$807.30 penalty included in said judgment, shall reduce and satisfy that judgment to the extent of the aggregate of these amounts and shall file in this court a certified copy of such remittitur and satisfaction, in which event, but not otherwise, the remainder of the judgment below will be affirmed. Let the plaintiffs in error recover their costs in either event.

WILLIAMS v. MOLTHER et al.

(Circuit Court of Appeals, Second Circuit, April 9, 1912.)

No. 197.

1. COURTS (§ 329*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—INFERENCE FROM PLEADING.

Where the bill in a suit in a Circuit Court to compel the local inspectors to give complainant an examination for a pilot's license, which they had refused to do, alleged that complainant was thereby deprived of a right given him by the laws of the United States to his damage in "over \$1,000," and no objection was made because the bill did not show the requisite amount involved to give the court jurisdiction, an appellate court may infer that the damages would exceed \$2,000, exclusive of interest and costs, and entertain jurisdiction, since in such case complainant would be authorized by an amendment to place the value of the right of which he was deprived at such sum.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

2. PILOTS (§ 5*)—LICENSES—CONSTRUCTION OF STATUTE—RIGHT TO EXAMINATION.

Rev. St. § 4442 (U. S. Comp. St. 1901, p. 3037), found in title 52 for the regulation of steam vessels, provides that, "whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and, if satisfied, from personal examination of the applicant, with the proof that he offers that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license." Section 4405 of the same title (U. S. Comp. St. 1901, p. 3017) authorizes the board of supervising inspectors to "establish all necessary regulations required to carry out in the most effective manner the provisions of this title and such regulations when approved by the Secretary of the Treasury shall have the force of law." *Held*, that sections 42 and 46 of rule 5 of the regulations established under such authority, which provide that no license as pilot shall be issued to any person who has not served at least three years in the deck department of a steamer, motor vessel, sail vessel, or barge consort, are not "necessary regulations required to carry out in the most effective manner" the provisions of title 52, but, on the contrary, are in direct contradiction of section 4442 thereof; that, while no

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

citizen has an inherent right to a pilot's license, every citizen claiming to be a skillful pilot of steam vessels has a right to be examined for it; and that such regulations, which impose an arbitrary condition precedent to the exercise of such right, are invalid.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit in equity by Frank R. Williams against John Molther and Robert Chestnut, as local inspectors of steam vessels. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 189 Fed. 700.

Frank Williams, in pro. per.

George B. Curtiss, U. S. Atty., of Binghamton, for appellees.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. December 28, 1908, Frank R. Williams, the complainant, applied to John Molther and Robert Chestnut, as United States local inspectors of steamboats at the port of Oswego, for examination for a license as second-class pilot on Lake Ontario and River St. Lawrence.

On the same day the said inspectors refused to examine him because his application did not show that he had three years' service in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort, as required by sections 42 and 46 of rule 5 of the rules and regulations of the board of supervising inspectors of steam vessels. Thereupon he appealed to the supervising inspector at Cleveland, Ohio, who affirmed the decision of the local inspectors. Thereupon he appealed to the supervising inspector general at Washington, who affirmed the decision of the supervising inspector. Thereupon he appealed to the board of supervising inspectors, who decided that it was a matter over which the board has no control.

He then turned to the courts and first to the United States District Court, which we held had no jurisdiction. 180 Fed. 709, 103 C. C. A. 491. Finally, he began this action in equity against the local inspectors (appearing throughout on his own behalf) in which he alleged his own qualifications, the refusal of the defendants to examine him, and prayed that sections 42 and 46 of rule 5 of the board of supervising inspectors of the department of commerce and labor be declared illegal and void, and that the defendants be enjoined from enforcing the same, and from refusing to examine him for the license. The defendants answered, admitting that the complainant had made the application, and that they had refused it for reasons stated in the bill.

The cause was tried upon an agreed statement of facts which submitted to the decision of the judge holding the Circuit Court the single question of law whether the provisions of the rules complained of are invalid and void or are a lawful condition precedent to the right of ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amination for a pilot's license. The United States Attorney, who represents the defendants, states in his brief:

"The plaintiff appears to be an honest citizen and is actuated by a belief that he has been deprived of a legal right; hence the government has not deemed it advisable to insist on technicalities concerning the form of action under which the question involved is sought to be determined."

[1] The action is certainly one of a civil nature in equity arising under a law of the United States within Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), giving jurisdiction to the Circuit Court. But the only allegation contained in the complaint as to the amount or value of the matter in dispute is that the act of the defendants constitutes an invasion of the complainant's business privileges to his loss and irreparable injury of over (without saying how much it is over) \$1,000. The act requires that the matter in dispute should exceed, exclusive of interest and costs, the sum or value of \$2,000. As the complainant is a layman and without counsel and the defendants have not taken any objection on this ground in the Circuit Court, and that court has decided the question of law which the parties agreed to submit to it, we are not disposed to suggest this objection.

If the complainant were to ask leave to amend, we would certainly grant it. And there is authority for our holding that we may infer that unliquidated damages alleged to be in excess of \$1,000 are not less than \$2,000, exclusive of interest and costs, because of the conduct of the parties. Mr. Justice Holmes said in *Giles v. Harris*, 189 U. S. 475, 485, 23 Sup. Ct. 639, 641 (47 L. Ed. 909):

"It is true that by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, 434 [U. S. Comp. St. 1901, p. 508], the Circuit Courts are given cognizance of suits of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States, in which the matter in dispute exceeds the sum or value of \$2,000. We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money. *Wiley v. Sinkler*, 179 U. S. 58 [21 Sup. Ct. 17, 45 L. Ed. 84]; *Swafford v. Templeton*, 185 U. S. 487 [22 Sup. Ct. 783, 46 L. Ed. 1005]. But, assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing. The certificate was made *alio intuitu*. There is no pecuniary limit on appeals to this court under section 5 of Act 1891, c. 517, 26 Stat. 826, 828 [U. S. Comp. St. 1901, p. 549], *The Paquete Habana*, 175 U. S. 677, 683 [20 Sup. Ct. 290, 44 L. Ed. 320]. And we do not feel called upon to send the case back to the Circuit Court in order that it might permit the amendment. In *Mills v. Green*, 159 U. S. 651 [16 Sup. Ct. 132, 40 L. Ed. 293]; s. c., 69 Fed. 852 [16 C. C. A. 516, 30 L. R. A. 90], no notice was taken of the absence of an allegation of value in a case like this."

Reference may also be had to the language of the court in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 310, 17 Sup. Ct. 540, 41 L. Ed. 1007.

In *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84, and *Swafford v. Templeton*, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005, it was held that the deprivation of a man's political and social rights, such as the right to vote, may be alleged to involve damage in money.

[2] Section 4405 U. S. Rev. Stat., provides:

"Sec. 4405. (Meetings of board; assignment of districts.) The supervising inspectors and the supervising inspector-general shall assemble as a board once in each year, at the city of Washington, District of Columbia, on the third Wednesday in January, and at such other times as the Secretary of the Treasury shall prescribe, for joint consultation, and shall assign to each of the supervising inspectors the limits of territory within which he shall perform his duties. The board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law. The supervising inspector for the district embracing the Pacific Coast shall not be under obligation to attend the meetings of the board oftener than once in two years; but when he does not attend such meetings he shall make his communications thereto, in the way of a report, in such manner as the board shall prescribe."

And under this the board of supervising inspectors have adopted sections 42 and 46 of rule 5:

"42. No original license as second-class pilot shall be issued to any person who has not had three years' experience in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort. The local inspectors shall, before granting a license as second-class pilot, satisfy themselves that the applicant is qualified to steer; provided, that on the Mississippi and territory rivers one year of such required experience must have been in the pilot house as steersman."

"46. No original license for pilot of any route shall be issued to any person, except for special license for steamers of 10 gross tons and under, who has not served at least three years in the deck department of a steamer, motor vessel, sail vessel, or barge consort, one year of which experience must have been obtained within the three years next preceding the date of application for license, which fact the inspectors may require, when practicable, to be verified by the certificate, in writing, of the licensed master or pilot under whom the applicant has served, such certificate to be filed with the application of the candidate."

The trial judge held that these rules were "necessary regulations required to carry out in the most effective manner" the provisions of title 52, and were not inconsistent with Rev. Stat. U. S. § 4442, which reads:

"Sec. 4442. (License of pilot.) Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination, of the applicant, with the proof that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this title."

It is fair to say that Attorney General Miller came to a similar conclusion in respect to a master under section 4439, Rev. Stat. U. S., 20 Opinions Attorney General, 213.

We are not convinced by these opinions. Congress unquestionably has power to regulate commerce upon the waters involved, and in so doing to restrict the right to act as pilot upon steamers navigating them, to persons who shall have obtained a license. It can also make the very regulations complained of. But the question is whether these regulations are necessary to carry out the provisions of title 52, Rev.

Stat. U. S., which the board of supervising inspectors has the power to make. To exclude from the right of examination for a license persons who have not had the prescribed experience seems to us to be a direct contradiction of section 4442, which entitles any person claiming to be a skillful pilot of steam vessels to be examined by the local inspectors. While no citizen has the inherent right to a pilot's license, every citizen has a right to be examined for it. The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason. The period of such experience necessary to qualify an applicant would seem in the nature of things to be different in different cases. One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience. An engineer or an owner who was not in the deck department at all might well by observation and attention have acquired all the qualifications required by the law. The rule imports into the law a condition not to be found in it, and we do not think that it is necessary to carry out the provisions of the title nor even useful or appropriate for that purpose, as it may prevent citizens entirely competent from obtaining a license. Moreover, as we stated in our previous opinion, "such or similar restrictions might easily be used to create a dangerous monopoly of the business of pilots and marine engineers."

The decree is reversed and the court below directed to enter a decree declaring the provisions in question of rule 5 invalid, and directing the defendants to examine the complainant.

In re FISHEL et al.

In re NATIONAL DISCOUNT CO.

(Circuit Court of Appeals, Second Circuit. June 5, 1912.)

No. 230.

1. USURY (§ 111*)—AFFIRMATIVE RELIEF—BANKRUPTCY.

A petition in bankruptcy for an order directing the trustee to surrender the proceeds of accounts to petitioner under a collateral loan contract, and an answer pleading usury, and asking that the petition be denied, and the trustee be declared entitled to the proceeds, does not show a prayer by the trustee for affirmative relief within New York General Business Law (Consol. Laws 1909, c. 20) § 377, under which only a borrower is entitled to affirmative relief against a usurious contract without paying the amount due, with legal interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 272-306; Dec. Dig. § 111.*]

2. USURY (§ 53*)—USURIOUS CONTRACT.

A contract for a loan providing for a 5 per cent. commission to be paid the lender for certain services, such as collecting accounts held as col-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lateral security, in addition to legal interest on the loan is usurious, it appearing that actual rendition of such services was not contemplated.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 91, 114–118; Dec. Dig. § 53.*]

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Henry W. Fishel and another, bankrupts. On petition by the National Discount Company to review, and on appeal by the company from an order of the District Court modifying an order allowing a claim of said petitioner. Affirmed.

Jerome, Rand & Kresel (William J. Wallace and Isadore J. Kresel, of counsel), for appellant.

Stroock & Stroock and Hays, Hershfield & Wolf (S. M. Stroock, Charles Levy, and Ralph Wolf, of counsel), for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. [1] The National Discount Company is the assignee of certain specified accounts due Fishel, Nessler & Co. as collateral for repayment by them of advances made under an agreement dated August 8, 1910, whose sixth article is:

"Sixth.—The customer agrees to pay to the banker in cash or allow the banker, if it so elects, to retain from any moneys advanced, collected or received upon the accounts of the customer, a commission of 5 per centum on the gross amount of accounts of the customer assigned to the banker, to reimburse the banker for services rendered or to be rendered in the collection of the accounts, such as sending out statements, attending to all correspondence, adjust returns, allowances, discounts and investigations with reference to same, and for assisting in extending credits, securing references and reports and generally in aiding and assisting the customer with his credit department. The customer also agrees to reimburse the banker for such outlays as exchange on checks and postage."

Before the agreement was executed the borrowers wrote as follows to the lenders:

"Mr. Julius Lewis (Natl. Discount Co.), 682 Broadway, City.

My Dear Sir: In signing the enclosed formal agreement, it is agreed and understood that you are at no time to have any communication whatever with any of our customers and that the accounts are only to be used as collateral for loans made. We are to collect all outstandings and agree to endorse and turn over the checks to you as received and if at the expiration of each loan the full amount is not paid, we are to send our check to wipe out such loan."

The proofs show that the lender was not intended to perform, and did not perform, any of the services mentioned in section 6 of the agreement.

November 3, 1910, a petition in bankruptcy was filed against Fishel, Nessler & Co., and a receiver appointed who was subsequently elected trustee. It was found that the bankrupts had assigned some of the same accounts assigned to the National Discount Company to two other lending companies, viz.: Bloomingdale Bros. and Traders' Commercial Company. It being obvious that collection by any one under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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these circumstances would be difficult, the lending companies, November 15, 1910, entered into the following agreement which the receiver, though not a party signatory, actually carried out:

"Whereas, the National Discount Company, Bloomingdale Bros. and Traders' Commercial Company claim to be the owners of certain outstanding accounts of the above-named alleged bankrupts, and

"Whereas, it appears that a large number of the debtors on such outstanding accounts have refused to pay the said accounts, and

"Whereas, it appears that it would be advantageous to have all outstanding accounts collected by and through John S. Sheppard, Jr., receiver in bankruptcy of the above-named alleged bankrupts, it is stipulated as follows:

"First.—That all outstanding accounts of the above-named alleged bankrupts owned or claimed by the parties above named, be collected by and through the receiver herein.

"Second.—That all moneys collected by the receiver from the accounts claimed to have been assigned, shall be kept by the receiver in a separate fund, subject to the rights and remedies of the parties hereto, and subject to the further order and determination of the court.

"Third.—That any and all merchandise returned to the receiver on the accounts claimed to have been assigned, shall be kept separate and apart from the rest of the merchandise in the possession of the receiver and be subject to any and all claims of the parties hereto, and subject to the further order and determination of the court.

"Fourth.—It is further understood and agreed that the National Discount Company, Bloomingdale Bros. and Traders' Commercial Company will write to the debtors with whom they have been in communication to the effect that the account should be paid to the receiver, and otherwise facilitate the receiver in the collection of the accounts.

"Fifth.—It is understood that this stipulation shall be without prejudice to the rights of the parties hereto and that the fund collected by the receiver as well as the merchandise set aside by the receiver from the outstanding accounts claimed to have been assigned, shall be subject to the claims of the parties, as to ownership and priority, with the same force and effect as if this stipulation had not been entered into.

"Sixth.—Nothing herein contained shall authorize the receiver to bring suits on said account, except with the consent to be hereafter obtained from the three parties or such of the three parties interested in the claim in which suit is contemplated."

January 9, 1912, by a subsequent stipulation, the receiver turned over the said moneys and proceeds to himself as trustee.

There is not much difficulty about the legal principles involved, but there is some as to what the parties, in view of their stipulations and their conduct, intended.

In this state before statutory regulation to the contrary, one who paid more than the legal rate of interest for the loan of money could recover the excess, provided he repaid the money actually loaned (*Wheaton v. Hibbard*, 20 Johns. [N. Y.] 292, 11 Am. Dec. 284; *Palen v. Johnson*, 50 N. Y. 49); and, of course, equity would not give the relief by requiring the cancellation or surrender of instruments securing usurious loans except upon the same condition (*Livingston v. Harris*, 11 Wend. [N. Y.] 329). The statutory changes so far as need be considered in this case are found in the following sections of the General Business Law:

"373. Usurious contracts void. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods, or other things

whatsoever, whereupon or whereby they shall be reserved or taken or secured or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void. Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled."

"377. Borrower bringing an action need not offer to repay. Whenever any borrower of money, goods or things in action, shall begin an action for the recovery of the money, goods or things in action taken in violation of the foregoing provisions of this article, it shall not be necessary for him to pay or offer to pay any interest or principal on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief to the borrower in any case of usurious loans forbidden by the foregoing provisions of this article."

It will be seen from the foregoing that no lender can recover on any usurious contract who in making out his case develops the taint of usury or against whom the borrower or his privies set up and sustain the defense of usury. This is a necessary result of the statutory provision that all such agreements shall be void. On the other hand, although the borrower and his privies can attack usurious agreements, only the borrower can do so free from the condition of paying the amount actually loaned with legal interest. This is the difference made between defending and attacking on the ground of usury. The Court of Appeals of New York has strictly confined the privilege of attacking without paying the amount loaned with legal interest to the actual borrower, holding that an assignee in bankruptcy under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 522) of the borrower is not entitled to it. *Wheelock v. Lee*, 64 N. Y. 242. It is contended by counsel for the trustee that this case is inconsistent with our decision in *Re Kellogg*, 121 Fed. 333, 57 C. C. A. 547. We do not think so. The trustee in that case as owner of the mortgaged premises asked the court for leave to sell the same free and clear of liens, which is a very common course in bankruptcy. The proceeds of sale took the place of the land, and he was defending on the ground that the mortgage was usurious against the claim of the mortgagee to be paid out of them. What the court decided was that he had a right, as the successor of the borrower, to make this defense.

The obvious reason why the receiver was selected to collect these accounts and keep them separate from the other funds of the estate was that, if they did not belong to the lending companies as assignees of the bankrupt, they belonged to the bankrupt, and therefore to his trustee. This would follow automatically without the trustee's making any affirmative claim because the funds were in his possession. The course of proceeding which the parties actually took shows that the claimants were asking for affirmative relief. February 6, 1911, the Discount Company filed a petition setting forth its claims as owner, and praying that the court order the trustee "to surrender to the petitioner the said moneys or property above referred to, together

with any and all other moneys or property now in his possession or under his control belonging to the petitioner."

The other lending companies filed similar petitions. March 24, 1911, the trustee filed an answer (and filed answers to the petitions of the other lending companies) denying the petitioner's title and setting up the defense of usury, and praying that the petition be denied, and that the moneys in question be declared the property of the trustee in bankruptcy of Fishel, Nessler & Co. Affirmative relief being not proper to a mere defense, this latter part of the prayer should be taken to be another way of praying for the dismissal of the petition, viz., that the moneys were not the petitioner's but were the respondent's.

Before the special master the Discount Company assumed the burden of proving its claim and established it to his satisfaction. It was only after the district judge had modified the master's report by holding that the contract between the Discount Company and the bankrupt was usurious that the stipulation of November 15, 1910, was brought to his attention, and the claim made that the trustee was asking for affirmative relief without the payment of the amount actually loaned with legal interest as he was bound to do under section 377, *supra*.

The other lending companies are content with the report of the special master and the order of the court modifying it, so that their claims need no consideration.

[2] We entirely agree with the conclusion of the district judge that the large commissions agreed for in addition to legal interest were a device to cover usury.

We are unable to adopt the theory of the Discount Company that the receiver and trustee in bankruptcy is to be regarded as the agent and trustee of the lending companies, having no claim of his own to the moneys collected by him under the stipulation, and therefore under the necessity of asking for affirmative relief. It may be conceded that the question is not perfectly clear, but we are not disposed to differ from the conclusion of the district judge.

The order is affirmed, with costs.

ROYAL INS. CO., LIMITED, OF LIVERPOOL, ENG., v. KLINE
BROS. & CO.

LONDON & LANCASHIRE FIRE INS. CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 13, 1912.)

Nos. 214, 215.

INSURANCE (§ 335*)—AVOIDANCE OF POLICY FOR BREACH OF CONDITION—IRON-SAFE CLAUSE—INVENTORY.

The provision of the iron-safe clause in a fire insurance policy on merchandise requiring the insured to take a complete itemized inventory within 30 days, if one shall not have been taken within the preceding year, otherwise the policy shall be void at the end of said 30 days, is a valid condition subsequent, a failure to comply with which will avoid the pol-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

icy, and the keeping of books containing a record of purchases and sales, in compliance with another requirement of said clause, does not dispense with the necessity of taking such inventory.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Actions at law by Kline Bros. & Company against the Royal Insurance Company, Limited, of Liverpool, England, and same against the London & Lancashire Fire Insurance Company. Judgments for plaintiff, and defendants bring error. Reversed.

For opinion below, see 192 Fed. 378.

Cardoza & Nathan (Edgar J. Nathan and T. A. Hammond, of counsel), for Royal Ins. Co.

Hartwell Cabell, for London & Lancashire Ins. Co.

Fried & Czaki (Frederick M. Czaki, of counsel), for defendants in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment entered on a verdict in favor of the plaintiff directed by the court. The action was to recover for loss by fire of tobacco insured by the defendant. Many questions have been argued by counsel which need not be considered because the case must be reversed for failure of the insured to perform the warranty known as the iron-safe clause, which is as follows:

"Iron-Safe Clause Warranty to Keep Books and Inventories and to Produce Them in Case of Loss.

"The following covenant and warranty is hereby made a part of this policy:

"(1) The assured will, at least once in each calendar year, take a complete itemized inventory of stock on hand, showing the different grades and brands, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured, the unearned premium from such date shall be returned.

"(2) The assured will keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, and an itemized record showing each grade of tobacco manufactured and on sale, and shipments of same by grades, from date of inventory, as provided for in first section of this clause, and during the continuance of this policy.

"(3) The assured will keep such books, record of grades, and inventory, also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually opened for business, or, failing in this the assured will keep such books, inventories and record of grades in some places not exposed to a fire which would destroy the aforesaid building. In the event to produce such set of books, inventories and record of grades for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

The policy sued on was issued July 20, 1908. The fire occurred March 19, 1909. The plaintiff had not been in existence for 12

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

months before that date, and no inventory had been previously taken. Therefore, under the first paragraph of the iron-safe clause, it was the duty of the insured to take an inventory on or before August 19th, and under the second paragraph to keep books which should present a complete record of the business from the date of the inventory, and under the third paragraph to keep the inventory and books in a securely locked iron safe. The failure to take an inventory makes the policy null and void. It is a condition subsequent preventing recovery if relied upon by the defendant. When the parties to the contract have agreed upon such covenants, courts have no right to inquire into the reason for them or to qualify them or to ignore them. *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, 14 Sup. Ct. 379, 381 (38 L. Ed. 231):

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

The provision of the iron-safe clause requiring the keeping of an inventory was considered in *Southern Ins. Co. v. Knight*, 111 Ga. 622, at pages 629, 630, 36 S. E. 821, at page 824 (52 L. R. A. 70, 78 Am. St. Rep. 216). The court said:

"It appears from the plaintiffs' testimony that they had not taken an inventory of the stock of goods which was covered by the policy within 12 months prior to the date of the policy, nor did they take one within 30 days after the date of its issuance. The plaintiffs introduced evidence tending to prove that the insurance was written on the very first day they opened their store, and that they had on hand that day the invoices representing all purchases made by them, and that every article contained in the invoices was on that day in the store, and that they exhibited such invoices to the agent of the company who wrote the policy. It is contended by the plaintiffs that this was at least a substantial compliance with that portion of the iron-safe clause which required an inventory, and that, as loss occurred within less than 12 months from the date the policy was written, they are not precluded from recovering on the policy merely because they failed to take an inventory within 30 days. A clause of the character designated in the policy as the 'iron-safe clause' has been held by this court to be valid, and to constitute a warranty and not a mere representation. *Scottish Union Co. v. Stubbs*, 98 Ga. 754 [27 S. E. 180]. In the opinion in that case, Mr. Chief Justice Simmons uses this language: 'This clause constitutes a promissory

warranty. It binds the assured to do certain things for the protection of the insurer, and is important as providing a check against fraud on the part of the assured, and a mode by which the insurer may ascertain for itself the extent of the loss; and the compliance of the assured with this part of the contract is a condition upon which, by the express terms of the contract, the validity of the policy is made to depend.' The precise question presented for decision is whether a collection of invoices covering every article embraced within a stock of merchandise on a given day is an inventory of such stock within the meaning of the clause above quoted. In other words, was the insurer bound to treat these invoices, when exhibited to it, as an inventory of the goods?"

The court went on to hold that a collection of invoices could not be regarded as an inventory, and that invoices could not be understood to state the actual value of the merchandise invoiced, which is a necessary feature of an inventory.

We see nothing in *Ætna Ins. Co. v. Johnson*, 127 Ga. 491, 56 S. E. 643, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461, or *Ætna Ins. Co. v. Lipsitz*, 130 Ga. 170, 60 S. E. 531, 14 Ann. Cas. 1070, inconsistent with *Southern Ins. Co. v. Knight*, *supra*. In the former the covenant to keep books was held not performed because some of the items in the merchandise account simply stated, "Thatcher's bill, \$31.00," "Allen's bill, \$24.75," etc., without indicating what goods were added to the stock. It was, however, pointed out that, the warranty not stating exactly what kind of books or entries should be kept, the question always would be whether those kept did, having reference to the character of the business, substantially give the information that was intended to be covered. In the latter case an inventory was kept, and the court held that the record did not sustain the allegation that a part of it was in Hebrew.

The plaintiff contends that it did substantially perform its warranty as to an inventory, because its books show exactly what goods were on hand and destroyed at the time of the fire. At the trial it produced small books showing the actual weight of all raw tobacco received and weekly reports sent to the New York office from another book which was destroyed, showing the number of bales made, with their grades and brands. At the time of the fire all the tobacco received had been baled. But the weight of the bales (except those actually sold, which were the smallest part) were merely estimated. Conceding that the iron-safe clause did not call for values, but only for grades and brands, there was still no inventory made within 30 days from the date of the policy, as required by its first paragraph. At best the books produced can only be regarded as conforming to the requirements of the second paragraph. We think it an inevitable conclusion, although a very hard one, that the plaintiff cannot recover. The case is not like *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460, in which it appeared that the insured did take an inventory and keep the books required in an iron safe, but that in removing them from the safe for the sake of their preservation, the inventory, without fraud or negligence, was lost or left in the safe and destroyed. Mr. Justice Harlan said:

"Nor do the words 'or in some secure place not exposed to a fire which would destroy the house where such business is carried on' necessarily mean

that the place must be absolutely secure against any fire that would destroy such a house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated. Indeed, upon the facts stated, the plaintiffs were under a duty to the insurance company to remove their books and inventory from the iron safe, and thereby avoid the possibility of their being destroyed in the fire that was sweeping towards their store, provided the circumstances reasonably indicated that such a course on their part would more certainly protect the books and inventory from destruction than to allow them to remain in the safe. If they believed, from the circumstances, that the books and inventory would be destroyed by the fire if left in the safe, and if, under such circumstances, they had not removed them to some other place, and the books or inventory had been burned while in the safe, the company might well have claimed that the inability of the insured to produce the books and inventory was the result of design or negligence, and precluded any recovery upon the policies. We are of opinion that the failure to produce the books and inventory referred to in the policy means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory had been stolen, or had been destroyed in some other manner than by fire, although they had been placed 'in some secure place not exposed to a fire' that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man, acting in good faith, would exercise. A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding, the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice."

The judgment is reversed.

MONK v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. May 13, 1912.)

No. 195.

1. SHIPPING (§ 41*)—CHARTERS—CONSTRUCTION—DEMISE OF VESSEL.

A charter of a coal boat, without motive power, for a year at \$5 per day, which included a watchman or caretaker furnished by the owner, who, however, had nothing to do with the movements of the boat or its loading or discharging, was a demise of the boat by which the charterer became the owner *pro hac vice*.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 149-155; Dec. Dig. § 41.*]

Demise of vessel, see note to *The Del Norte*, 55 C. C. A. 225.]

2. SHIPPING (§ 54*)—INJURY TO TOW BY ICE—LIABILITY OF TUG.

The time charterer of a coal boat, who was the owner *pro hac vice*, had urgent need of the coal with which the boat was loaded to keep its power plant at Bay Ridge in operation and directed respondent, a towing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

company, to tow the boat there from Hoboken where she was lying, although both parties knew there was serious danger to her from floating ice. Respondent objected, but finally undertook the towage with two tugs. The passage was made, and the boat docked, but she soon after filled and sank because of injuries received from the ice. *Held* that, under the circumstances, respondent was only liable to the owner of the boat for negligence in the towing, and, no negligence being shown, the owner could not recover from it any part of the damage sustained.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Thomas Monk, Jr., as owner of the coal boat George T. Monk, against the Cornell Steamboat Company. Decree for libellant (175 Fed. 271), and respondent appeals. Reversed.

Amos Van Etten, for appellant.

Carpenter & Park (Samuel Park, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. February 9, 1908, the coal boat George T. Monk, having a square bow and stern with slightly rounded corners, generally called a box, was lying at Hoboken laden with 735 tons of coal destined for the power house of the New York Edison Company at Bay Ridge, and the respondent was under contract to tow her there. The Edison Company was charterer of the boat for one year from July 1, 1907, for the sum of \$5 per day. The libellant maintained his boat, and kept a man aboard whom he paid, but the Edison Company loaded and unloaded her, and had entire control of her movements, and paid for all towage. The boat had lain waiting at Hoboken for two days on account of ice in the river which had been blown by the wind over to the Bay Ridge side of the upper bay. The coal being absolutely necessary for its power plant, which would have had to shut down without it, the Edison Company insisted upon the respondent's towing her to destination. The respondent's despatcher said the ice was bad, that he did not want to tow in it, and that more than one tug would be required, to which the superintendent of the Edison Company replied that he must have the coal even if it took six tugs to take the boat to destination.

Accordingly the respondent's tugs Bavier and Williams took the boat in tow. When they arrived opposite the Edison Company's power plant, they found that the broken ice had frozen solid for a quarter of a mile or more from shore into the Bay. Thereupon the Bavier, leaving the boat in charge of the Williams, broke up a channel through the ice as she went in, and widened it as she came out. Then she started ahead with short hawsers to each corner of the boat, the Williams following astern with a line to the boat's stern, so as to be ready to reverse her engines if the Bavier fetched up in the ice, and prevent the boat from running upon her. The boat was taken in this way apparently in safety to her pier, but shortly after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sank as the result of water entering through holes made at each corner of her bow by the ice.

The specific charge of negligence in the libel was that the Bavier, by lengthening her port hawser, had caused the boat to sheer to port so as to damage her port bow against the ice. We cannot see how the shortening of the port hawser would cause the boat to sheer to port. At all events, the district judge rightly held that this charge was not made out, and it is abandoned by the libellant.

The negligence relied upon is that the Bavier did not break up a wide enough channel. The district judge found that the channel was wide enough, but that the bow of the boat, being seven feet wider than the tug, was bound to come in contact with the broken ice necessarily remaining in it as she followed the tug. He thought the case covered by the *Phoenix* (D. C.) 143 Fed. 350, where the boat towed was only allowed half damages because her master acquiesced in being towed through the ice, but he also thought the libellant entitled to recover in full, because the request to tow on this occasion came not from the libellant (the owner), but from the charterer.

Another ground of negligence relied upon is that both tugs should have towed ahead, side by side, and so better protected the bow of the boat from contact with the ice. The master of the Bavier said that this would not have been safe, because, if they had fetched up in the ice, the boat would have run upon them and done them injury. This was a matter of judgment, and we cannot say that the judgment exercised by the master was wrong.

[1] We think the real question in the case is whether the Edison Company was owner *pro hac vice* and its orders to the respondent as to the navigation of the boat the same as if given by the owner. That very learned and experienced admiralty judge, Addison Brown, held that time charters of boats without motive power, even though in charge of a care keeper for the owner make the charterer owner *pro hac vice*. The *Daniel Burns* (D. C.) 52 Fed. 159:

"But upon the proof as to the hiring of the boat, I do not think the facts show that either the Burns' or her owner was liable for a mere deficiency of grain found on unloading. There was no charter of the boat in the ordinary sense. The boat was merely hired by the libellant, in accordance with a very common practice, for an indefinite time, at the rate of \$2 a day, for use by libellant in storing or carrying its grain about the harbor; that price to be paid for each day that any cargo was aboard. The boat, so far as respects loading and unloading, her navigation, and the delivery of cargo, was to be subject wholly to the orders and control of the libellant. The price of \$2 per day included a man, who was called a captain, who stayed upon the boat, and whose business it was to attend to her and keep her pumped out as necessary. But this man had nothing to do with the loading, trimming, or unloading of the cargo, nor with the navigation of the boat; and the canal boat had no motive power of her own. Whatever navigation there was, was to be done exclusively by the libellant. When any cargo was to be delivered, the libellant would cause it to be towed; and the cargo, or so much of it as might be sold, would be transported by the libellant to the place where the buyer wished to remove it. * * * The boat was in legal effect delivered to the libellant. The libellant, in putting its grain on the boat, did not part with the possession of the grain, nor deliver it to the boat owner. On the contrary,

the boat was delivered to the libelant, and was legally in its possession, custody, and control. The libelant was owner *pro hac vice*."

[2] We are content to follow this. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat and the fact that the owner paid the man in charge, who was only a watchman and caretaker, is not sufficient to prevent the charter from being a demise of the boat.

The question then is: What effect should be given to the orders of the charterer, the Edison Company? If a tug tows a boat in her charge through dangerous ice without any consultation with her master or owner, the tug and owners will be solely responsible for damage to the boat. *The Rambler* (D. C.) 66 Fed. 355. If in such case the tug tow the boat with the consent of her master or owner, the tug and owners will be only liable for half the damages the boat may sustain. *The Phoenix* (D. C.) 143 Fed. 350. If in such case the master or owner of the boat towed agrees to take the risk of towing in the ice, the tug and owners will not be liable for towage in ice, but only for negligence in so towing. *The Packer* (D. C.) 28 Fed. 156.

When the boat towed assumes all the risks of towing, it assumes the risk of the tug's negligence, as we have held in *The Oceanica*, 170 Fed. 893, 96 C. C. A. 69, because, the tug not being an insurer or common carrier, want of ordinary care and prudence is all the tug and owners are responsible for. There is nothing else for the contract assuming all risks to operate on. Of course, if at the outset of a voyage the master or owner of a boat to be towed agrees to take a particular risk, as of towing through ice or of starting in the face of an impending storm or in fog, that contract would have something to operate on, without assuming the risk of the tug's negligence in doing the towing. Such was the case of the *Packer*, *supra*.

As the respondent unwillingly and only upon the insistence of the owner *pro hac vice* undertook the towing through ice known to be dangerous, we think it would only be liable for any negligence in the towing. There was no negligence. The accident happened, as the district judge found, because it was dangerous to tow this boat through the ice then prevailing, even though due care were exercised. The libel should have been dismissed.

Decree reversed, with costs.

MARQUESEE v. HARTFORD FIRE INS. CO. †

(Circuit Court of Appeals, Second Circuit. July 10, 1912.)

No. 232.

1. INSURANCE (§ 112*)—CONTRACT WITH UNAUTHORIZED AGENT OF PROPERTY OWNER—RATIFICATION AFTER LOSS.

A contract of insurance, made by one assuming without authority to act as agent for the owner of the property insured, may be ratified by such owner at any time before the insurer has withdrawn, even after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† For opinion on rehearing, see 198 Fed. 1023.

the property has been destroyed by fire and he has knowledge of such fact.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 134; Dec. Dig. § 112.*]

2. CORPORATIONS (§ 406*)—POWERS OF OFFICERS—PRESIDENT.

The president of a corporation, whose by-laws provide that "all contracts or obligations of any kind which may be entered into shall be made by the board of directors," has no power to contract for insurance in behalf of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

Lacombe, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Julius Marqusee against the Hartford Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

Fried & Czaki (Frederick M. Czaki, of counsel), for plaintiff in error.

Ivins, Mason, Wolff & Hoguet (T. A. Hammond, Herbert D. Mason, Randolph W. Childs, and Robert L. Hoguet, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. March 16, 1909, one McIntosh telephoned from his country place to Wilson, the agent of the Hartford Fire Insurance Company (the defendant) at Quincy, Fla., asking him to cover the stock of tobacco belonging to Kline Bros. & Co. (plaintiff's assignor) at that place with insurance against fire for one year from March 16, 1909, for the sum of \$3,500. On the same day Wilson wrote the policy in suit for the defendant and took it to the warehouse of Kline Bros. & Co. with the intention of delivering it to McIntosh, and, not finding him, left the policy there for him. March 19th the property was totally destroyed by fire. Within a week thereafter McIntosh tendered to the defendant's agent the premium, which the latter refused to take; but the defendant did not deny liability until April 30, 1909, when it wrote:

"Messrs. Kline Bros. & Company, Quincy, Fla.—Gentlemen: This is to notify you that the paper which you hold, purporting to be a policy of insurance against loss by fire, dated March 16, 1909, No. 985, we have just learned after diligent inquiry is not and never was a contract of this company. In the event that it shall appear we are mistaken either as to the fact or the law upon which this conclusion is based, we further notify you that this company hereby specifically denies liability under such policy.

"Yours very truly,

Hartford Fire Ins. Co.

"Egleston & Prescott, General Agents."

The statement that the policy delivered "is not and never was a contract of this company" is founded upon the proposition that McIntosh had no authority to represent Kline Bros. & Co. when he ordered the insurance. A great deal of evidence on this subject pro

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and con was offered at the trial. McIntosh was a stockholder, had been president, and was at the time he ordered the insurance in possession of the warehouse and claiming to act as president. The circumstance that the premium had not been paid is immaterial, because the delivery of the policy before receiving it amounted to a giving of credit. *Stewart v. Insurance Co.*, 155 N. Y. 269, 49 N. E. 876, 42 L. R. A. 147.

The trial judge directed a verdict for the defendant, apparently upon two grounds, which he had passed upon in a previous action arising out of the same fire (*Kline Bros. & Co. v. Royal Ins. Co.* [C. C.] 192 Fed. 378) viz.: First, that McIntosh had no authority to make the contract for Kline Bros. & Co.; and, second, that they could not ratify it after the fire had occurred.

[1] No one disputes the general principle that one may ratify an unauthorized contract made on his behalf and that the effect is the same as if he had himself originally made the contract. It is expressed in the Latin maxim: "*Omnis ratihabitio retrotrahitur et mandato equiparatur.*" The very idea of ratification implies that one party has an option to ratify or not, and that he has this advantage over the other party, to wit: That he may hold the other party whether the other party wish it or not, whereas the other party cannot hold him if he is not willing to be held. The English cases go so far as to hold that one may ratify even after the other party has withdrawn from the contract. *Boulton Partners v. Lambert*, 41 Chan. Div. 295; *In re Tiedeman*, [1889] 2 Q. B. D. 66; *In re Portuguese Consolidated Copper Mines, Ltd.*, [1890] 62 L. T. R., 88.

It is not surprising that the trial judge refused to follow these cases, and it is not necessary for us to go so far in holding that the judgment below is erroneous. Before ratification an unauthorized contract is not binding, because it is not mutual. The party discovering the lack of authority may therefore withdraw. When he has done so there is nothing to ratify. What shocks us at first blush is that one may ratify an unauthorized contract after he knows that it is to his own advantage to do so, and so bind the other party to his apparent disadvantage. Further reflection, however, causes this apparent unfairness to disappear. The other party, having agreed to be bound by this contract and not having withdrawn from it, has no ground to complain if compelled to perform; the original lack of authority having been cured.

The latest English case cited fully sustained the view of the court below. *Grover v. Mathews*, [1910] 2 K. B. 401. In it the plaintiffs had a policy of the defendant on their factory for £1,000 for 12 months from March 26, 1908. It had been effected through their broker, Brows, by another broker, Dott, representing the defendant. March 4, 1909, Brows wrote to Dott asking that the policy be renewed. March 5th Dott sent a binder renewing it. March 27th the factory was destroyed by fire, and on that date two directors of the plaintiff company sent the premium to Dott, who declined to accept it. The question was whether, assuming that a valid contract for fire insurance had been made through Brows with the defendant by Dott on behalf

of the plaintiff, but without their authority, the plaintiffs could ratify it after the loss occurred. Hamilton, J., held that they could not. We cannot approve this conclusion.

Cases arising out of policies taken out by carriers or bailees and maritime policies for the benefit of whom it may concern throw no light on the question under consideration, because in them the insurer must be held to have insured any person whose interest the insured intended to cover.

[2] We agree with the court below that the plaintiff failed to prove that McIntosh was authorized to contract for Kline Bros. & Co. If they had been sued for the premium on the policy, they could have successfully defended, unless the company proved ratification. But as in this case their assignee is claiming on the policy, proof of ratification lay upon him. It is true that the record does not show expressly whether Kline Bros. & Co. ratified the contract before April 30th, when the defendant withdrew from it, although it may be inferred from the defendant's letter of that date, the pleadings, the conduct of the parties, and the course of the trial that they had made claim on the policy before it. However, as the case was decided, so far as this question is concerned, on the ground that they could not ratify after the fire, we think there ought to be a new trial, at which the plaintiff will have an opportunity of showing, if he can, that they did ratify the contract before the defendant withdrew from it.

The judgment is reversed.

LACOMBE, Circuit Judge (dissenting). I am unable to concur with the majority of the court. It seems too clear for discussion that McIntosh, the old president of the company, had no authority—express, implied, or to be inferred—to make a contract of insurance binding on Kline Bros. & Co. He certainly had no such express power conferred upon him as president. The powers of the president as defined by the articles of incorporation were merely to preside at all meetings; to have supervision of the affairs of the company *under the direction* of the board of directors; to sign or countersign all certificates, contracts, and other instruments of the company, as authorized by the board of directors; and to make reports. When this strictly limited delegation of authority is compared with the paragraph in the fourth article, quoted *infra*, it is manifest that the corporation was scrupulously careful not to give the president the power to effect contracts of insurance which should be binding on it. That paragraph reads as follows:

"All purchases and sales of any kind by the company and *all contracts or obligations of any kind* which may be entered into *shall be made by the board of directors*, who, acting jointly, shall have the entire control and management of the affairs of the company, the receipt and disposal of its assets and the payment of its obligations, and the incurring of any liabilities for the company."

Nor does the record disclose any delegation to McIntosh, by the board of directors, of authority to make this or any other binding contract. At a meeting of the incorporators held December 16, 1908, McIntosh, Rogers, and E. A. Kline were elected the board of directors.

Subsequently on the same day the board elected McIntosh president, Kline vice president, and Rogers secretary and treasurer, "to hold office until the first regular election of officers under the by-laws of the company and until their successors are chosen." At that same meeting the board passed a resolution providing that McIntosh as president, for a period of four months from the date of the resolution, be paid a salary of \$62.50 per month, for acting as president of the company and giving his time and services towards the preservation of the assets of the company and their disposition, *under the direction and control of the board of directors*. This resolution reserved to the board their power to make contracts. The president could enter into any specific contract only when *directed* to do so by the board. The record is barren of any evidence tending to show that prior to the attempted making of the contract in suit he had undertaken to bind the company by making any contract which they had accepted. There is not a scintilla of proof on which plaintiff could ask a jury to infer that McIntosh was being held out to the world as a person authorized to make contracts beneficial to the company.

As to ratification I am in entire accord with Judge Hand's discussion of the question, and as to his conclusion that until after the fire "defendant had no knowledge that McIntosh had not bound the plaintiff's assignor to pay the premium and that its own undertaking had, therefore, been without consideration from the outset." I cannot reach the conclusion that there is no unfairness in the application of the doctrine of ratification to the case at bar. It seems to be an element of that doctrine that the party sought to be bound by the ratification of a contract, until then void because of lack of mutuality, should have a fair and equal opportunity to withdraw at any time before ratification. It certainly is a very harsh rule which would allow Kline Bros. & Co. to hold this policy, it may be for weeks, without ratification, able to defend against a suit for premium on the ground that it never made a contract, but with the privilege of consummating the contract by ratification as soon as a fire might break out. It can only be sustained on the theory that until ratification either side has the right to withdraw; but the insurance company's "right to withdraw" is a mere illusion, if it has no knowledge of the facts which would authorize it to exercise such right. The proposition is peculiarly wicked in this case, because of what happened at the trial to defendant's so-called "second defense." The trial judge struck it out entirely at the very outset of the trial. He did so because he understood that, by a prior decision of another judge upon a motion in reference to the pleadings, it had been held that the matters set up in this part of the answer constituted no defense. The policy contained a provision that:

"This entire policy shall be void if the insured has concealed * * * any material fact or circumstance concerning this insurance or the subject-matter thereof."

The answer set up that McIntosh, when he applied for the policy, concealed the fact that there were internal dissensions within the company. These were not merely ordinary controversies between con-

flicting interests. They had reached such a stage that one party had secured an alternative mandamus to secure its possession of its property, books, and papers, and the leader of the other party had taken forcible possession of the personal property which was the subject of insurance at the point of a pistol. It is contended that these facts were material, that they had an important bearing upon the subject-matter, indicating the presence of what is called in insurance law a *moral risk*, of the existence of which good faith required that an applicant should advise the party with whom he seeks to effect insurance. It would seem that these circumstances might reasonably induce the underwriter either to decline to issue a policy or to charge a premium commensurate with the increased risk.

Unadvised as to these circumstances and as to the further fact that McIntosh's dealings with its agent had given it no right to exact payment of a premium from Kline Bros. & Co., the insurance company, it seems to me, was misled as to its right to withdraw before ratification, and has good ground to complain of the application of the doctrine of ratification.

In re CONDON.

(Circuit Court of Appeals, Second Circuit. April 8, 1912.)

No. 196.

BANKRUPTCY (§ 140*)—PROPERTY—OWNERSHIP.

S. having borrowed \$11,000 from a bank and deposited certain mining stock as collateral, and the bankrupt desiring to purchase the stock for his son, procured a substitution of the son's note for that of S. to the order of the bank accompanied by the stock as collateral, with authority to the bank to sell the stock in case of nonpayment of the note, payment of which the bankrupt guaranteed in writing. Thereafter the bankrupt paid the note which was canceled by the bank as paid in full by the son, and the collateral was returned to the bankrupt who put it in his safe in an envelope indorsed, "Property of" the son. Bankruptcy proceedings having been instituted, the temporary receiver demanded the surrender of another certificate of an equal number of shares belonging to the bankrupt, and this certificate being in the hands of another, the bankrupt delivered the son's certificate, stating that he would thereafter obtain his own and give it to his son. *Held*, that the title to the stock purchased from S. was in the son, and not in the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings against Martin J. Condon. On petition of Martin J. Condon, Jr., to revise an order denying his application for a delivery of certain stock in the possession of a receiver as the property of the alleged bankrupt. Reversed.

Henry G. K. Heath, for appellant.

Hiram Barney and Tompkins McIlvaine, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

WARD, Circuit Judge. This is a reclamation proceeding by Martin J. Condon, Jr., for 40,000 shares of the capital stock of the San Cristobal Mining Company in the hands of the temporary receiver of the alleged bankrupt, Martin J. Condon, Sr. One Starbuck had borrowed \$11,000 of the Third National Bank of Knoxville, Tenn., against his note to the bank for that amount, accompanied by certificates for the stock in question in his name and by him indorsed in blank.

Condon, Sr., testified that his son asked him to buy this stock for him, and he agreed to do so with the view of interesting his son in some business. The sale was accomplished in this way. Condon, Jr., in substitution for Starbuck's note, gave his own note, dated June 11, 1908, for \$11,000 to the order of the bank accompanied by the stock in question as collateral, with authority to the bank to sell the same in case of nonpayment of the note. Condon, Sr., guaranteed the payment of the note in writing upon the back of it.

If the bank were out of the case and Condon, Sr., had given Starbuck \$11,000 with the request that he, Starbuck, deliver the stock in question to Condon, Jr., there could be no pretense that Condon, Sr., ever owned the stock or did anything else than pay for it on account of his son, or if, instead of giving him \$11,000 in cash, he had given him his son's note for \$11,000 and guaranteed the payment of it, the result would have been the same. The fact that the stock was pledged to a bank, and in its possession, does not alter the real nature of the transaction. When the bank accepted Condon, Jr.'s, collateral note in place of Starbuck's, with authority from Condon, Jr., to sell the collateral in case of nonpayment of the note, Condon, Jr., must be taken to have been the owner of the stock. The delivery of the stock was from Starbuck to Condon, Jr., and not to Condon, Sr. This accords with the testimony of both father and son.

October 25, 1909, Condon, Sr., paid the note, which was canceled by the bank as paid in full by Condon, Jr., and the collateral returned to Condon, Sr., who put it in his safe in an envelope indorsed, "Property of Martin J. Condon, Jr."; the son having no appropriate place in which to keep it. If Condon, Sr., as between himself and his son, paid the note by virtue of his guaranty, he would be subrogated to the rights of the bank, and could hold the collateral to secure repayment from his son. But this is totally at variance with the proofs, which are to the effect that he paid the note for the purpose of protecting his son's title. The fact that the bank returned the stock to Condon, Sr., and that he put it in his safe, can in no way affect the title which had previously vested in Condon, Jr.

April 11, 1911, an involuntary petition in bankruptcy having been filed against Condon, Sr., the temporary receiver called upon him to surrender another certificate of 40,000 shares of the San Cristobal Mining Company belonging to him. He said this certificate was in the hands of one Taylor, who was arranging for the sale of the property under an option, and that he would save the receiver trouble by giving him his son's stock in place of his own, and then get his own stock from Taylor and give it to his son. In point of fact, the re-

ceiver subsequently obtained Condon, Sr.'s, stock from Taylor and refused to deliver the stock in question to Condon, Jr.

The District Judge denied Condon, Jr.'s, petition on the ground that the evidence showed a gift from the alleged bankrupt to his son, unexecuted for want of delivery. He assumed that Condon, Sr., was the owner of the stock. We think, on the contrary, that the facts show that Condon, Sr., never owned the stock at all, although he gave his credit to enable his son to get the stock. In this view of the case the authorities relied upon by the District Judge as to unexecuted gifts, *Trow v. Shannon*, 78 N. Y. 446, and *Matter of Crawford*, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71, have no application. The order is reversed with costs.

THE TEXAS.

THE GEORGE W. TRUITT.

(Circuit Court of Appeals, Second Circuit. May 13, 1912.)

Nos. 221, 222.

1. COLLISION (§ 95*)—STEAMER AND TUG WITH TOW—VIOLATION OF CROSSING RULES.

The schooner *Trutt*, while being towed stern first on the port side of the tug *Hoffman* from Jersey City to the Stapleton Anchorage, came into collision with the steamship *Texas*, which was proceeding from the anchorage up the Bay. They were on crossing courses; the tug and tow being the burdened and the steamer the privileged vessel. It was hazy, but the vessels could see each other for at least five minutes before the collision. The tug signaled twice with two whistles, and persisted in her course, although she received no answer. The *Texas* ported, and continued to port almost to the time of collision. *Held*, that the tug was in fault for persisting in her attempt to cross ahead of the steamer in violation of the rules, and that the *Texas* was in fault for not keeping her course and speed as required by the rules.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

Collisions with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

2. COLLISION (§ 95*)—NEGLIGENCE—TOWING VESSEL STERN FIRST.

Towing a vessel stern first in New York Bay, while unusual, is not unlawful, and does not render the tug liable for a collision, unless the other vessel was in fact misled as to her course.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by George W. Elzey as master of the schooner *George W. Trutt*, and the Atlantic Mutual Insurance Company, petitioners, against the steamship *Texas*, the Scandinavian-American Line, claimant, and the tug *Maria Hoffman*, Wilbur C. Fisk, claimant, and cross-libel by the claimant of the steamship against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the other vessels. Decree against the tug Hoffman alone, and libelant and cross-libelant both appeal. Modified and affirmed.

For opinion below, see 192 Fed. 233.

Haight, Sanford & Smith (Edward R. Baird, Jr., and John W. Griffin, of counsel), for the schooner.

Carter, Ledyard & Milburn (Walter F. Taylor, of counsel), for the cargo.

Carpenter & Park (Samuel Park, of counsel), for the steam tug.

Burlingham, Montgomery & Beecher (Charles C. Burlingham, of counsel), for the Texas.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. [1] January 14, 1911, the tug Maria Hoffman took the schooner George W. Truitt laden with cement at Communipaw in tow on her port bow for the purpose of towing her stern first to the anchorage grounds at Stapleton. At 12:45 p. m. the steamer Texas, then lying opposite Stapleton, weighed her anchor and proceeded on her voyage to New York. At this time the tow and steamer were a nautical mile apart. The tide was ebb. At a point on the eastern side of the channel a little north and west of the Bay Ridge bell buoy 12½, they came into collision at almost a right angle. The stem of the Texas struck the port bow of the Truitt, about 50 feet aft of her stem, and the Truitt, swinging around on the starboard side of the Texas twisted her stem to starboard. Immediately before the collision the tug Hoffman had thrown off her lines and backed away from the schooner. Otherwise she, instead of the schooner, would have been in collision. At the same time the Texas went full speed astern on her engines.

There had been a light fog that morning, but there was not enough for some 10 minutes or so before the collision to be of any consequence. None of the vessels involved or in the neighborhood was blowing fog signals. We agree with the district judge that objects could be seen for at least three-quarters of a mile. The combined speed of the steamer and tow was not over eight miles, so that there were at least five minutes in which to navigate in sight of each other. Indeed, the testimony on behalf of the steamer, read in connection with the entries in her engine room log, show that she saw the tug and tow more than five minutes before the collision. We also agree with the district judge that the vessels were on crossing courses from the moment the Texas got fairly under way from her anchorage; the tug and tow being the burdened and the steamer the privileged vessel. Those in charge of the navigation of the Texas ported and continued to port from the time they saw the tug and tow down to almost the moment of collision. This was a plain violation of the steering rules. They explained it by saying they supposed the schooner was going up the Bay, or that the tug was backing to the westward and southward with the intention of bringing her bow down and then proceeding on a hawser. Therefore, thinking the situation absolutely safe, they ported, as they say, to go under her stern and turned their

attention to some tugs which were towing the steamer Neidenfels on a hawser from Bay Ridge toward Kill von Kull under whose stern they also intended to go. During this considerable period the tug and tow kept persistently on a course across the steamer's, although they say two signals which they gave of two whistles each were not answered by the steamer.

[2] The district judge held the tug at fault for persisting in her intention to cross the steamer's bows. We concur with him in this. He also held her at fault for towing the schooner stern first and discharged the steamer on the ground that she was misled into supposing that the schooner was going away instead of approaching her course. In this conclusion we cannot agree. Towing a vessel stern first, while unusual, except for some necessity which did not exist in this case, cannot be said to be unlawful. Such a proceeding may impose more than usual care on the tug and may excuse a vessel which is misled by the appearance into a sudden error. But surely no one could be heard to say that he had been led into error by such a circumstance in broad daylight with abundant time for observation and water for navigation. It is impossible that those in charge of the *Texas* could have been misled if they had watched the schooner with the tug at her port bow towing her down the Bay stern first at a speed of four knots an hour. If nothing else, the fact that the vessels could run for several minutes without material change of bearing would show the constantly increasing danger of collision. As they altered their course from N. E. by N. to E. by N. before the collision and then needed only 50 feet to the northward to go clear, it is plain there would have been no collision if they had held their course and speed as required by law.

The decree is modified and the court below directed to enter a decree for the owners of the *George W. Truitt* and her cargo against the claimants of the steamer *Texas*, and the owners of the tug *Maria Hoffman* to the agreed value of their interest in the said tug and their pending freight with interest and costs and dismissing the Scandinavian-American Line against the schooner *George W. Truitt*, with costs.

In re ABELL.

LACY v. CITIZENS' BANK.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1912.)

No. 123.

BANKRUPTCY (§ 312*)—PRIORITY OF CLAIMS—UNRECORDED MORTGAGE—ABANDONMENT OF SECURITY.

There is no ground for postponing the claim of the holder of a chattel mortgage given by a bankrupt, which was for a time withheld from record, to the claims of other creditors who became such during that time, where he asserts no lien by virtue of the mortgage, but has proved as an unsecured creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496-500; Dec. Dig. § 312.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition to Revise Order of District Court of the United States for the Eastern District of Missouri.

In the matter of one Abell, bankrupt. Petition by Nat M. Lacy, trustee, to revise an order of the District Court. Dismissed.

George W. Groves, for petitioner.

Ben Eli Guthrie (Ben Franklin and R. W. Barrow, on the brief), for respondent.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. A statement of the facts in this case is all that is necessary to show that there is no merit in this petition.

In December, Abell, the bankrupt, executed and delivered to the respondent, the Citizens' Bank of Macon, Mo., a note for \$9,800 and a chattel mortgage to secure it. The mortgage covered the entire stock of merchandise then in Abell's store at Macon. There was an understanding between Abell and the officers of the bank that the mortgage should not be filed, and it was not filed until January 16, 1911. On that day the bank attempted to take possession of the property. Abell was adjudicated a bankrupt, apparently on June 19, 1911. When the petition for the adjudication was filed does not appear.

Prior to the first meeting of the creditors the bank voluntarily relinquished all claims it may have had under the mortgage, and voluntarily turned the property named in the mortgage over to the trustee in bankruptcy. At the first meeting of the creditors it presented a claim, as an unsecured creditor, for \$19,208.58, which claim was allowed. In this sum was included the note of \$9,800 secured by the chattel mortgage. A dividend having been declared, Lacy, the trustee, filed a petition, alleging that all of the creditors who had proved claims became such creditors between the date of the mortgage and the date of its filing, and asked that the bank be barred from claiming any of the proceeds of the mortgaged goods until these creditors had been paid in full. This petition was denied by the referee. His order was affirmed by the court, and Lacy, the trustee, has presented to this court this petition to review.

It is difficult to see how any support for the trustee's position can be found in the cases cited by his counsel. In *re Bothe*, 173 Fed. 597, 97 C. C. A. 547; In *re Wade* (D. C.) 185 Fed. 664.

The petition to revise is dismissed.

VOIGTMANN et al. v. SEELY et al.

(Circuit Court of Appeals, Second Circuit. May 29, 1912.)

No. 155.

1. PATENTS (§ 328*)—INVENTION—FIREPROOF WINDOW.

The Voigtman patent, No. 600,186, for a fireproof window, is void for lack of patentable invention, in view of the prior art.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COSTS (§ 68*)—HALF COSTS—GROUNDS.

Where the prevailing party flagrantly violated the rules of evidence by requiring the examiner to copy into the record evidence which was obviously incompetent and in other ways, he will not be allowed in full the costs to which he would otherwise be entitled.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 287-289; Dec. Dig. § 68.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Frank Voigtmann and Silas H. Pomeroy against Frank Seely and another. Decree for defendants, and complainants appeal. Affirmed.

Offield, Graves, Towle & Offield and Philip B. Adams (C. K. Offield and A. H. Graves, of counsel), for appellants.

John G. Elliott, for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. [1] This is an appeal from a decree of the Circuit (now District) Court dismissing the bill upon United States letters patent to the complainants No. 600,168, dated March 8, 1898, for a new and useful improvement in fireproof windows. The claims relied on are:

"5. In a fireproof window, the herein-described automatically-closing sash, consisting of the combination of the fireproof casing *A*, the fireproof sash *L*, pivoted therein, the destructible retaining device *M*, *N*, by which said sash is held open; all substantially as shown and described.

"6. In a fireproof window, the herein-described automatically-closing sash, consisting of the combination of the fireproof casing *A*, the fireproof sash *L*, pivoted therein, the retaining-chain *M*, having the fusible link *N* therein; all substantially as shown and described.

"7. In a fireproof window, the herein-described automatically-closing sash, consisting of the combination of the fireproof casing *A*, the fireproof sash *L*, pivoted therein at a pivot *P* above its middle, the retaining-chain *M*, having the fusible link *N* therein at a point opposite the opening; all substantially as shown and described."

The purpose of the invention was to retard fire from getting out of or into a building through windows open for ventilation. This is accomplished by inserting a fusible link in a chain or retaining device which holds a fireproof window, pivoted above its center, open. When the heat reaches it, the link melts and the window closes automatically. Every element composing the combination was old, and the novelty, if any, lay in the use of the fusible link. But this had been used as far back as 1890 in the Pabst Theater at Milwaukee, Wis., to open a pivoted skylight over the stage, and was also covered by United States letters patent, to Ashcroft, dated July 24, 1888, for improvements in safety covers for elevator wells, hatchways, and other roof openings. It is true that the object in both these cases was exactly the opposite to the patent, viz., to let the flame and heat out of the building. But the elements are the same, except that the skylight or cover is pivoted below, instead of above,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the center. We do not think it involved anything more than mechanical skill to change the arrangement from one opening to one closing a window. The Circuit Court of Appeals for the Seventh Circuit, in *Voigtmann v. Perkinson*, 138 Fed. 56, 70 C. C. A. 482, and for the Eighth Circuit, in *Voigtmann v. Weis-Ridge Cornice Co.*, 148 Fed. 848, 78 C. C. A. 538, have so held. Unless we felt that these adjudications were clearly wrong, it would be our duty out of comity to follow them.

[2] The defendant, against the objection and protest of the complainant, required the examiner to copy into the record the depositions of four witnesses actually being examined which had been taken in another suit by the complainants on the same patent against other defendants. These depositions were also referred to by the defendant in the examination and cross-examination of other witnesses. The defendant against the complainant's protest examined witnesses as to conversations with one Hayes, then deceased, in respect to an anticipating structure made by him and incorporated in the record letters from him to third persons on the same subject. Hayes had himself been examined as a witness for defendants in a previous case and had not mentioned this anticipating structure at all. Apart from the obvious incompetency of such evidence, we may say that, as he was a prolific inventor of safety fire devices, it is difficult for us to believe that, when being examined as a witness against the complainant's invention, he should have forgotten that he had himself anticipated it. The decree is affirmed with costs of this court, but with only half costs of the Circuit Court, to the defendants.

NOYES, Circuit Judge. I concur in the conclusion reached by Judge WARD, because I think the case a doubtful one in which it is appropriate that this court should follow the decisions of the coordinate tribunals of the Seventh and Eighth circuits. *Mast Foes & Company v. Stover Manufacturing Company*, 177 U. S. 485, 488, 20 Sup. Ct. 708, 44 L. Ed. 856.

PERFORATED PLATE CO. et al. v. CONNOLLY et al.

(District Court, S. D. New York. June 20, 1912.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HEAT-REGULATING DEVICE.

Evidence considered, and *held* to show priority of invention in favor of the Elliott & Stanton patent, No. 883,183, for a device for regulating the heat applied to cooking utensils, over that of the Cruickshank patent, No. 864,518, for the same invention. The Elliott & Stanton patent also *held* valid and infringed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Perforated Plate Company and the New England Enameling Company, Incorporated, against James F. Connolly, doing business as J. F. Connolly & Co., and the J. F. Connolly Manufacturing Company. On final hearing. Decree for complainants.

Kenyon & Kenyon (Robert N. Kenyon, Richard Eyre, and Gorham Crosby, of counsel), for complainants.

Charles McC. Chapman, for defendants.

HOLT, District Judge. This is a suit to restrain the alleged infringement by the defendants of a patent, No. 883,183, issued to Elliott & Stanton on March 31, 1908, for a device for regulating the heat applied to cooking utensils. The defendants own a patent, No. 864,518, issued to Cruickshank August 27, 1907. The Cruickshank patent, having been issued earlier than the Elliott & Stanton patent, presumably has priority; but the complainants claim that the invention described in the Elliott & Stanton patent was made earlier than the invention described in the Cruickshank patent. In my opinion, that is the sole question in the case.

I think that none of the prior patents cited show anticipation, that the defense that the apparatus manufactured under the Elliott & Stanton patent was in public use more than two years before the application for the Elliott & Stanton patent is not sustained, and that the claim that the Elliott & Stanton patent is invalid as a mere aggregation is untenable. The device manufactured and sold by the defendants, in my opinion, is substantially the same as that shown in the complainants' patent. The simple fact is that the invention shown in the Elliott & Stanton patent and in the Cruickshank patent is identical, and, when it is determined which patent is entitled to priority over the other, it results that an article manufactured under the other infringes.

The application for the Cruickshank patent was filed in the Patent Office on August 25, 1906. The application for the Elliott & Stanton patent was filed March 26, 1907. The Cruickshank patent was issued August 27, 1907, and the Elliott & Stanton patent was issued March 31, 1908. The Elliott & Stanton application, therefore, was made after the Cruickshank application, but before the Cruickshank issue. In the ordinary course of business in the Patent Office, an interference would have been declared; but, the invention being of an anomalous character, the Elliott & Stanton application was assigned to "Class 53, Domestic Cooking Vessels, Boilers, Domestic," and the Cruickshank application was assigned to "Class 233, Heating and Cooking Stoves, Liquid, Gaseous Fuel, Stoves, Cooking, Lids and Tops." The result was that the examiner in the Patent Office who was examining each application had no knowledge of the pendency of the other, and the two patents were issued without any interference being declared.

The complainants claim, however, that the invention embodied in the Elliott & Stanton patent was made earlier than the Cruickshank patent. They have introduced a large amount of evidence, which

satisfies me that Elliott & Stanton, late in 1904, or early in 1905, conceived the idea of the device in suit, constructed a device in accordance with it, and continued experimenting with it in Elliott's store in Saugerties until about the spring of 1906, when they manufactured several of the devices, which were put in practical use that summer. The earliest date of which there is any record proof of the Cruickshank invention is June 1, 1906, when the British application for a patent was filed. Cruickshank asserts that he made the invention in 1889, 17 years before, while working in a mine near San Francisco. He testifies, in substance, that he originally took the covers of two tin cans, inserted one into the other, so as to fasten them together, made holes in the upper and lower sides, and used the apparatus for cooking. He claims that he cooked mush with it, but that it cooked very slowly, and that he ultimately abandoned its use for that purpose, and used it only to heat milk. He claims that he lived alone and did his own cooking, and that no one in California saw the device. He returned to England in 1892. He claims he took with him one of his devices, and used it abroad for heating milk, but never showed it to any one. In 1901 or 1902, he had one, and in 1905 a second one, made in France by Mr. Baloche, locksmith and ironworker, Ru-Breda. He left Paris in 1905, and went back to London, and in June, 1906, he had two made in London, one of which was sent to an American patent solicitor for the purpose of drawing the papers for an application for a United States patent, and the other was given to Mr. Tainter, who brought it to America.

As the evidence satisfies me that Elliott & Stanton made the invention as early as the end of 1904, or the beginning of 1905, the proof of the manufacture of the device by Cruickshank in London in 1906, and of any subsequent acts in reference to the patent, is immaterial on the question of priority of invention. The question is whether Cruickshank actually made the invention and reduced it to form before the device was manufactured in London. He himself testifies that he made the original devices himself and intentionally prevented any one from seeing them, and that no one ever did see them until the specimens were made in Paris by Baloche, the first in 1901 or 1902, and the second in 1905. It seems strange that a man should have been using a cooking utensil frequently in his room for years, and that he cannot produce any one to corroborate his testimony who was about the place.

Assuming that he intentionally concealed it from everybody, we have a case of a rival patentee undertaking to prove priority of invention by his own evidence, without the slightest corroboration. But when we come to the date of the manufacture by Baloche in 1901 or 1902, then Cruickshank's evidence, if true, could probably be corroborated. Why is not Baloche, or any of his workmen, produced? Or, if they have disappeared, why is no evidence given of any efforts to find them? If trustworthy evidence were given of the manufacture of the patented device by Baloche in Paris in 1901 or 1902, that would be the end of the case. The only witness who attempts to corroborate Cruickshank is Tainter. Tainter says that Cruickshank applied to him in

the spring of 1906 for financial assistance in getting out the patents, and that a year or a year and a half previous to that he first knew of the device and saw Cruickshank using it in London. But Cruickshank says that Tainter was in error in his dates, that Tainter did not leave England for America until February, 1907, that he (Cruickshank) did not arrive in London from Paris until September, 1905 and that Tainter first saw him using the device on an oil stove in 1906. These dates given by Cruickshank are strongly corroborated by written entries and memoranda, and I have no doubt are entirely correct. This evidence of Cruickshank is certainly very candid and honest, and I may say that, while the story which he tells is quite extraordinary and on its face improbable, the reading of Cruickshank's testimony has not impressed me unfavorably.

At the same time, all the evidence of Cruickshank to the effect that he invented the device in 1889, or that he used it prior to the time that the proof satisfies me that Elliott & Stanton invented it, is absolutely uncorroborated, and, in my opinion, the absence of corroboration, particularly from Baloché or his men, and the absence of proof of any attempt to obtain their evidence, makes it impossible to determine on Cruickshank's testimony alone that he made the invention earlier than Elliott & Stanton. It would be a dangerous precedent to establish that a patent can be invalidated by a claim of prior invention based on the entirely uncorroborated evidence of a rival patentee. Moreover, if Cruickshank's testimony were fully accepted, in my opinion, the correct conclusion to draw from it would be that whatever invention he originally made, in 1889, was abandoned by him until he concluded to try to revive it and obtain a patent for it many years later.

The complainant is entitled to a decree as demanded in the bill.

SWINDELL et al. v. HAGAN.

(District Court, W. D. Pennsylvania. August 27, 1912.)

No. 84.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ANNEALING FURNACE.

The Swindell patent, No. 624,401, for an annealing furnace, in which gas is used as the fuel, was not anticipated, and discloses patentable invention; also *held* infringed.

In Equity. Suit by Edward H. Swindell and Bessie Swindell, as executors of William Swindell, deceased, and John C. Swindell, against George J. Hagan. On final hearing. Decree for complainants.

Bakewell & Byrnes, of Pittsburgh, Pa., for complainants.

Harry Easton, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This is a patent case, now before the court on final hearing upon bill, answer, replication, and proofs. The plaintiffs, having title, charge infringement of letters patent of the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States No. 624,401, issued May 2, 1899, to William Swindell and John C. Swindell for an annealing furnace. The bill is in the usual form and prays the customary relief. While there are no unusual defenses, there is an unusual number of references to alleged disclosures in the prior art, there being cited 104 United States patents, 2 French patents, 6 British patents, 7 specified prior publications, and 19 specified prior installations and uses. Of all these references, not more than 13 were used in the argument and brief in behalf of defendant. The inclusion by the pleader of references, unless they are thought to be material to the issues, is not to be commended. It adds more weight to the burden of litigation, but rarely gives increased weight to the defense.

Under the authority of the plaintiffs, a partnership with the firm name of William Swindell & Bros. has been constructing and installing annealing furnaces as described and covered in the patent from the year 1898 to date. Such installations are found in the states of New York, New Jersey, Pennsylvania, Ohio, Indiana, and Illinois, and at the time the testimony was taken numbered 138 in all. The defendant is also engaged in building annealing furnaces, and has been in business for himself since 1909. Since that date, at least, he has built some annealing furnaces which plaintiffs charge are infringements of the patent. His testimony is not clear as to the time when his present form of annealing furnace was first used. He thinks that Mr. Erickson, by whom he was employed, first erected such annealing furnaces as early as 1900. His description of the Erickson construction does not clearly bear him out. He failed to produce, or account for the nonproduction of, Mr. Erickson, who was living, as a witness. It may therefore fairly be presumed that Mr. Erickson's testimony would not be favorable to the defendant. From all the evidence it is clear that the Swindell annealing furnace for a period of 10 years was the generally accepted annealing furnace under conditions which afforded the use of natural or artificial gas.

The utility of plaintiffs' annealing furnace and the presumption of its novelty are better realized when consideration is given to the facts that annealing furnaces are built for the treatment by intense heat of tons of material at a time, that the weight of such material requires strong and expensive construction, and that for such reasons the users are comparatively few. It is not necessary to make extended reference to the specification forming part of the patent. It is stated therein:

"Our invention relates more particularly to furnaces of the class designed to receive and impart heat to annealing boxes containing sheets, plates, or other articles which are to be annealed; and its object is to provide a furnace of such class in which a uniform degree of heat may be imparted to the annealing boxes and an economical consumption of gaseous fuel be attained."

The patentees specify such correlation between the air-supply and waste-flues and the floor of the annealing furnace that the air is greatly heated before the moment of combustion and the heat of the waste gases utilized before their escape.

The defendant is charged with the infringement of the first two claims of the patent, which are as follows:

"1. In a furnace, the combination of a combustion-chamber, a gas-supply flue extending longitudinally below the floor thereof, a plurality of gas-supply passages leading from the gas-supply flue into the combustion-chamber, an air-supply flue extending longitudinally below and in contact with the floor of the combustion-chamber so as to be heated thereby, a plurality of air-supply passages leading from the air-supply flue into the combustion-chamber, and a waste-flue leading out of and extending below the floor of the combustion-chamber and adjoining the air-supply flue.

"2. In a furnace, the combination of a combustion-chamber, a gas-supply flue extending longitudinally below the floor thereof whereby it is heated, a plurality of gas-supply passages leading from the gas-supply flue into the combustion-chamber, a waste-flue leading out of and extending below the floor of the combustion-chamber, air-supply flues extending longitudinally below and in contact with the floor of the combustion-chamber whereby they are heated, and adjoining opposite sides of the waste-flue whereby they are further heated, and a plurality of air-supply passages leading from the air-supply flues into the combustion-chamber."

Analysis of claim 1 shows the following elements:

- (a) A combustion-chamber.
- (b) A gas-supply flue extending longitudinally below the floor thereof.
- (c) A plurality of gas-supply passages leading from the gas-supply flue into the combustion-chamber.
- (d) An air-supply flue extending longitudinally below and in contact with the floor of the combustion-chamber so as to be heated thereby.
- (e) A plurality of air-supply passages leading from the air-supply flue into the combustion-chamber, and
- (f) A waste-flue leading out of and extending below the floor of the combustion-chamber and adjoining the air-supply flue.

The same elements are found in claim 2, with slight variations in element (d), which specifies:

*"Air-supply flues * * * adjoining opposite sides of the waste-flue whereby they are further heated."*

Claim 2 covers the annealing furnace of claim 1, but in a double symmetrical form, and specifies the heating of the air by the waste-flues as well as by the floor of the furnace.

Some of these elements are old in the art, as, for instance, the combustion-chamber, without which no furnace of any kind can be conceived. The patentees were not the first to place the waste-flue or the fuel-supply flue beneath the floor of a furnace. They were the first to make the particular arrangement of the flues specified in their patent. Above all, so far as appears in this case, they were the first to embody all the elements of the claims in an annealing furnace.

The argument on behalf of the defendant, that the claims are drawn to cover a furnace generally, and not an annealing furnace, and that the prior art with respect to furnaces generally should cause the patent to receive the most narrow construction, is not to be sustained, in view of the facts that the patent was granted for an annealing furnace, and contains the specification of "a certain new and useful improvement in annealing furnaces" only. The patent relates to the particular art of annealing furnaces. It would not be of value to consider further and in detail the references by the defendant.

Almost all of them relate to a different art. None of them disclose the structure of the patent in suit. The validity of the patent must be sustained.

Little is to be said on the question of infringement. The furnace of the defendant has all the elements of the claims in controversy. This is apparent from the models of the different furnaces introduced in evidence by the defendant. The various flues are arranged in almost the same way, and bear the same relation to each other in construction and operation. The omission by defendant of certain transverse connections found in the air-flues of the patent is noted, but not material. The gas-supply passages and the air-supply passages from the respective flues are the same in each construction, except that they are shorter in defendant's and do not rise as high at the sides of the combustion-chamber. This shortening of such passages permits the air and gas to mix at a lower elevation than in the structure of the patent, but such mixture is carried to the proper height on each side in a longitudinal air and gas passage extending the full length of the furnace, with the same width as that of the several passages of which it is a composite extension. The differences are so slight that they do not aid the defendant. Nor is defendant helped by the testimony on his behalf to the effect that the air-supply flues are not necessary to the operation of his furnace. The existence of such flues negatives the effect of that testimony, which in other respects is very unsatisfactory, especially as it does not appear that opportunity was afforded the plaintiffs to see one of defendant's furnaces in operation with the air-flues closed. The air-flues being in the defendant's furnaces justify complainants' fear of infringement, because, if for no other reason, defendant by his answer has justified his right to their use.

The court finds the issue as to infringement in favor of the complainants. An injunction will issue as prayed for.

Let a decree be drawn in accordance with this opinion.

PANOULIAS et al. v. NATIONAL EQUIPMENT CO.

(District Court, S. D. New York. June 3, 1912.)

PATENTS (§§ 262, 280*)—JUDGMENT (§ 592*)—SUIT FOR INFRINGEMENT—ACCOUNTING—PRIOR JUDGMENT AS BAR.

The owner of a patent may bring either an action at law to recover damages for its infringement or a suit in equity for an injunction, with incidentally a right to an accounting for damages and profits; but he is not entitled to split up his cause of action, and a judgment for damages in an action at law, while conclusive on the parties on the questions of validity and infringement, is a bar to the right to an accounting in a subsequent suit in equity against the same defendant for other sales prior to the commencement of the law action.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 403, 439; Dec. Dig. §§ 262, 280; * Judgment, Cent. Dig. § 1107; Dec. Dig. § 592.*]

Accounting by infringer of patent for profits, see note to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

*For other cases see same top c & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Panayiotis Panoulis and another against the National Equipment Company. On final hearing. Decree for complainants.

Ferdinand E. M. Bullowa and Emilie M. Bullowa, for complainants.
Irving M. Obreight (William Quinby and Livingston Gifford, of counsel), for defendant.

HOLT, District Judge. This is a suit in equity, brought to restrain the infringement of a patent and for an accounting. The complainant before this suit brought an action at law against the Confectioners' Machinery & Manufacturing Company for an infringement of the patent in suit, and recovered a verdict of \$1, nominal damages. The charge in that action at law was that the complainant had made and sold two machines infringing the patent, called Enrober machines, to one James C. Kuhn. It is admitted that the defendant in this case is the same party as the defendant in the action at law, having changed its name. This suit was brought on for trial before me, and I decided that the defendant was estopped from denying the validity of the patent, or its infringement, by the judgment in the action at law, and that therefore the complainant was entitled to a decree for an injunction.

The complainant claims that, in addition, he is entitled to a decree for a general accounting, in order to recover the damages or profits caused by the defendant's manufacture and sale of Enrober machines other than those sold to Kuhn. The defendant claims that there can be no accounting ordered in respect to the manufacture or sale of Enrober machines before the beginning of the action at law, on the ground that the complainant could not split up his causes of action, and was bound to include in that action all the causes of action that he had for infringement at the time the action at law was begun, and that therefore the judgment in that action is a bar to any accounting in this action in respect to any infringement occurring before the action at law was begun.

The patentee in the case of an infringement has a right to bring either an action at law to recover damages or a suit in equity for an injunction, with incidentally a right to an accounting for damages or profits. But, if either course be adopted, complainant is, in my opinion, not at liberty to split up causes of action for the infringement of the patent which had accrued up to that time against the defendant sued, but is bound to include all such causes of action in the suit, and, if he omits to include existing causes of action in any such suit, the judgment in it is a bar against his maintaining any subsequent action upon the omitted causes of action.

The complainant urges that an infringement of a patent is a tort, and there is authority for that proposition. There is authority, also, for the proposition that an action to recover damages for an infringement of a patent is an action on contract, or quasi contract, based on the rights accruing from the grant of the patent. I do not think that it is necessary to determine what the nature of a cause of action for the infringement of a patent is. A patentee who sues an infringer can recover in one suit, either at law or in equity, for all the damages caused by all or any acts of infringement of which the defendant has

been guilty. *Wilder v. McCormick*, 2 Blatchf. 31, Fed. Cas. No. 17,650. But after one judgment has been recovered, he cannot sue the same defendant again for other acts of infringement during the same period. *Horton v. N. Y. Cent. & H. R. Co.* (C. C.) 63 Fed. 897.

It frequently happens that a defendant is a manufacturer or vendor of an infringing machine or article, and has made or sold hundreds or thousands of them, believing that they do not infringe or that the patent which they are alleged to infringe is invalid. To permit a patentee who has established his patent in a suit for one infringement to go on bringing separate suits against the same defendant for each separate act of infringement would be a gross injustice, and in violation of those fundamental principles of law that it is a matter of public interest that litigation be terminated, and that judgments are, as a general rule, conclusive as to all facts which have been or which might have been litigated between the parties in the original suit.

My conclusion is, therefore, that the complainant is entitled to a decree for a permanent injunction, and for an accounting for any damages caused by any acts of infringement occurring after August 16, 1909, when the action at law was begun, but not for any acts of infringement before that time.

EDISON MFG. CO. v. BANKS ELECTRIC & MFG. CO.

(District Court, S. D. New York. June 20, 1912.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BATTERY.

The Dodge patent, No. 894,487, for a voltaic or primary battery, was not anticipated, and discloses patentable invention, in that it is stronger and cheaper, and can be more readily renewed, than those in prior use; also *held* infringed.

In Equity. Suit by the Edison Manufacturing Company against the Banks Electric & Manufacturing Company. On final hearing. Decree for complainant.

Louis Hicks (Delos Holden and Frederick Bachmann, of counsel), for complainant.

A. G. N. Vermilya, for defendant.

HOLT, District Judge. This is a suit in equity to restrain the infringement of a United States patent, No. 894,487, issued to Eben G. Dodge for improvements in a voltaic or primary battery. The invention, although relating to an electrical apparatus, is mechanical, rather than electrical. The object of the invention, as stated in the patent, is to simplify and cheapen the construction of primary batteries of the class in which the negative electrode consists of a plate of oxide of copper or other depolarizing agent properly molded and agglomerated, and the positive electrode of a plate or plates of zinc, so that renewals of the same would be less expensive and more readily carried out.

By the invention both the electrodes are supported by one frame or hanger, secured to the battery cover with one clamp. By such a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

construction the entire essential parts of the battery can be manufactured and put together in the factory, and, when the electrodes become exhausted, a renewal can be made by simply loosening the clamp, throwing away the old hanger, with its attendant electrodes, and substituting a new set in its place by clamping the new hanger to the cover of the battery jar. The renewal can be effected almost as readily as a new incandescent light bulb can be inserted in the place of one that is worn out. The result is a combination of the essential parts of the battery in one simple and rigid structure, which can be manufactured cheaply, can be easily renewed, and the use of which, when a renewal is necessary, largely avoids the danger of contact with the caustic soda solution in the jar in which the electrodes are plunged. The complainant's form of battery has gone into very extensive use, particularly for railway signals. The facts that the parts are completely assembled at the factory, that the structure is strong and cheap, and that a new battery can be so easily substituted for a wornout battery, have caused batteries of this class to be largely adopted by leading railroads.

I am satisfied from the evidence that this invention was novel, and was not anticipated by any of the patents or publications in the prior art. There is nothing electrically new in the arrangement of the parts; but this mechanical arrangement is novel. I have no doubt that the batteries made and sold by the defendant infringe. There is no difference between them and the complainant's battery, except that the defendant's depolarizing plate, instead of being a solid plate of oxide of copper, surrounded by a frame, consists of a considerable number of such plates inserted in a frame. The comparison made by the complainant's expert of the two plates to two window frames, one of which contains a single piece of glass and the other a number of pieces of glass, seems to me a good illustration of the essential similarity between the two plates. The evidence shows that they act in a precisely similar manner.

The complainant is entitled to a decree as demanded in the bill.

CHEATHAM ELECTRIC SWITCHING DEVICE v. AMERICAN AUTOMATIC SWITCH CO.

(District Court, S. D. New York. May 13, 1912.)

COURTS (§ 351*)—DISCOVERY (§ 80*)—PRODUCTION OF DOCUMENTS BEFORE TRIAL—FEDERAL COURTS.

A federal court cannot compel a party in an action at law to produce books or papers before the trial, either under Rev. St. § 724 (U. S. Comp. St. 1901, p. 583), or under a state practice; the only remedy of the party desiring such production being by a bill of discovery in equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. § 351; * Discovery, Cent. Dig. §§ 103, 105; Dec. Dig. § 80.*]

At Law. Action by the Cheatham Electric Switching Device against the American Automatic Switch Company. On motion by plaintiff

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for an order requiring defendant to produce its books before trial. Motion denied.

Ellery Edwards, Jr., of New York City, for complainant.
Kiddle & Wendell, of New York City, for defendant.

WARD, Circuit Judge. This is a petition in an action at law upon letters patent of the United States asking the court to require the defendant to permit the plaintiff to examine its books before trial, under section 724, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 583). The Supreme Court has in the case of *Carpenter v. Winn*, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842, finally determined that the courts can only compel the production of books and papers under section 724 in an action at law at the trial and not before. This leaves the plaintiff a bill of discovery as his only remedy. The more liberal state legislation and practice cannot be followed under sections 721 and 914, Rev. Stat. U. S. (U. S. Comp. St. 1901, pp. 581, 684), because they are inconsistent with section 724 as construed by the Supreme Court. *Ex parte Fiske*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117.

The prayer of the petition is denied.

In re NEVADA-UTAH MINES & SMELTERS CORPORATION.

(District Court, S. D. New York. July 18, 1912.)

1. BANKRUPTCY (§ 261*)—SALES—NOTICE.

A petition by a trustee in bankruptcy to the federal District Court for an order authorizing a meeting of creditors to act upon any bid which might be submitted at the meeting, though irregular, was sufficient to authorize the referee to act upon it, and was sufficient notice that a sale was proposed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 361, 362; Dec. Dig. § 261.*]

2. BANKRUPTCY (§ 261*)—SALES—NOTICE.

A notice in bankruptcy serving in a double capacity as notice to creditors that application for a sale of property and as notice to bidders, though irregular, did not vitiate the sale; the notice being freely advertised, and it not appearing that further publicity would have produced another or better bid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 361, 362; Dec. Dig. § 261.*]

3. BANKRUPTCY (§ 261*)—SALES—REGULARITY.

A federal court sitting in bankruptcy can dispense with compliance with a rule requiring a sale to be made by an auctioneer, and requiring a conspicuous notice in front of the premises two days before the sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 361, 362; Dec. Dig. § 261.*]

4. BANKRUPTCY (§ 262*)—"PUBLIC SALE."

There is a "public sale" in bankruptcy where all persons are permitted to bid, where bids are not held open, except with the bidder's consent, and where notice inviting bids is publicly given.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

For other definitions, see Words and Phrases, vol. 8, p. 7773.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—32

5. BANKRUPTCY (§ 264*)—SALES—CONFIRMATION—NOTICE—NECESSITY.

Creditors in bankruptcy are not entitled to notice of confirmation of a sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 368, 369; Dec. Dig. § 264.*]

In the matter of the Nevada-Utah Mines & Smelters Corporation, bankrupt. On report of a sale. Report confirmed.

Rosenberg & Levis (J. N. Rosenberg, of counsel), for trustee.

Winthrop & Stimpson (Chas. Thomas Payne, of counsel), for Trippe & Co.

Liebmann & Tanzer (Laurence Tanzer, of counsel), for objecting stockholders.

Pavey & Moore (F. D. Pavey, of counsel), for consenting stockholders.

Rounds, Hatch, Dillingham & Debevoise (E. R. Dillingham, of counsel), for assenting creditors.

HAND, District Judge. [1, 2] The proceedings in this case were quite irregular, and the practice adopted was certainly not that required by the official forms in bankruptcy prescribed by the Supreme Court, yet I am inclined to think that, in spite of their deviation, the whole substance of the protection to the estate existed. Form 42 (89 Fed. xlix; 32 C. C. A. lxxiii) of the official forms is the specified one to follow in a case like this. It prescribes a petition by the trustee to the referee asking leave to sell the property at public sale. Notice of this petition is given to the creditors, and on the return of that notice the referee, if he sees fit, directs a sale. This sale is then carried on by the trustee without further notice. In the case at bar the trustee applied first to the court for an order authorizing, among other things, a meeting of creditors, to act upon any bid which might be submitted at the meeting. Adequate notice of this meeting was given, and, upon the return day, the referee directed the property to be sold upon the only bid presented. The order for the sale itself, and the order accepting the bid, were made at one time by the referee. I think the petition presented to the court, disregarding the order made upon it, was a sufficient petition to authorize the referee to act upon it, and was sufficient notice of the fact that a sale was proposed. If, on the return day, the referee had directed the trustee to sell at auction, there would have been no irregularity in the proceedings. Instead of that, there was an attempt to make the notice serve in a double capacity, both as to notice to creditors that an application would be made for a sale; and a notice to bidders to make bids for the property, at the time in question, and the question becomes whether this practice was regular.

[3, 4] I do not find in the petition upon which the order of the court was made any ground stated justifying a private sale, and, indeed, I can see no reason for a private sale. Was this a private sale, for, if so, it seems to have been irregular under General Order 18, subd. 2 (89 Fed. viii, 32 C. C. A. xx). I think, on the whole, it was a public sale. The advertisement contained a proposal to all bidders

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to come in and make their bids on the day in question, and the notice was advertised as freely as was necessary, or, at least, as much as the court thought necessary. The property was struck down to the only bidder. There is no suggestion that further publicity would have produced another bidder, and, indeed, from all of the facts, there is no reason to suppose that any better bid could have been had. It is quite true that the sale does not conform with rule 17 of the local rules of this court, in that it was not sold by the auctioneer, and in the absence of a conspicuous notice in front of the premises two days before the sale. These are matters, however, which are not jurisdictional, and an order of this court dispensing with them is not invalid. What, then, is a public sale? I think it is no more than this: That all persons shall have the right to come in and bid, that the bids shall not be held open, except with the bidders' consent, and that notice shall be given publicly at which all bids are invited. All this was done in the case at bar, and I know of no reason why the sale should not take place at the same time at which the referee directs a sale, provided all necessary publicity is given, and every opportunity to those who wish to come in and bid. Neither the statute nor the rules prescribe how a public sale shall take place, and there is no necessity of an auction sale.

[5] As to the order of confirmation, I do not find anything which requires notice to the creditors of such an order. The statute (Act July 1, 1898, c. 541, § 70b, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]), says that the sale must be subject to the approval of the court if for less than 75 per cent. of the appraised value, but the approval of the court was obtained. It has certainly never been the practice of this district to give notice to all creditors of an application to confirm, and I think the absence of such a requirement in section 58 pretty clearly shows that Congress did not intend that they should have it.

I am somewhat moved in confirming the order of the referee by the fact that the great body of stockholders, as well as all the creditors, do not wish it to be reopened, and appear to be satisfied with the results. Nothing can be more variable than the price of mining stocks, and the petitioner very candidly concedes that he cannot assure the court of any better result at another time. The case is not one in which the sale has taken place hastily, or before the creditors and stockholders have had the fullest opportunity to do the best they can with the property. The bid is by a reorganization committee, who have allowed, and still will allow, these stockholders, who are not many, to come into the reorganization on the same terms as all others. It seems to me quite clear that, in spite of the irregular manner in which the matter was carried on, the sale should go through.

However, this proceeding should certainly not be taken as a precedent for any other. The only justification for it was that the pledgee was threatening a sale of an important part of the property, and there was every reason to suppose that the usual time for advertisement of the property could not safely take place after the order of the referee for a sale. That justified and required in this instance a somewhat anomalous procedure, but it should be considered anomalous never-

theless. It is a very dangerous practice to vary the set rules for judicial sales. In this district we are perhaps apt to be loose in such matters and especially to forget, though not in this case, that the creditors must have notice of the application for the sale, not merely of the sale itself.

Report confirmed.

KANSAS CITY GAS CO. v. KANSAS CITY et al.
(District Court, W. D. Missouri, W. D. March 2, 1912.)

No. 3,793.

1. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—LAW "IMPAIRING OBLIGATION OF CONTRACT."

A municipal ordinance which violates the terms of a valid contract made between the city and a gas company and imposes penalties for failure to comply with its requirements is a legislative act which "impairs the obligation of the contract," within the prohibition of the federal Constitution, and entitles the gas company to relief by injunction in a federal court of equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3412-3417.]

2. COURTS (§ 282*)—JURISDICTION—PREVENTING A MULTIPLICITY OF SUITS.

A federal court of equity has jurisdiction of a suit to enjoin the enforcement, through repeated criminal prosecutions for its violation, of a municipal ordinance which is void as in violation of the federal Constitution, on the ground of preventing vexatious litigation and a multiplicity of suits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

3. CONSTITUTIONAL LAW (§ 81*)—"POLICE POWER"—LIMITATIONS.

The police powers of a state or municipality do not extend to the passage of laws or ordinances which violate fundamental rights secured by the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

4. INJUNCTION (§ 85*)—ORDINANCES—VALIDITY—POLICE REGULATIONS.

Enforcement of a municipal ordinance purporting to be an exercise of the police power will be enjoined where it is oppressive, unequal, unjust, or altogether unreasonable, where obedience would require an expenditure which would render its operation confiscatory, or it impairs the obligation of a contract under the mere guise or pretext of contributing to the public safety, health, and welfare which it is not adapted or intended to secure, and the courts will go behind its letter for the purpose of determining its real substance and effect.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

5. CONSTITUTIONAL LAW (§ 129*)—IMPAIRMENT OF CONTRACTS—FRANCHISE OF GAS COMPANY.

Complainant was granted a franchise to supply and distribute natural gas in Kansas City for a term of 30 years, to be obtained from a supply company having wells and pipe lines, under a contract approved by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

city which bound the supply company "only to furnish such supply, for such period of time" as its wells and pipe lines and such other resources as it should be able to command were capable of supplying. The franchise ordinance reserved to the city the right of inspection and regulation, but provided that the pressure required from complainant "must not only be reasonable but practicable." It further provided that should the supply of natural gas obtainable by complainant, "reasonably accessible," be inadequate, or should the city council so find, complainant should no longer be required to supply it, and also for termination of the franchise if complainant should fail or neglect to comply with its terms for 60 days after notice. After a few years the supply of gas began to fail, and during the coldest weather complainant was unable to maintain full pressure. Experts employed by the city to investigate the gas fields reported that the available supply would be exhausted in two or three years and could not be increased without unreasonable and unjustified expenditure. In this situation, at the beginning of winter the city council passed an ordinance requiring complainant to maintain a prescribed pressure at all times under penalty of prosecution and fines for each day it failed to do so. It was shown without contradiction that the supply company furnished all the gas it could and that it was impossible for complainant to maintain the required pressure in very cold weather, and that it did maintain it at other times. On its failure, prosecutions were instituted. *Held*, that such ordinance was unreasonable and void as impairing the obligation of the contract, which itself provided adequate remedies to meet the situation, and that its enforcement would be enjoined.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 296, 301, 362-413; Dec. Dig. § 129.*]

6. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURTS—INJUNCTION TO STAY PROCEEDINGS IN STATE COURT.

Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), prohibiting the granting of injunctions by the federal courts to stay proceedings in a court of a state, applies only to proceedings which are pending in a state court when resort is had to the federal court, and whether an action is then pending in the state court must be determined by the law of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Norton v. San Jose Fruit-Packing Co.*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

7. COURTS (§ 508*)—FEDERAL AND STATE COURTS—CONFLICT OF JURISDICTION—PENDENCY AND SCOPE OF PRIOR PROCEEDING—INJUNCTION.

The pendency in a federal court of a suit by a gas company against a city to have an ordinance requiring complainant to maintain a certain pressure in its mains under penalty of prosecutions and fines declared unreasonable and unconstitutional and void as impairing the contract made by its franchise, and the enforcement of such ordinance enjoined, is not a bar to a subsequent suit by the city against the gas company in a state court for an accounting under the franchise ordinance on the ground that the contract rates charged were excessive because of the insufficient pressure maintained, and to enjoin its further collection of such rates, and there is no ground on which the federal court may enjoin such second suit, which does not interfere with the full exercise of its own jurisdiction in the cause pending before it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.*]

Conflict of jurisdiction of federal courts with state courts, see note to *Louisville Fruit Co. v. City of Cincinnati*, 22 C. C. A. 356.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Kansas City Gas Company against the City of Kansas City, Mo., Darius A. Brown, Mayor, John G. Park, City Counselor, Jay Lee, Assistant City Counselor, Jacob Harzfeld, F. E. Parker, and C. A. Sumner, Public Utility Commissioners of said Kansas City, and Clyde Taylor, counsel and attorney for said commissioners. On demurrer to bill and motion for preliminary injunction. Demurrer overruled, and motion granted in part.

By ordinance passed September 27, 1906, and approved September 27, 1906, the city of Kansas City authorized Hugh J. McGowan, Charles E. Small, and Randal Morgan, the survivors or survivor of them, and their or his assigns, to lay, acquire, and maintain pipes in Kansas City, for the purpose of supplying natural gas to said city and its inhabitants. This ordinance was duly accepted in writing, as therein required, and thereupon became a contract between the city and said grantees. This contract was for a full period of 30 years, and provided that the grantees might convey all their rights and privileges therein granted to a corporation, its successors or assigns, to be organized by them under the laws of the state of Missouri for the purpose of acquiring, building, constructing, and operating a gas plant authorized under that ordinance. The complainant is such corporation, and has succeeded to all the rights conferred upon the original grantees.

The ordinance, by section 5 thereof, further provided that "said grantees shall at all times keep and maintain such pressure of gas in all places where the same may be furnished to Kansas City and its inhabitants as may be required by ordinance; provided the pressure so required shall be reasonable and practicable." This provision was contained in two prior ordinances known as "model ordinances," passed by the common council of Kansas City, and duly approved, which were intended to operate as a guide in the preparation of any ordinance-contract thereafter to be entered into authorizing the actual supplying of natural gas to the city.

Section 10 provided that: "For the purpose of enforcing the provisions of this ordinance and securing the correct measurement of gas furnished under the same and the proper pressure of said gas to produce the best obtainable results with least consumption of gas, with due regard to the reasonableness and practicability of such pressure, and to prevent the waste thereof and to protect the city in its corporate rights, and to protect the consumers in their rights, the city shall have the right to provide, by ordinance, for the appointment of one or more inspectors or measurers of gas, and to prescribe their duties by ordinance, and to pass such ordinances as may be necessary to enforce the provisions of this ordinance."

Section 13 provided that: "The said grantees shall be entitled to charge and collect from consumers of such gas, during the period of five years from and after natural gas is first furnished hereunder at the rate of not to exceed twenty-five cents per thousand cubic feet, and during the period of five years next thereafter at the rate of not to exceed twenty-seven cents per thousand cubic feet, and thereafter during the period of the aforesaid grant at the rate of not exceeding thirty cents per thousand cubic feet." And further that: "Under the permission and authority hereby granted, the grantees shall furnish natural gas for illuminating, heating and mechanical purposes, which shall at all times be of the same character and quality as when it comes from the earth; and it shall not be mixed with air or otherwise adulterated."

Section 14 provided that: "Should the supply of natural gas, obtainable by grantees reasonably accessible, be, at any time hereafter during the life of this ordinance, inadequate to warrant them in continuing to supply natural gas under the terms of this ordinance, or should the common council of Kansas City so find at any time (and in the event of a disagreement as to the facts in this respect either party or a gas consumer may have recourse to the courts to establish the facts), they shall not be longer required to do so, but shall manufacture and furnish manufactured gas to said city and its inhabitants through said mains and pipes under the provisions of

this ordinance as far as applicable and subject to all the terms and provisions contained in the ordinance number 6,658 granted to Milton J. Payne and others, passed August 24, 1895, and the ordinance number 6,125 granted to Robert M. Snyder and others, passed January 10, 1895, and ordinance number 8,033, entitled: 'An ordinance granting the consent of Kansas City to the consolidation of the Missouri Gas Company and the Kansas City Gas Company,' until the expiration of said ordinance and no longer, except as to price which shall be settled by arbitration (as thereafter provided). The grantees shall not discontinue furnishing natural gas without serving at least six (6) months' written notice upon the mayor of Kansas City of their intention so to do."

Section 17 provided that: "If the said grantees shall do or cause to be done any act or thing by this ordinance prohibited, or shall fail, refuse or neglect to do any act by this ordinance required, they shall forfeit all rights and privileges granted by this ordinance, and this franchise and all rights thereunder granted shall ipso facto cease, terminate and become null and void, provided such failure to comply with the conditions of this ordinance shall continue unrectified for sixty (60) days after written notice thereof from the board of public works of said city, or the common council of said city."

By section 20 it was provided that the grantees might acquire the ownership or use or control, by purchase, lease, agreement, or otherwise, of the pipes and property of the Kansas City Missouri Gas Company aforesaid, subject to the right of the city to purchase the same under the special provisions of the several ordinances under which said company was then operating, as set out above. Such pipes and property were subsequently acquired under this provision. By said section 20 it was further provided that: "Grantees covenant that their contract for gas supply is with the Kaw Gas Company and the Kansas City Pipe Line Company (corporations), that under the terms thereof, after two years from the time natural gas is first furnished to Kansas City thereunder, the division of the gross income received for said gas between the distributing company and the supply company shall be in the proportion of thirty-seven and one-half cents out of each dollar to the former, and sixty-two and one-half cents to the latter; and covenant for themselves, their successors and assigns, that none of the terms of that contract agreement shall be changed without consent of Kansas City expressed by ordinance; and grantees agree for themselves, their successors and assigns, that if Kansas City shall acquire said plant and property they will on demand transfer free of cost to Kansas City all their rights under said contract; and grantees further agree to procure from said two corporations and file with the city clerk within ninety days from the time this ordinance becomes a law, a written agreement in form to be approved by the city counselor, agreeing that they (said two corporations) will, if Kansas City shall acquire said plant as aforesaid, upon demand, furnish and continue to furnish during the remaining period of this franchise gas to Kansas City on the same term as they have agreed to furnish it to the grantees, their successors and assigns." Kansas City further agreed not to exercise its right to purchase for the period of 10 years, unless grantees shall before that time have "ceased to furnish natural gas as required by this ordinance."

The written agreement referred to, in form approved by the city counselor, was duly filed. The city counselor also approved the form of contract between the grantees and the supplying corporations. All the rights of the supplying corporations have been acquired and are now owned and controlled by the Kansas Natural Gas Company, a foreign corporation. This supply contract between the supplying companies of the first part and the grantees, now the Kansas City Gas Company, of the second part, in so far as it bears upon this controversy, provides as follows: "The party of the first part hereby agrees that it will during the period of such ordinance, or any extension or renewal thereof, or of any ordinance which may be obtained, either in the interest of the party of the second part, or of its property, supply and deliver through its said pipe line or lines, to said party of the second part, or any successor in the ownership of the property for the distribution of

gas for Kansas City, Missouri, at a pressure of twenty (20) pounds at the point of delivery above mentioned, natural gas in such amount as will at all times fully supply the demand for all purposes of consumption, as provided in this contract, for the consideration hereinafter mentioned. However, as the production of gas from the wells and the conveying of it from long distances is subject to accidents and interruptions and failures, the party of the first part does not under this contract undertake to furnish the party of the second part with an uninterrupted supply of gas for the period named herein, but only to furnish such supply for such a period of time as the wells and pipe lines of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying. And it is expressly understood and agreed by the party of the second part that the party of the first part shall not be liable for any loss, damage or injury that may result either directly or indirectly from such shortages or interruptions, but said party of the first agrees to use diligence to supply the party of the second part with a constant and sufficient quantity of merchantable gas for all consumers. So long as the party of the first part is able to supply the same, the party of the second part agrees to buy from the party of the first part all the gas it may need to fully supply the demand for domestic consumption in the said city and to pay to the party of the first part for the natural gas which it shall receive from said party of the first part for all purposes during the first two years a sum equal to sixty per cent. of its gross receipts from the sale of such natural gas in said city of Kansas City, Missouri, and thereafter a sum equal to sixty-two and one-half per cent. of such gross receipts."

This was the form of contract submitted to and approved by the then city counselor of Kansas City just prior to and in view of the adoption of the franchise ordinance in question.

Section 21 of the ordinance provides that: "Nothing in this ordinance shall be construed as granting to said grantees any exclusive franchise, rights or privileges."

In section 22 it is provided that: "It being the purpose to safeguard and make sure that there may always be competition in the matter of supplying gas and that gas will be supplied within the city, the grantees and assigns agree that any action on their part impairing or limiting or preventing such competition, or any substantial and continued failure for a period of sixty days to furnish gas in compliance with the provisions of this ordinance, shall constitute a violation of this ordinance, and the city shall have the right to repeal this ordinance by ordinance, and shall have the right to purchase the plant under the same terms and provisions stated in sections 13 and 14 of ordinance of Kansas City, No. 6,658, passed August 24, 1895, commonly known as the ordinance of the Kansas City, Missouri, Gas Company, but the statement of these particular remedies shall not be construed as taking away from the city any of its rights in law or equity. * * * Kansas City retains to itself the right to itself own and operate a plant or plants for supplying the city, or the inhabitants thereof, with natural or artificial gas (if it shall at any time see fit so to do) for lighting and heating and manufacturing purposes, and to own and operate a plant or plants for supplying the city, or the inhabitants thereof, with any other sort of light."

Under this franchise ordinance the grantees and their assignee, the complainant company, have been furnishing natural gas to Kansas City, and its inhabitants, since the late fall of 1906 and the winter of 1907. The service, at first more restricted, has been continuously increased to meet the demand of increased consumption and the varying supply of the fields. At various periods the supply has proved unequal to the demand of consumption in unusually cold weather, ranging somewhere about what is usually denominated zero weather. It was originally contemplated and understood by both parties that the supply should be taken from Kansas fields as nearest and most accessible to Kansas City. Prior to and also, perhaps, contemporaneously with the passage of this ordinance, the supply company had made contracts with other towns and cities in Kansas and Missouri for the supply of natural gas; and whether from the great increase of consumption, or from

natural causes, or both, the supply of natural gas in the Kansas fields and the accompanying pressure became greatly diminished, and in some pools practically exhausted, so that it became necessary to extend the mains of the supply company to other fields, notably in the state of Oklahoma. This was attended with great expenditure and with many legal difficulties, particularly in the case of procuring transportation of gas from the state of Oklahoma, but final appeals to the Circuit Court of Appeals and the Supreme Court of the United States resulted in throwing open these fields of supply to the Kansas City consumers. With all such diligence and effort on the part of the complainant and its supply company, it was found, more particularly during the winter of 1910-11 and 1911-12, that the supply was unequal to the demand during periods of unusually low temperature as stated. This led to negotiations between the city authorities and the gas company with a view to bettering conditions and providing for future supplies.

On or about October 24, 1911, the city gas inspector's department, by direction of the mayor, issued a booklet of information to the consumers of natural gas setting before them the conditions existing, together with certain recommendations of the Public Utilities Commission. This booklet, among other things, contained the following:

"Last year after such investigation as could be made, without the employment of gas experts to visit the fields, the Commission recommended to the gas company that storage tanks should be erected in the city, of sufficient capacity to enable the company to carry the demand over the 'peak' load, by supplementing the quantity coming direct from the field by the amount stored therein. In response to this recommendation, the company is erecting a tank of 5,000,000 cubic feet capacity for this purpose.

"While this will not solve the difficulties, still the danger of suffering from lack of gas will not be as great this winter.

"Upon instructions from Mayor Darius A. Brown, the city gas inspector and the gas company officials were instructed to equalize the gas pressure at the different distributing stations within the city, so that all parts of the city would get approximately the same service.

"The results from this suggestion were immediately beneficial.

"It is the belief of the Commission that except in seasons of prolonged cold weather or in case of an unavoidable breakdown at the pumping stations the service of the gas company will be fairly satisfactory. In either of the above contingencies the facilities of the service will not be adequate. If the report of Prof. Haworth shows gas in sufficient quantity in the field to warrant the expenditures, the Commission will insist that an additional pipe line be laid during the coming summer, which will be ample to take care of the demand in Kansas City for some time.

"The accompanying suggestions of the gas inspector, Mr. Robt. W. Goodnow, are commended to the people of Kansas City as being well worth their attention.

"We advise that if you use the gas for fuel that you have some coal or wood on hand to fall back upon, should there be some interruption in the service.

"Last winter the service was better than in the past; at the same time some interruptions did occur, that seemed almost unavoidable."

November 21, 1911, the examining expert, Prof. Haworth of the University of Kansas, and state geologist of that state, made his report upon the condition of the gas fields of Kansas and Oklahoma, and shortly thereafter another expert employed by the city, Mr. B. F. Walker, professor of mechanical engineering in the University of Kansas, made report upon the pipe lines, works, and facilities for supply and distribution of the complainant company and its supply company. The former reported that under present conditions two more winters, or three at most, is as long as we may expect natural gas to be delivered to Kansas City in sufficient quantity to equal present domestic consumption unless new developments of gas far exceed present indications; that the pipe lines and pumping stations of the company are about as much as the known gas supply would warrant the company in installing, or as there is any need of installing. Prof. Walker found that so far as the

supply is concerned the present equipment is sufficient to meet the needs of the territory served during all excepting a very few weeks of the year; that to increase the capacity of the system will only use up the available gas in a shorter time; that, unless the supply of gas is largely augmented by the discovery of new fields, it is impracticable to attempt to increase the supply of gas consumers, except by cutting down its use in commercial plants. He says: "Speaking now of the feasibility of the extensive additions to equipment mentioned above on the condition of more gas being available at lowered pressure, with the purpose of increasing the capacity of the system, we have to bear in mind the report of Prof. Haworth to the effect that, unless fields now unknown are discovered, the supply of gas will be exhausted in two or three years at the present rate of consumption. To make the additions mentioned would require fully half of that time, if not more, with an expenditure running into millions of dollars. No sane man would invest his money in such a project."

The substance of the reports of the two experts taken in connection with the other testimony was that the gas supply is rapidly diminishing so that its life is but two or three years at the most, or perhaps from five to seven, provided commercial users be cut off. In a subsequent report to the city council Prof. Haworth said he thought his estimate was too sanguine and should be somewhat reduced. The supply cannot be increased other than by the opening of new fields, and no new fields are in sight, and there is every reason to believe that they do not exist to any remedial extent. The present equipment is reasonably sufficient to handle the present supply, and the equipment of the complainant company is sufficient to supply the wants of the city when gas is supplied to its mains at contract pressure, which means in sufficient quantity, because the pressure depends almost entirely upon the quantity of gas; that to supply additional gas to the complainant company would require the investment of millions of dollars, and a long period of time for installation; that the quantity of gas to be procured would not justify any sane man in making such investment in view of the results obtainable. In other words, that it would be entirely unreasonable. These reports were accepted by the city, by the gas company, and by the public generally, as reliable and accurate. The instrumentalities of the complainant company are so constructed that when the volume of gas is insufficient the pipes and mains are opened automatically, and all gas obtainable is admitted and distributed; so that the complainant constantly distributed all the gas it could obtain from its supply company. There is no other supply of natural gas obtainable by complainant whether reasonably accessible or otherwise, and in the absence of sufficient volume it has no means appreciably to augment its pressure. Consequently, at no time during the period covered by this controversy has the complainant, in point of fact, been able by the exercise of diligence or by expenditures, reasonable or otherwise, appreciably to increase the volume of gas or the pressure at which it has been delivered. Even the contemplated holder, with a capacity of 5,000,000 cubic feet, if it could have been filled, would not have been able to increase the pressure to five inches during periods of extreme cold. It is further shown that all practicable storage is affected by packing the gas in the pipes. Holders are not needed when there is gas to fill them, and there is no gas to fill them when they could be used to advantage. Under the provisions of the contract ordinance that the city might, by ordinance, prescribe a pressure that was reasonable and practicable, the common council on January 12, 1909, passed an ordinance that the pressure should not be less than 5 inches water pressure for a period of 24 consecutive hours, nor exceed 13 inches of water pressure for a like period. On the 23d day of May, 1910, this ordinance was amended by striking out the words "for a period of twenty-four consecutive hours"; thereby providing for a constant pressure of not less than 5 nor more than 13 inches. No penalties were provided, and it is in evidence that this was done at the insistence of the gas company that no penalty could be imposed for failure to furnish a pressure of gas that was impossible. This was the condition during the remainder of 1910 and during the year 1911, until some time after the report of the experts in November.

In view of, and with full knowledge of, the conditions then existing, the common council on the 14th day of December, 1911, passed an ordinance, approved December 15, 1911, amending the ordinance of May 23, 1910, aforesaid, by adding a new section which provided that: "Any person, firm or corporation supplying natural gas to this city, or its inhabitants, who shall violate any of the provisions of section 1 hereof, shall be deemed guilty of a violation hereof, and shall, upon conviction thereof, be fined in a sum of not less than one hundred dollars, or not more than five hundred dollars, for every such violation, and for each and every day during the whole or part of which any such person, firm, company or corporation shall fail to comply with the terms hereof, he, it, or they shall be deemed guilty of a separate violation hereof."

Section 1, as has been stated, provided that the complainant should "so control its source of supply and adjust its mains for the distribution of natural gas that the minimum pressure of said gas at every point in this city, where natural gas is supplied for consumption, shall not be less than five inches water pressure." Unusually cold weather prevailed in Kansas City during December and January. The city sought, whether effectively or not, to institute two prosecutions under this amended ordinance, and threatened to bring many others. Upon this state of facts the complainant exhibited its bill to this court seeking relief on the ground that the ordinance was unreasonable, impracticable, and impossible to be obeyed by the complainant; that it impaired the obligations of its contract with the city, took its property without due process of law, and was therefore void. A temporary restraining order was issued. The defendants appeared and contended in opposition: First, that the ordinance was a valid exercise of the police power of the city, and was intended to protect the health and general welfare of the community; second, that, the ordinances being valid police regulations, property rights must yield to them; third, that the difficulty of procuring gas does not render the ordinances unconstitutional; fourth, that complainant has an adequate remedy at law, it can present its defenses in the state court or sue for damages, and an injunction will not lie; fifth, that the ordinances do not violate the Constitution. Meantime, before the hearing in this court, the city, on behalf of itself and all gas consumers, filed in the state court its bill in equity declaring that the gas furnished by complainant by reason of inadequacy and insufficiency of pressure was not of the value of the contract price and praying an accounting. The complainant thereupon contended in this court that this action on the part of the city was in disobedience of the restraining order heretofore issued by this court, and that this court had full jurisdiction of the entire subject-matter involving the pressure in controversy.

The hearing upon the temporary injunction was held on the 26th, 27th, and 29th days of January, 1912. The complainant on its part filed numerous affidavits to sustain the contentions, substantially as heretofore recited. The defendants filed many affidavits, none of which sought appreciably to controvert such contentions respecting supply and impossibility of performance. Their affidavits establish that on certain days of unusually low temperature, during the period complained of, the pressure did not reach the minimum prescribed by ordinance. These facts are undisputed. Other affidavits sought to establish the necessity of a five-inch pressure for the uniform and proper distribution of natural gas throughout the distributing system for gas as it now exists in Kansas City; that gas furnished at a less pressure than five inches is worth less than that furnished at five inches or over; that practically all the apparatus that is used by all persons resorting to the use of natural gas for heating and lighting in Kansas City is so designed as to operate more satisfactorily and safely at a pressure above the five-inch water pressure; that there is danger from asphyxiation and fires when the pressure fluctuates from a point considerably below five inches to one above and increasing to thirteen inches; that fires have thus resulted, and death by asphyxiation has been narrowly averted; that from five to seven inches is recognized as the reasonable and most effective pressure for the practical use of natural gas. On February 3, 1912, several days after the arguments,

defendants, by consent, filed their joint and several demurrer to the bill upon the grounds: First, that said bill does not state any matter of equity entitling plaintiff to the relief prayed for; second, the facts stated are not sufficient to entitle plaintiff to any relief against these defendants; third, the facts stated show that complainant has an adequate remedy at law; fourth, the facts stated show that this is not a controversy arising under the Constitution or laws of the United States.

Charles E. Small and Edward L. Scarritt, for complainant.

John G. Park, City Counselor, and Clyde Taylor, Attorney for Commissioners, for defendants.

VAN VALKENBURGH, District Judge (after stating the facts as above). [1] I. Complainant asserts that the amended ordinance of December 15, 1911, is unjust, unreasonable, oppressive, and void, in that it impairs the obligations of its ordinance-contract with the city and takes its property without due process of law. Complainant invokes section 10, article 1, of the Constitution of the United States and the fourteenth amendment thereof. The defendants contend that no constitutional question is involved, and, there being no diversity of citizenship, that this court is without jurisdiction.

As has been frequently said, it is always a matter of great delicacy when federal courts are called upon to interfere with the local laws of the state, and I cannot more adequately describe the attitude of this court than by quoting from the opinion of Chief Justice Marshall in the case of *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257. He says:

"It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

The ordinance of September 27, 1906, authorizing complainant's assignors to lay, acquire, and maintain pipes in Kansas City for the purpose of supplying natural gas to said city and its inhabitants, being legally adopted, accompanied by all legal requirements, and properly accepted, constitutes a contract between complainant and the city. *Vicksburg v. Waterworks Co.*, 202 U. S. 453-462, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; *Aurora Water Co. v. City of Aurora*, 129 Mo. 540, 31 S. W. 946; *State ex rel. Abel v. Gates*, 190 Mo. 540-558, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Monett E. L., P. & I. Co. v. City of Monett (C. C.)* 186 Fed. 360-364. And a municipal ordinance which impairs the obligations of such a contract, or takes property without due process of law, comes within the prohibitions of the federal Constitution, and in such cases the federal courts may be appealed to for redress.

The Supreme Court, in *Willcox v. Consolidated Gas Co.*, 212 U. S.

19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, in discussing such a situation, says:

"It is not a question of discretion or comity for the federal court to take jurisdiction of a case; it is the duty of that court to take jurisdiction when properly appealed to; and it should not be criticised for so doing even though the case be one of local interest. The right of a party plaintiff to choose the federal court cannot be properly denied."

The practical reason for this, apart from the plain provisions of the law, is clearly and forcibly stated in the opinion of that court in *Prentis v. Atlantic Coast Line*, 211 U. S. 210-228, 29 Sup. Ct. 67, 70 (53 L. Ed. 150):

"It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants would be proceedings in court and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two—pure matters of fact. When those are settled, the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent."

Applications to the courts of United States for relief under circumstances such as are here alleged to exist have been commonly made and uniformly entertained. *Atchison, T. & S. F. R. Co. v. City of Shawnee* (C. C. A. Eighth Circuit), 183 Fed. 85, 105 C. C. A. 377; *Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; *San Francisco G. & E. Co. v. City, etc., of San Francisco* (C. C.) 189 Fed. 943-948; *Shawnee Milling Co. v. Temple* (C. C.) 179 Fed. 517; *City of Owensboro v. Cumberland T. & T. Co.* (C. C. A. Sixth Circuit) 174 Fed. 739, 99 C. C. A. 1; *Spring Valley Water Co. v. City & County of San Francisco et al.* (C. C.) 165 Fed. 667; *Dobbins v. City of Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

In *Atchison, Topeka & Santa Fé Railroad Co. v. City of Shawnee*, the court said:

"A resolution of a city council, ordering a railroad company to open and put in condition for public travel a street through its station yards, previously vacated by an ordinance which constituted a contract with the company, where disobedience of such order subjected the railroad company to a penalty under the laws of the state, is a legislative act, which impairs the obligation of the contract and entitles the company to relief by injunction in a federal court of equity."

In *Northern Pacific Railway Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, the Supreme Court said:

"Municipal legislation passed under supposed legislative authority from the state is within the prohibition of the federal Constitution and void if it impairs the obligation of a contract.

"In cases arising under the contract clause of the federal Constitution, this court determines for itself whether there is a contract valid and binding between the parties, and whether its obligation has been impaired by the legislative action of the state.

"Legislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract."

And this was said to be true when the municipal legislation has the effect to impair contract rights by depriving the parties of their benefit, and makes requirements which the contract did not theretofore impose upon them.

"The terms 'life, liberty, and property' embrace every right which the law protects; they include not only the right to own and hold, but also the right to use and enjoy property. Profits and income are property. The right of contract, the right to fix the terms and conditions upon which the owner will sell, lease, or otherwise dispose of his property, is itself property, and any statute or ordinance which limits or curtails these rights deprives the party affected of his property." *Spring Valley Water Co. v. City and County of San Francisco* (C. C.) 165 Fed. 667.

Citations in support of this proposition might be indefinitely multiplied.

[2] II. Counsel for defendants next urge that a federal court of equity is without jurisdiction, for the reason that this is a criminal proceeding, and that complainant has an adequate remedy at law by interposing its defense in the courts of the state. We may freely concede the general proposition that equity will not ordinarily interfere to stay prosecutions, where an adequate remedy at law is provided. That remedy, however, must be as full, adequate, and complete in every particular as that which a court of equity would give, and, when it is not so, the latter court will assert its jurisdiction, and, in proper cases, restrain unwarranted and vexatious prosecutions. *City of Rushville et al. v. Rushville Nat. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Atchison, Topeka & S. F. R. Co. v. City of Shawnee* (C. C. A. Eighth Circuit) 183 Fed. 85, 105 C. C. A. 377; *City of Hutchinson v. Beckham* (C. C. A. Eighth Circuit) 118 Fed. 399, 55 C. C. A. 333; *Jewel Tea Co. v. Lee's Summit, Mo., et al.* (C. C.) 189 Fed. 280; *San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County et al.* (C. C.) 163 Fed. 567; *Shawnee Milling Co. v. Temple* (C. C.) 179 Fed. 517; *Nelson v. City of Murfreesboro* (C. C.) 179 Fed. 905-908; *Sylvester Coal Co. et al. v. City of St. Louis et al.*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *Dillon on Municipal Corporations* (5th Ed.) pars. 1269, 1270.

The grounds upon which this jurisdiction is exercised may be most pointedly disclosed by a brief reference to the decided cases.

"A court of equity may enjoin the enforcement of a city ordinance to prevent a multiplicity of actions; the ordinance being void as to the appellee in a most material provision which absolutely denied to it substantial rights except on condition that it submit to unjust restrictions." *City of Rushville et al. v. Rushville Nat. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

The language of the Court of Appeals for this circuit in *Atchison, Topeka & Santa Fé R. Co. v. City of Shawnee*, has been already quoted under the preceding section.

"The enforcement of a municipal ordinance, void for interference with interstate commerce, by criminal proceedings, with frequent arrests and other arrests threatened, will be enjoined." *Jewel Tea Co. v. Lee's Summit, Mo.* (C. C.) 189 Fed. 280.

In *San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County et al.* (C. C.) 163 Fed. 567, the equity jurisdiction was upheld on the ground of multiplicity.

"A bill for injunction to restrain the enforcement of a criminal or penal statute is allowable when the statute is unconstitutional or invalid, where, in an attempt to enforce it, property rights are invaded, or where oft-repeated attempts to enforce it would create a multiplicity of suits." *Shawnee Milling Co. v. Temple* (C. C.) 179 Fed. 517.

In *Sylvester Coal Co. et al. v. City of St. Louis et al.*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566, the Supreme Court of this state said:

"The enforcement of a city ordinance making it a misdemeanor to buy or sell certain articles, unless in the manner therein provided, will be enjoined if such ordinance is invalid although its invalidity has not been determined in a prosecution thereunder or in an action of a legal character. The prevention of vexatious litigation and a multiplicity of suits constitutes a favorite ground of equity jurisdiction. Municipal ordinances, though penal, are not criminal statutes."

"It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." *Dobbins v. City of Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

"A court of equity has jurisdiction of a suit to enjoin the enforcement of an illegal city ordinance imposing a license tax, where, in addition to the illegality of the tax, it is shown that, if the city is permitted to proceed to enforce it by the remedies provided, complainant will be called upon to defend a multitude of criminal prosecutions, and will suffer irreparable injury in his business. And this is so notwithstanding the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the city." *City of Hutchinson v. Beckham* (C. C. A. Eighth Circuit) 118 Fed. 399, 55 C. C. A. 333.

This doctrine is so well recognized and is sustained by such an overwhelming weight of authority that it is deemed unnecessary to discuss it further.

[3] III. But counsel for defendants earnestly insist that this ordinance is an exercise of the police power of the city amply conferred by the state Constitution and laws, and by charter; and that such regulations do not impair constitutional guaranties. No court can or should ignore or impair the legitimate police powers reserved to the states which are essential to the maintenance of order and the preservation of the health, happiness, and general welfare of the citizen. The definition of this power contained in the citations of defendants' counsel is readily accepted and must be indorsed by every thoughtful person.

"This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect

the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties by entering into contracts may not estop the Legislature from enacting laws intended for the public good." *Manigault v. Springs*, 199 U. S. 473-480, 26 Sup. Ct. 127, 130 (50 L. Ed. 274).

And again:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, 'Salus populi suprema lex'; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." *Beer Co. v. Massachusetts*, 97 U. S. 25-33, 24 L. Ed. 989.

And the Supreme Court of the United States, speaking through Mr. Justice Lurton in the late case of *City of Chicago v. Sturges*, 222 U. S. 313, 32 Sup. Ct. 92, 56 L. Ed. 215, decided December 18, 1911, and not yet reported in bound volume, has further said:

"Primarily governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual."

But the learned justice ended the paragraph just quoted as follows:

"If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law is it not to be regarded as denying due process of law under the provisions of the fourteenth amendment?"

And in *Beer Co. v. Massachusetts*, supra, the court limited its statement in the following language:

"Of course, we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several states, or otherwise."

And in *Manigault v. Springs*, supra, it was distinctly stated that "this power is subject to limitations in certain cases." These limitations are most forcibly and luminously stated in the case of *Mugler v. Kansas*, 123 U. S. 623-661, 8 Sup. Ct. 273, 297 (31 L. Ed. 205), a case upon which counsel for defendants most confidently rely as vouchsafing immunity to the ordinance attacked in this proceeding. The court says:

"Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are

appropriate or needful for the protection of the public morals, the public health, or the public safety.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund Cases*, 99 U. S. 700, 718 [25 L. Ed. 496]), the courts must obey the Constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137, 176 [2 L. Ed. 60], 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

This utterance of the Supreme Court of the United States in a case where it upheld the police power of the state when properly exercised was adopted by the Supreme Court of this state in *State v. Layton*, 160 Mo. 474-489, 61 S. W. 171, 174 (62 L. R. A. 163, 83 Am. St. Rep. 487), with this added statement:

"Under forms of government where limitations upon executive and legislative powers do not exist, there is no restriction upon this necessary function of government; but under our federal and state governments limitations are to be found in our written Constitutions."

The Supreme Court of Missouri, in *State v. Julow*, 129 Mo., loc. cit. 174, 31 S. W. 782, 29 L. R. A. 257, 50 Am. St. Rep. 443, thus quotes with approval the following language of Judge Comstock in *Wynchamer v. People*, 13 N. Y. 378:

"To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The Constitution would then mean that no person shall be deprived of his property or rights, unless the Legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. * * * Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, then the Legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with liberty and life."

Turning again to the Supreme Court of the United States, we find the following exposition of this same limitation in the opinion of Mr. Justice Matthews in *Yick Wo v. Hopkins*, 118 U. S. 356-369, 6 Sup. Ct. 1064, 1071 (30 L. Ed. 220), a case which had under con-

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sideration a municipal ordinance passed in derogation of the constitutional rights of Chinese residents of the city and county of San Francisco:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Mr. Justice Miller, in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557, said:

"It would be a very curious and unsatisfactory result, if in construing a provision or constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

It may be confidently stated that in no case in which a carefully considered opinion has been written has the police power of the state been asserted without reservation of the limitations recognized in the cases cited. In adopting the federal Constitution the people of the United States in their sovereign capacity placed upon their own powers limitations which can be removed only by acts of equal dignity and solemnity. It constitutes a compact between the people, considered in whole or in part, and the individual, whether his station be high or low. It transcends government, state or national, which seeks to invade or set aside its guaranties. Those guaranties are co-ordinate, and no one of them can be so employed as to render nugatory any of

the others. They are not so flexible or volatile that they may be lightly set aside under conceptions of necessity or desirability however beneficial or well meant the purpose may be. A Constitution that neither guarantees stability nor places limitation upon the arbitrary exercise of governmental power is a Constitution in name only, and by the Constitution of the United States the judicial power is extended to all cases in law and equity arising under it.

[4] IV. It must be conceded, then, that the police power of the state is subordinate to the Constitution, and that statutes and ordinances purporting to be an expression of that power will be set aside if they invade constitutional rights. It may be conceded further that such regulations will be sustained, unless their conflict with such rights is clearly apparent. What then are the grounds upon which the court may feel itself called upon to declare such acts invalid? The principles governing are well established. The difficulty, if any, to be encountered, lies in the determination of the facts. These must be resolved by whatsoever tribunal has been charged with that duty.

In general it may be stated that the courts, in all jurisdictions, with uniformity, have declared that the enforcement of a municipal ordinance will be enjoined when it is unreasonable, whether upon its face, or where a state of facts makes it so; where it is oppressive, unequal, unjust, or altogether unreasonable; where it involves oppression or abuse of power under the mere guise or pretext of regulation; where obedience would require an expenditure which would render its operation confiscatory; where it has no reference to the comfort, safety, or welfare of society; where it is not adapted thereto nor intended to produce such beneficial result; where it subverts rights under the mere pretense and color of regulation; where it is apparent that the public health, safety, and welfare bear but the most remote relation to the law; where it impairs the obligations of contracts under the mere guise and pretext of contributing to the public safety, health, and welfare in the form and under the pretense of police regulation. This is always so when such vices appear upon its face, and the courts when appealed to will always go behind the letter for the purpose of determining the real substance and effect. The above statement might be indefinitely elaborated, but it is sufficient to indicate the grounds upon which such ordinances will be scrutinized when it is charged that a so-called police regulation invades the constitutional rights of the party applying to the court for protection. For purposes of elucidation a number of illustrative decisions will be quoted from the great array of cases cited in support of the doctrine.

"The courts will not take the recital in an ordinance that its purpose is to condemn private property to a public use as conclusive. They will look through any sham and see the truth, and the best evidence obtainable, whether documentary or oral understandings, will be received to show the real purpose." *Kansas City v. Hyde*, 196 Mo. 498, 96 S. W. 201, 7 L. R. A. (N. S.) 639, 113 Am. St. Rep. 766; *State ex rel. Abel v. Gates*, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Glasgow et al. v. St. Louis et al.*, 107 Mo. 198, 17 S. W. 743.

"The courts will declare an ordinance void for unreasonableness where it is oppressive, unequal, unjust, or altogether unreasonable." *City of Lamar v. Weidman*, 57 Mo. App. 507.

"Where a regulation in order to make the prices possible would require an expenditure from which no reasonable return could be obtained at the rates provided in the contract, it is void." *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034.

"But certainly there is a limit in this regard over which Legislatures and municipalities cannot pass; they cannot, in the exercise of assumed police powers, violate charter contracts and overthrow vested rights. The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise. *Cooley, Const. Lim.* (5th Ed.) 712." *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789.

One of the most illuminating cases upon this subject is that of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, wherein was involved an ordinance upon its face apparently well within the police power of the city, apparently equal and impartial in its provisions, but which, from the facts, the court found was passed and operated for purposes of discrimination against the Chinese laundrymen of San Francisco. The court said:

"It is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly, and convenient manner; nevertheless, such a construction would afford no warrant for such an exercise of legislative power, as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself.

"The same principle has been more freely extended to the quasi legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. Accordingly, in the case of *State of Ohio ex rel., etc., v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262-300, an ordinance of the city council purporting to fix the price to be charged for gas, under an authority of law giving discretionary power to do so, was held to be bad, if passed in bad faith, fixing an unreasonable price, for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of their works.

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

"The determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

This doctrine is still further elaborated by the Supreme Court in the case of *Lochner v. New York*, 198 U. S. 45-64, 25 Sup. Ct. 539, 546 (49 L. Ed. 937, 3 Ann. Cas. 1133), wherein it was said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general

proposition. Otherwise the fourteenth amendment would have no efficacy, and the Legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for.

"It is a question of which of two powers or rights shall prevail—the power of the state to legislate, or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate. * * *

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose."

The doctrine of this case was followed and in all things approved by the Supreme Court of this state in the case of *State v. Miksick*, 225 Mo. 561, 125 S. W. 507, 135 Am. St. Rep. 597.

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the meaning of the constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law. Rights guaranteed to a citizen by the Constitution cannot be abridged by legislation under the guise of a police regulation. The statute cannot escape censure by assuming the label of a police regulation. It has none of the elements or attributes which pertain to such a regulation, for it does not in terms or by implication promote, or tend or promote, the public health, welfare, comfort, or safety; and, if it did, the state would not be allowed under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the Constitution intended to secure against diminution or abridgment." *State v. Julow*, 129 Mo. 163, 31 Sup. Ct. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443.

"In order to sustain legislation of the character of the act in question, as a police measure, the courts must be able to see that its object in some degree tends towards the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare. If no such object is discernible, but the mere guise and masquerade of public control, under the name 'of an act to regulate business and trade,' etc., is adopted, that the liberty and property rights of the citizen may be invaded, the court will strike down the act as unwarranted." *State ex rel. Wyatt v. Ashbrook et al.*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765.

"It is conceded that its acts must have such a relation to the public health that the courts by inspection can discern that they relate to and are convenient and appropriate to promote the public health, and are not mere arbitrary provisions which the courts can see have no natural connection with the professed purpose of subserving the public health." *St. Louis v. Schuler*, 190 Mo. 524-534, 89 S. W. 621, 622 (1 L. R. A. [N. S.] 928).

"Where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance. It is

well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

"An ordinance may be valid in its general purpose, but unreasonable and oppressive as applied to certain property." *McQuillin on Municipal Ordinances*, par. 186; *Heman v. Ring*, 85 Mo. App. 231-235.

"The ordinance must be reasonable as applied to the particular subject-matter." *McQuillin on Municipal Ordinances*, par. 186; *City of Willow Springs v. Withaupt*, 61 Mo. App. 275, 276.

"It may be stated, as a general proposition, that when a city makes a contract for a municipal improvement—e. g., conferring the right to introduce, distribute, and sell water within the city—it cannot, in derogation of its contract, by ordinance or otherwise, impose additional burdens upon the grantee or vary the conditions contained in the contract." *McQuillin on Municipal Ordinances*, par. 239; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886.

"Such laws must be plainly appropriate to secure the end in view, which was itself legal and commendable. They must have direct relation to the public health and a direct and plain tendency to aid in the securing of it." *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

"Courts are not to be deceived by the mere phraseology in which an ordinance is couched when the action of the municipality in the light of the fact shows conclusively that it was passed for an unlawful purpose and not for the purpose therein stated." *Michie's Ency.* vol. 8, pp. 1010-1012; *Postal Telegraph Cable Co. v. Taylor*, 192 U. S. 64-73, 24 Sup. Ct. 208, 48 L. Ed. 342.

In the case of *Kansas Natural Gas Co. v. Haskell* (C. C.) 172 Fed. 545-558, the act provided for the exercise of eminent domain, the restriction of pressure in pipe lines in the state beyond an asserted danger point of 300 pounds; inspection and supervision, regulation of foreign corporations doing business within the state, all confessed to be police powers reserved in the state; but the court held that the purpose of the law after all, masked as it was, contemplated solely and chiefly the prevention of the exportation of gas from the state, and so an interference with interstate commerce. The court said:

"Does a state possess the constitutional power, derivable from any source whatever under our Constitution and laws, to prohibit, through its legislative assembly and lawfully constituted officials assuming to act in pursuance of its expressed will, the transportation of natural gas in interstate commerce, or persons from engaging in such enterprise in a lawful manner? For, unmasked and shorn of all pretexts, evasions, and subterfuges, this is beyond all cavil precisely what the act in controversy contemplates, and its enforcement, if valid, means; for it is both incomprehensible and inconceivable to our minds that it might even be thought by any one that another view of the act in question should be taken by a court, or that it might in the end be solemnly decreed that that which is abortive and ineffectual if attempted by direction shall become virile and impregnable to attack if sheltered behind such subterfuges, glossed by such pretexts, or coated with such evasions as are here employed."

This case was affirmed and quoted with approval in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, and the same principles are laid down by the Court of Appeals of this circuit in *Haskell*, Governor of Oklahoma, et al., v. *Cowham* (C. C. A.) 187 Fed. 403, 109 C. C. A. 235. The authorities in support of these principles are overwhelming in number and compelling in dignity, and the Supreme Courts of the United

States and of this state are foremost in their exposition. *St. Louis v. St. Louis Theater Co.*, 202 Mo. 690, 100 S. W. 627; *City of Rushville et al. v. Rushville Nat. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892; *St. Louis Gunning Co. v. City of St. Louis*, 235 Mo. 99, 137 S. W. 929; *State ex rel. Haeussler v. Greer*, 78 Mo. 188; *State ex rel. v. Corrigan Street Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *Kansas City v. Corrigan*, 86 Mo. 67; *Sloan et al. v. Pacific R. Co.*, 61 Mo. 24-32, 21 Am. Rep. 397; *State v. Fisher*, 52 Mo. 174; *Thompson, Judge in State v. Addington*, 12 Mo. App. 214; *Corrigan v. Gage*, 68 Mo. 541; *Louisville & N. R. Co. v. Railroad Commissioners of Tenn. (C. C.)* 19 Fed. 679-689; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; *Dillon on Municipal Corporations*, pars. 591, 592, 716.

[5] V. We come now to the question of whether the court should stay the operation of this ordinance in the light of the law as thus disclosed and of the practically undisputed facts shown at the hearing. It appeared without dispute at the hearing, in fact it is practically admitted, that during periods of low temperature, such as have been heretofore referred to, it is impossible for the complainant to comply with this penalty ordinance. It does not "control its source of supply." Its source of supply is the Kansas Natural Gas Company, a distinct corporation with which it has a contract providing that the supply company is bound "only to furnish such supply for such a period of time as the wells and pipe lines of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying." And it is further expressly understood and agreed between them that the supply company shall not be liable for any loss, damage, or injury that may result either directly or indirectly from shortages or interruptions. The supply company is, however, held to use diligence to supply complainant with a constant and sufficient quantity of merchantable gas for all consumers. The diligence of that company was shown at these hearings by persuasive testimony, no part of which was controverted by defendants.

But even if it be conceded, which it cannot be, that the complainant company does either directly or indirectly control its source of supply from a legal standpoint, nevertheless it is powerless to compel the forces of nature. It appears overwhelmingly from the facts produced before this court that gas in sufficient volume does not exist reasonably accessible to complainant, or elsewhere, to supply a constant pressure at all times and places as required by this ordinance; and, if it could be procured at all, it would be only at an expenditure so enormous and unreasonable as to amount to impairment of complainant's property and franchise rights.

This is practically conceded by counsel for defendants in their brief. They say:

"Complainant introduced evidence tending strongly to show that the supply of natural gas is failing, and that during extremely cold weather it cannot supply the demand. It is complainant's duty to do its utmost to furnish satisfactory service and a reasonably sufficient supply and pressure of gas. Complainant ought to be punished for failing in this duty."

Upon the facts in this case, this far shown to the court, these statements of counsel well-nigh "admit" the defendants out of court. The defense made no effort to show that complainant is able to comply with this ordinance under the circumstances stated by them, nor that it is willfully, negligently, or otherwise unlawfully failing, neglecting, or refusing to do so. We must conceive therefore that counsel for defendants stand squarely upon the proposition that under the franchise ordinance complainant's contract compels it to furnish gas in all desired quantities, at all times and places, and under all possible conditions. I have no doubt that this is the general impression in the minds of those who have not considered the nature of the substance involved and who are unfamiliar with the terms of the agreement between the city and the gas company. But reflection convinces us that this is not true.

It is well recognized that natural gas is more or less elusive, unstable, and uncertain. It is produced by nature in indeterminate quantities, not by man according to fixed and controllable laws of production. The rule respecting it is thus stated:

"If the supply in case of natural gas should fail, that would be a defense in case the company had made all effort to furnish the gas, for natural gas is no article that can be manufactured, and a quite different situation from an instance of supplying artificial gas is presented." Thornton on the Law Relating to Gas and Oil, par. 535, pp. 591, 592.

The franchise ordinance recognizes the limitations of the subject-matter. In section 5 it provides that the pressure which may be required of complainant must be not only reasonable but practicable—a provision which the agents of the city had voluntarily inserted in prior "model" ordinances.

Section 10, avowedly for the purpose of securing the correct measurement of gas furnished, and the proper pressure of gas to produce the best obtainable results, with least consumption, carefully provided that all this must be done "with due regard to the reasonableness and practicability of such pressure."

Section 14 made provision for that time when the supply of natural gas obtainable from sources "reasonably accessible" should, within the prescribed life of the ordinance, become inadequate to warrant the company in continuing to supply it. The contract between the original grantees and the supplying company expressly limiting the obligation to supply gas, when prevented by the caprice of nature, as heretofore quoted, is expressly made a part of the franchise contract between complainant and the city, in that, it was expressly approved by the city's legal department and agreement for its ultimate transfer to the city furnished as part of the franchise conditions. The provisions for forfeiture because of neglect to do any act by the franchise ordinance required, and for repeal because of failure to furnish gas in compliance with the provisions of the ordinance, each contain a saving clause of 60 days, within which the complainant may rectify its failures and continue substantial compliance. Both parties understood the nature of the subject-matter with which they were dealing. No municipality desires to impose unreasonable conditions, and no sane

contractor for public utilities would or could afford to accept such. It was well understood that natural gas would eventually fail, and that when it did it would do so by degrees and not abruptly. What the grantees under this franchise ordinance agreed and contracted to do was to use all reasonable diligence and make all reasonable expenditure necessary to furnish to the inhabitants of Kansas City such natural gas as they might need and desire for illuminating, heating, and mechanical purposes under any reasonable and practicable pressure, which gas must at all times be of the same character and quality as when it comes from the earth and not be mixed with air or otherwise adulterated.

But the defendants say that during most of the year, for all but five or six weeks, and part of the time during that short period, the company can and does maintain the pressure required by this ordinance. Therefore, if it can be and is maintained for the greater part of the time, it is a practicable and reasonable provision and cannot be declared void in this or any other proceeding; but, for such occasions as the facts show it to be unreasonable, complainant must be left to its defense in prosecutions instituted in the municipal courts. As we have already seen, an ordinance may be valid in its general purpose, but unreasonable and oppressive as applied to certain property. It must be reasonable as applied to the particular subject-matter. The police power must not be exercised in such manner as to oppress or discriminate against a class or an individual. It is conceded by counsel that:

"Courts will declare an ordinance unreasonable upon a showing of a state of facts which makes it unreasonable. And an ordinance may be reasonable and valid in its application to some streets and void as to its application to other streets or other parts of the same street." *St. Louis v. St. Louis Theater Co.*, 202 Mo. 690, 100 S. W. 627; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. Law, 286; *Chicago v. Gunning System*, 214 Ill. 628-641, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892.

The issues in these cases involved matters like bill-board or hanging-sign ordinances, which are reasonable as applied to congested portions of the city and unreasonable in other localities; ordinances affecting the speed of trains, reasonable in thickly settled districts and unreasonable in sparsely settled suburbs. Here the law is practical in operation and distinguishes between the localities involved. Can it be said that it cannot be equally operative when periods of time are involved? Is there redress for oppression in one case and not in the other? It has been said by the courts that the fact that a municipal court, from the very nature of its functions, could not deal comprehensively with an offense under a penalty ordinance, challenged as involving the improper exercise of the rate making power, would, without more, justify the intervention of a court of equity where the rights of the parties can be more perfectly adjudicated. The same principle would apply quite as fully to a case like the present where propositions must be considered and determined far beyond the scope and province of a municipal court.

But no such consideration as that stated by defendants' counsel is

presented in this case. It was not contended at the argument that the complainant has neglected or refused to maintain the desired pressure, when it was possible for it to do so, nor was there a shred of evidence to that effect. On the contrary, it was asserted and contended that it could comply with the ordinance and did so at all times except when the temperature was so low as to make compliance impossible. The facts were all known to every department of the city at the time this amended ordinance was passed. It is significant that the council waited to impose the penalty clause until a time of year and unusually low temperature in this locality, even for that season made it apparent in the light of expert information and past experiences that the gas company could not comply with its terms. We cannot close our eyes to this obvious fact. No matter what may have been the past misdeeds of the complainant, and none are disclosed, that have contributed appreciably, if at all, toward the present unsatisfactory condition of pressure, it cannot, of course, be supposed that the council intended to pass a retroactive measure. The only office of this penalty amendment—and we are forced in the light of all the surrounding circumstances to conclude that this was the motive in the minds of its framers—would be to punish the gas company for something beyond its power to remedy. It must be conceded that the measure is in no sense appropriate or adapted to correct the evil, nor to contribute in the slightest degree to the health, safety, comfort, or welfare of the community. It is entirely inoperative to restore the requisite volume of gas to exhausted fields. It is therefore a police measure, if one at all, in name only, and not in substance and effect. Furthermore, having been framed under such conditions as to compel the conclusion that it was passed for an ulterior purpose, it falls directly within the principle announced by the Supreme Court of the United States in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, heretofore fully discussed. It is directed at a single corporate citizen under circumstances which make its operation and intended operation unjust and oppressive. This finding does not and is not intended to interfere with any proper exercise of the police power of the city or other form of legitimate regulation and supervision. As was said by the court in *Kansas Natural Gas Co. v. Haskell* (C. C.) 172 Fed. 545-571:

"It is not intended, by anything said in the course of this opinion, to either hold or intimate the state does not possess the power to supervise, control, and regulate in a reasonable manner the method of construction and manner of laying and maintaining pipe lines to be employed in the transportation of natural gas in interstate as well as intrastate commerce, for the purpose of preserving the health and promoting the safety of its citizens and safeguarding the public against accident which may result from the conduct of a business in which a highly inflammable, dangerous, and volatile product is transported. The right of reasonable inspection, supervision, and control, commensurate with the attendant danger, the state has and should exercise in its reserve police power. What we do say, and intend to be understood as saying and meaning, is this: All such regulations must be reasonably adapted and necessary to accomplish the end sought, and the result or end sought to be attained must be such as falls within the scope of the power residing in the state. * * *

"It must not be exerted in disguise for the purpose of denying any person within its jurisdiction the equal protection of the laws, or deny any such person his just property rights without due process of law."

And it may further be said that it cannot be exercised under the empty pretext of contributing to the public health and safety, to which it bears no possible relation, for the indirect and improper purpose of enforcing a false construction of the contract obligations of the complainant.

There can be no doubt that the complainant company is required to make full and substantial compliance with the terms of its contract. It must furnish all the gas it can, and as long as it can, within the terms of its contract, and it must so conduct its business as to protect the public from injuries for which it is legally responsible. If it is sincerely believed that the business of furnishing natural gas to the people of this city under conditions existing cannot be conducted without grave danger and suffering to the community, then a more practical police regulation, and one comporting more with the exigencies of the case, would be one prohibiting the complainant from furnishing natural gas at all under such conditions. This would be effective, and would be a police regulation in fact as well as in name, provided the situation is serious enough to warrant such a drastic measure.

This leads us to consider briefly what safeguards are incorporated in the franchise contract itself as measures of protection both to the community and the franchise holder. They are not few in number. By section 10 an elaborate system of inspection is provided. By section 17 forfeiture, involving the suspended franchises to furnish artificial gas, is the penalty for failure, refusal, or neglect to fulfill the requirements of the ordinance for so long a period as 60 days. By section 20 the city reserves the right to purchase and to operate the plant itself under conditions therein named, which right shall become immediately operative, even before the expiration of the 10-year period, if complainant ceases to furnish natural gas as required by the contract. By section 21 the city reserves the right to grant gas franchises to others. By section 22, to repeal the ordinance entirely upon substantial and continued failure for a period of 60 days to furnish gas in compliance with its provisions; and further to own and operate a plant or plants itself to supply the city or inhabitants with natural or artificial gas for any purpose, or to furnish any other sort of light. The city reserves its right of governmental control and all its general rights in law or equity. Reasonably exercised and applied to a proper state of facts, these reserved remedies are sufficient to protect the city and consumer alike. One other provision of the contract deserves fuller consideration; this is section 14, which provides that:

"Should the supply of natural gas obtainable by grantees reasonably accessible, be, at any time hereafter during the life of this ordinance, inadequate to warrant them in continuing to supply natural gas under the terms of this ordinance, or should the common council of Kansas City so find at any time (and in the event of a disagreement as to the facts in this respect either party or a gas consumer may have recourse to the courts to establish the facts), they shall not be longer required to do so."

This provision was evidently intended to meet a situation something like the present one, which must have been anticipated in view of the nature of the substance contracted to be furnished. As has been said, it was known from the first that the supply of natural gas would eventually become exhausted. In the nature of things it would begin to fail gradually; and a point would inevitably be reached when the problem to be solved by the city and company alike would be, when the continued use of natural gas for heating, illuminating, and mechanical purposes was no longer of advantage to either party, neither party would lightly seek to terminate the contract. The gas company would presumably desire to continue so long as it might do so at a profit. The city and its people would desire to continue the use so long as it contributed in a large degree to the general comfort and convenience. In case the parties are unable to agree, provision is made that appeal may be made by either, or in default thereof, by any consumer of gas, to the courts for a determination of whether under all the circumstances it is profitable or warrantable to cease furnishing on the one hand, or to insist upon continuance on the other. The law requires that gas must be furnished impartially to all who desire to use it; manifestly, as the quantity decreases, all cannot at all times and under all circumstances have as much as some may desire. It is not the only form of illumination that may be used or that is used. It is not the exclusive fuel employed. It is comfortable, it is convenient; and it is highly satisfactory or less so according to circumstances. It is a practical business question to be decided when we have reached a point where it must be continued and used in a restricted sense, or where it must be discontinued altogether.

In either event, private consumers must, of course, adapt their instrumentalities of consumption to the changing circumstances. The gas company would scarcely be justified in seeking to return to artificial gas, with its higher price and its more limited utility, while the city and the people felt that the supply remaining was still too valuable to be cast aside. But, if it continues the supply, may we legally construe the contract to mean that it must maintain its investment, its operating expenses, discharge its obligations to its supply companies, and at the same time that the obligations of the contract on the part of the city may be repudiated and the complainant be vexed by profitless litigation? If the city believes that the time has come when the change contemplated by the contract should be effected, it should institute proceedings to that end. Should the irreconcilable and indeterminable condition now contended for be insisted upon, the complainant would necessarily have to avail itself of this provision of the contract. It seems to the court that both parties should face the situation fairly as it presents itself. The gas company asserts that it stands ready to continue furnishing natural gas to the best of its ability, if that is desired. It would seem desirable that, so far as practicable, the wishes of the people of this community as to the continued use of natural gas in view of existing conditions be ascertained. Their representatives should decide this question and act accordingly. No right-minded man desires to impose unreasonable hardships upon

public service corporations. No one wants a public utility to be furnished at less than it is reasonably worth. The people, if they are placed fully and conscientiously in possession of the facts, may be relied upon to deal justly and fairly with all questions of this nature.

If, in making these suggestions, the court seems to have exceeded the limits of its legitimate functions, its apology must be that the question involved is deemed to be one of paramount importance, and it is felt that so complex a matter should be dealt with in a broad spirit, keeping in mind the extensive rights involved on both sides. That a solution should not be attempted by means of narrow policies which fall far short of accomplishment, and tend toward injustice, dissatisfaction, and unrest. This discussion has been long and burdensome to the court, and it may be felt generally wearisome; but it must be remembered that in this case the entire people of this city are parties directly or indirectly. It is proper that they should know what the facts are, what the court decides, and the reasons upon which the decision is based; because it is only through candor and full understanding that public questions affecting so intimately the entire body of the people may be resolved and determined with regard alike to the administration of justice and the maintenance of law.

[6] VI. It is submitted by the defense that the restraining order was improvidently issued in so far as the two cases alleged to have been pending when the bill was filed are concerned. Complainant insists that these cases were not legally pending "because there was no ordinance prescribing any way to serve a corporation with summons in a suit to collect a fine for violating a city ordinance until January 4, 1912, and these two alleged suits were filed on December 28, 1911."

Section 720 of the Revised Statutes (U. S. Comp. St. 1901, p. 581) provides that:

"The writ of injunction shall not be granted by a court of the United States to stay proceedings in a court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Provisions of this section relate only to the stay of proceedings begun in the courts of a state before any resort to the United States Court. *Lanning v. Osborne et al.* (C. C.) 79 Fed. 657-662, and cases cited. The municipal court of Kansas City is a court of the state within the meaning of the statute. By charter and ordinances passed thereunder, that court is given jurisdiction of violations of ordinances or other regulations of the city, for the breach of which any fine or penalty is imposed. These two cases were filed December 28, 1911. In Missouri civil cases are deemed to be begun when petitions are filed (*South Missouri Lumber Co. v. Wright*, 114 Mo. 326, 21 S. W. 811), and a prosecution for the violation of a city ordinance is begun when the prosecuting officer of the city files his affidavit or information (*City of Pilot Grove v. McCormick*, 56 Mo. App. 530). It must be conceded therefore that these cases were pending at the time complainant's bill was filed in this court; but at that time the only process provided in such cases before municipal courts was a warrant for arrest. This was concededly an inappropriate form of process to secure

jurisdiction over a corporation against which a fine only could be assessed. January 2, 1912, the common council, to supply this defect, provided for service upon corporations in such cases by summons, as in civil cases. This ordinance was approved January 4th following. The bill in this case was filed late in the afternoon of January 4th. It would appear therefore that, at the time this proceeding was instituted in the federal court, the two cases were pending in the municipal court, and that that court was provided with a form of process available for purposes of jurisdiction although not yet served. While the rule of jurisdiction in the federal courts differs from that in the state courts, nevertheless, in determining whether a case is pending in the state court, we must recognize the procedure prevailing in the state jurisdiction. I am therefore of the opinion that these cases were pending in a court of the state, within the meaning of section 720 of the Revised Statutes, at the time the restraining order was issued, and that as to those two cases that order must be dissolved.

[7] VII. There remains to consider whether the suit subsequently brought by defendants in the state court produces a conflict with a prior jurisdiction of the same parties and subject-matter in this court, and whether the injunctive process of this court should be extended to restrain defendants from prosecuting that suit until the issues in this case have been finally determined. The rule is well settled that, where the jurisdiction of a court of the United States has attached, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subsequent action or proceeding of the defendant respecting the same subject-matter in a state court. Mr. Justice Field, in *Sharon v. Terry* (C. C.) 36 Fed. 337:

"It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For, if any one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice." *Peck v. Jenness*, 7 How. 612-624, 12 L. Ed. 841; *Moran v. Sturges*, 154 U. S. 256-269, 14 Sup. Ct. 1019, 38 L. Ed. 981.

In *Starr et al. v. Chicago, R. I. & P. Ry. Co. et al.* (C. C.) 110 Fed. 3, Judge Sanborn said:

"Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. * * *

"The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may, and if it discharges its duty it must, if necessary, issue its injunction to prevent any interference by any one with

its effectual determination of the issues, and its administration of the rights and remedies involved in the litigation."

The Supreme Court, in *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, states the proposition thus:

"When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

See, also, *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

In *United States v. Eisenbeis et al.* (C. C. A.) 112 Fed. 190, 50 C. C. A. 179, the court said:

"The general rule is well settled that, where different courts have concurrent jurisdiction, the court which first acquires jurisdiction of the parties, the subject-matter, *the specific thing*, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. It is the duty of the court which first obtains *full and complete* jurisdiction over the *whole* case to keep control of it, to the exclusion of the other court that had not obtained such full jurisdiction and to grant the relief prayed for. This general principle is well settled. The only difficulty lies in its application to the facts of any given case."

And so it is said in *Prout v. Starr*, 188 U. S. 537-544, 23 Sup. Ct. 398, 47 L. Ed. 584:

"The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the state court."

In *Rodgers v. Pitt* (C. C.) 96 Fed. 668-670, the reason of the rule is thus emphasized:

"This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, national and state, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary law, and a citation of all the authorities in its support would be endless and useless."

Where the federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the Circuit Court, that court has jurisdiction, and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the federal questions or deciding them adversely to the party claiming their benefit. *Siler et al. v. Louisville & Nashville R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; *Risley et al. v. City of Utica et al.* (C. C.) 179 Fed. 875-882. The Supreme Court of the United States many years ago addressed itself to this question with a view to pointing out the distinctions which must be observed in the practical application of the principle.

In *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257, Mr. Justice Miller said:

"The rule that, among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties, or privies, seeking the same relief or remedy and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought; and does not extend to all matters which may by possibility become involved in it.

"It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly.

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits."

In *Watson v. Jones*, 13 Wall. 679-715 (20 L. Ed. 666), the same learned justice said:

"When the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that, if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties."

In *Knott v. Evening Post Co.* (C. C.) 124 Fed. 342-356, Evans, District Judge, said:

"It has never been doubted that a second suit brought by the same plaintiff against the same defendant on the same cause of action in courts of the same sovereignty would be defeated by a plea in abatement, but this is not, unless in a very remote sense, upon the ground that the court in which the first suit was brought acquired jurisdiction to the exclusion of all others, but is primarily upon the ground that a defendant should not be vexed by two such suits at the same time. Where the two suits, however, are in courts of different sovereignties, the rule does not apply, according to the doctrine of the courts of the United States. *Gordon v. Gilfoil*, 99 U. S. 169 [25 L. Ed. 383].

The Court of Appeals for this circuit, in a number of cases, has given this subject careful analysis. In *Ogden City v. Weaver*, 108 Fed. 564, 47 C. C. A. 485, the situation presented and the adjudication made are thus stated in the syllabus:

"The pendency in a state court of a suit in equity to determine the validity of a contract and the rights of the parties thereunder does not deprive the federal court of jurisdiction to entertain an action at law between the same parties brought by the defendant in the suit in the state court to recover a sum claimed to be due under such contract; the suit at law not being one which affects the custody of property, either actually or constructively."

Judge Thayer, speaking for the court, on page 567 of 108 Fed., on page 488 of 47 C. C. A., of the reported case, further says:

"It is urged, however, in behalf of the defendant city, that if the decree which it has secured in the state court is interlocutory and not final, and for that reason cannot be invoked in support of its plea of *res judicata*,

nevertheless the mere pendency of the case in the state court should have induced the trial court to suspend all proceedings in the case at bar until the action in the state court was finally heard and determined. This contention, however, is based upon a misconception of the character of the present proceeding, which is an action at law, in personam, to recover a sum of money due under a contract. It is not a case which affects the custody of any property over which the state court has first acquired jurisdiction. Neither is it a case which involves any interference with the orderly conduct of the litigation in the state court. It is simply one of those cases, such as frequently occur, where a state court and a federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question, and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed. It is well settled that the fact that a suit upon a cause of action is pending in a state court will not sustain a plea of *lis pendens* to a suit upon the same cause of action subsequently filed in a federal court. *Stanton v. Embrey*, 93 U. S. 548 [23 L. Ed. 983]; *Insurance Co. v. Harris*, 97 U. S. 331 [24 L. Ed. 959]; *Buck v. Colbath*, 3 Wall. 334-345 [18 L. Ed. 257]; *Standley v. Roberts*, 59 Fed. 836 [8 C. C. A. 305]. The rule is quite different, of course, when, after a suit is brought in a state court which affects the custody of property, or at some stage of the proceeding may affect its custody, a suit of a like nature is subsequently brought in a federal court."

The subject is still further and more elaborately discussed by Judge Sanborn in *Guardian Trust Co. v. Kansas City Southern Ry. Co.* (C. C. A.) 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620. He says:

"Even if the subsequent actions at law were between the same parties and involved the same cause of action, as they do not, these facts would furnish no ground for an injunction against their prosecution. The existence of an earlier suit in equity between the same parties for the same cause in one jurisdiction will not sustain a plea in abatement or an injunction to stay the prosecution of a later action at law in another jurisdiction, where the prosecution of the later action does not prevent the determination of the issues and the administration of the rights and remedies involved in the former suit. *Insurance Co. v. Brune's Assignee*, 96 U. S. 588-593, 24 L. Ed. 737; *Franklin v. Conrad-Stanford Co.*, 70 C. C. A. 171-175-178, 137 Fed. 737-741-744; *Ogden City v. Weaver*, 47 C. C. A. 485-489, 108 Fed. 564-568."

The learned judge quotes from *Insurance Co. v. Brune's Assignee*, *supra*, as follows:

"Certain it is that the plea of a suit pending in equity in a foreign jurisdiction will not abate a suit at law in a domestic tribunal. This was shown in a very able decision made by the Supreme Court of Connecticut, in *Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 433, where the authorities are learnedly and logically reviewed. See, also, *Colt v. Partridge*, 7 Metc. (Mass.) 570, and *Blanchard v. Stone*, 16 Vt. 234.

"If, then, a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement; if, still more, it has no effect when pleaded to another bill in equity, as the authorities show—it is impossible to see how it can be a basis for an injunction against prosecuting a suit at law. It follows that the refusal of an injunction by the Circuit Court was not erroneous."

It will thus be seen that the same rule applies to proceedings in equity as to actions at law. Adverting to the language of Judge Thayer, just quoted, to the effect that the fact that a suit upon a cause of action in a state court will not sustain a plea of *lis pendens* to a suit

upon the same cause of action subsequently filed in a federal court, Judge Sanborn further says:

"It is equally true that the fact that a suit upon a cause of action is pending in a federal court will not sustain a plea of lis pendens to a suit upon the same cause of action subsequently filed in a state court.

"These decisions of the Supreme Court and of this court answer many arguments of counsel in support of this injunction. They establish the propositions that the averments in the equity suit of no indebtedness of the Belt Company and of the invalidity of the notes, together with the prayers for the accounting and for the cancellation of these notes, did not withdraw from the jurisdiction of the state court or prevent the trial in that court of the issue of debt or no debt in the subsequent actions at law therein, for that question was adjudged in the cases of Brune's Assignee and of Ogden City. * * *

"This case falls far within the unquestioned rule that the pendency in a state or other court of an action in personam which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it."

These rulings of the Supreme Court and the Court of Appeals for this circuit are determinative of this question in the case at bar. It may be conceded that the parties to this proceeding, and to that in the state court, are essentially the same. This court first acquired such jurisdiction, as it did acquire, but the causes of action are not identical, although they do involve, in a general way, the same subject-matter, and in both similar questions are incidently presented for decision. The relief asked is essentially different. The bill in this court prays:

First:

"That said pressure ordinances above set forth, approved May 23, 1910, and December 14, 1911, and each of them, and any other similar ordinance which the defendant city may pass, be declared unconstitutional, unenforceable, void and not binding upon your orator."

Second: That defendants be permanently enjoined and restrained from taking any further steps in any suits heretofore instituted, or that may be instituted, to enforce or recover penalties for the alleged violation of said ordinances.

In the state court the complainant prays an accounting between the gas company and the city, and all consumers of gas, in order that it may be determined what is a fair, just, equitable, and reasonable value of the gas furnished to said consumers under the circumstances and conditions existing, and that the gas company in the meantime be restrained from charging or collecting from its consumers any sum for the supply of natural gas, and from shutting off the supply of gas to consumers in default of payment; while in this court the invalidity of the ordinance is asserted because of the unreasonableness and impracticability of the pressure exacted, and in the state court the alleged diminished value of the gas is founded largely upon alleged defective pressure, nevertheless a complete determination as to the validity of these ordinances, and the enforcement of any decree pursuant to such determination, can be effectuated in this court, without curtailment, by, or interference from, any decree of the state court, under the issues there framed, and without involving the contractual

question of the price which the complainant in this suit is entitled to charge for the gas it furnishes. It may be that the conclusion reached in this case, involving the reasonableness of pressure, would seem to indicate the injustice of a contrary decision in some other jurisdiction, which incidently involved the reasonableness of the same requirements of pressure, and vice versa; but that would not affect the decision of this court upon the question specifically before it, nor impede its process, nor the final execution of its decree.

No diversity of citizenship is present. Therefore this court acquires jurisdiction solely by reason of the federal questions presented; that is, the impairment of contract and the taking of property, without due process of law, by the passing of a law—in this case, an ordinance, by an agency of the state. It has no general jurisdiction over other matters of dispute between complainant and the city involving the ordinance-contract. It may, or may not, be that in connection with and incidental to the federal questions involved complainant might have framed issues involving purely local questions; and if it could have done so, and had done so, this court, having acquired jurisdiction of the case, through the presence of substantial federal questions, might have decided the local questions as well, even to the exclusion of the federal questions involved. But no such a situation is presented by the pleadings in this case. It is doubtful if the scope of the bill is sufficient to sustain an amendment for that purpose; but, even if it were, and such an amendment were necessary to support an enlarged jurisdiction in this court, it could not now operate to oust a jurisdiction in the state court which has already attached prior to such amendment. I am therefore constrained to hold that this court cannot, with propriety, seek to restrain the defendants from prosecuting their suit in the state jurisdiction. It is not to be conceived that the issues there pending will be ultimately resolved otherwise than in accordance with just principles. The rights of the complainant, under its ordinance-contract with the city, are matters of law that must appear upon the face of the record, and either party to that suit may have any decree reviewed upon appeal to the Supreme Court of the United States, if so desired.

It will be borne in mind that this is an interlocutory hearing and that the action of the court is based entirely upon the showing thus far made. However, in view of the completeness of that showing, and of the attitude of the parties at that hearing, I have deemed it advisable that these preliminary findings and discussions should be made full and explicit in order that the issues may be well defined, and that both parties may know with certainty what the views of the court are upon the legal questions involved, and the nature of the evidence that must be controlling in the final disposition of the case. I have in mind further that, under section 129 of the Judicial Code, either party may, if it desires, speedily have the rulings of this court reviewed by the Circuit Court of Appeals; that appeal may be taken within 30 days from the entry of this order, and will take precedence in the appellate court. It is entirely practicable that the questions here involved may be heard at the May term of the Court of Appeals

for this circuit, and thus the way may be cleared for a final settlement of this dispute before the approach of another winter brings a recurrence of the difficulties which gave rise to this litigation.

It follows that the demurrer to the bill must be overruled; that the defendants, and each of them, will be enjoined and restrained from taking any further steps to enforce or recover penalties for the alleged violations of said pressure ordinances approved May 23, 1910, and December 15, 1911, and from instituting, or permitting any such suits to be instituted or prosecuted against this complainant, or assisting directly or indirectly in the prosecution of any such suit or suits, or taking any steps whatever to enforce such ordinances until the further order of this court. An appropriate order may be prepared in accordance with this opinion, and this cause is continued for further proceedings upon the merits.

JEWEL TEA CO. v. LEE'S SUMMIT, MO., et al.
(District Court, W. D. Missouri, W. D. July 20, 1912.)
No. 3,694.

1. COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where complainant sued to enjoin the enforcement of a municipal ordinance, alleged to impose a license tax on interstate commerce, federal jurisdiction was determined by the value of the right to be protected or the extent of the injury to be prevented, and was therefore not avoided by reason of the fact that the license tax sought to be avoided amounted to less than \$2,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

2. COMMERCE (§ 41*)—INTERSTATE COMMERCE—MUNICIPAL ORDINANCE—LICENSE TAX.

Complainant, a merchant in Illinois, employed an agent who solicited orders for merchandise in defendant city in Missouri, reporting the orders to complainant by mail. The merchandise so ordered was put up in packages, all of which were shipped in one or more cases to the agent who alone had authority to receive the goods from the carrier, and who then delivered the packages to the various customers and collected and remitted the price. *Held* that such transaction constituted interstate commerce notwithstanding each package was not marked with the customer's name or otherwise identified as belonging to the particular customer to whom it was delivered, and hence was not subject to an ordinance imposing a license tax on venders of teas, coffees and other kinds of merchandise not otherwise licensed, etc.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 31; Dec. Dig. § 41.*]

3. COURTS (§ 508*)—FEDERAL JURISDICTION—CRIMINAL PROCEEDINGS—INJUNCTION.

Under Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), providing that injunctions shall not be granted by federal courts to stay proceedings in a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

state court, except where such injunction may be authorized by any law relating to proceedings in bankruptcy, pending prosecutions in the state court for violation of a municipal ordinance licensing vendors, may not be enjoined by a federal court on the ground that the ordinance is inapplicable to complainant's transactions constituting interstate commerce, though the commencement of further prosecutions may be enjoined.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

Federal courts enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank of Providence*, 16 C. C. A. 90; *Central Trust Co. of New York v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

In Equity. Suit by the Jewel Tea Company against Lee's Summit, Mo., and others to enjoin the enforcement of a municipal ordinance. On final hearing. Decree for complainant.

See, also, 189 Fed. 280.

Cowherd, Ingraham, Durham & Morse, of Kansas City, Mo., for complainant.

E. S. Bennett of Lee's Summit, Mo., and Pence & Sanford, of Kansas City, Mo., for defendants.

VAN VALKENBURGH, District Judge. This is a final hearing on a bill to restrain the defendants from enforcing an ordinance of the defendant municipal corporation entitled "An ordinance to license and regulate the different classes of business, employment, occupation, agencies, amusements, etc., in the city of Lee's Summit, Missouri," approved September 6, 1910. Lee's Summit is a municipal corporation under the laws of the state of Missouri, located in Jackson county, Mo. Defendant Rittenhouse is its mayor, and the defendant Brown its marshal. The complainant corporation is a citizen of the state of Illinois and a resident of the city of Chicago. This court acquires jurisdiction by reason of diversity of citizenship.

Sections 1, 2, 3, 4, and 5 of the ordinance in question are as follows:

"1. No person, firm, company, partnership, corporation or association shall, in the city of Lee's Summit, engage in, conduct, carry on, or exercise any of the following classes of business, employments, occupations, agencies, exhibitions, shows or amusements, without having first obtained a license therefor, from the said city of Lee's Summit, and pay a charge or fee for such license as set forth in the schedule following: * * * Vendors of teas, coffees, bread, candies, soda pop, or any kind of merchandise whatever, not otherwise licensed by this ordinance, selling at retail from wagon or other vehicle, one dollar per day for each such wagon or vehicle and one dollar per day where same is sold by solicitor taking orders for future delivery.

"2. It shall be the duty of the city clerk to issue all such licenses provided under this ordinance, for which he shall receive a fee of fifty cents on each valid license to be paid from the general revenues; provided that in all cases where the license is issued for a less period than one year the applicant shall pay the clerk's fee in addition to the license tax for the period covered.

"3. All licenses shall be issued to the first day of October of each year, and in computing time a fractional part of a month shall be counted a month; Provided that license for dramshops shall be issued to July 4th and January 4th of each year.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"4. Any person or persons, firm or copartnership, corporation, or association or any agent, manager or employé of any such person, firm, copartnership, corporation or association doing business in violation of this ordinance shall be subject to pay a fine of not less than five dollars, nor more than one hundred dollars.

"5. This ordinance shall take effect and be in force from and after the first day of October, 1910."

On August 7, 1911, a temporary injunction was granted by Judge McPherson then sitting, and the substantial facts appearing are recited in his opinion then filed. (C. C.) 189 Fed. 280. In the bill the ordinance is charged to be invalid as a burden and tax upon interstate commerce, in violation of clause 3, § 8, art. 1, of the Constitution of the United States, and of section 1, art. 14, of the amendments thereto. It is alleged that a number of criminal actions have been brought against the agents of complainant to enforce penalties under said ordinance, and that others are threatened. It is to obtain relief therefrom that this action is brought.

Defendants contend, first, that complainant has not sustained the burden of proof which the law casts upon it of establishing the facts necessary to invoke the jurisdiction of this court, and more particularly that there is no proof that the amount in controversy herein exceeds \$2,000; that it is the amount of the license tax which complainant seeks to be relieved of that determines the jurisdiction; second, that no complaint is made by the bill that the ordinance is unreasonable or oppressive, or that the rates are excessive, or that the ordinance is discriminatory against complainant, further, that the business of complainant does not fall within the domain of interstate commerce, and therefore that the commerce clause of the Constitution is not violated.

[1] 1. This suit is not merely to enjoin the collection of a tax. It involves the asserted right of the complainant to do an interstate business without tax or burden thereon. In such cases the jurisdiction is determined by the value of the right to be protected or the extent of the injury to be prevented, and not by the mere amount of the license fee involved. *State of Arkansas v. Kansas & T. Coal Co. et al.* (C. C.) 96 Fed. 353; *Humes v. City of Ft. Smith* (C. C.) 93 Fed. 857; *Sanford v. Poe*, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641; *Nashville, C. & St. L. Ry. Co. v. McConnell* (C. C.) 82 Fed. 65-70. "Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail." *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648. "A court of equity has jurisdiction of a suit to enjoin the enforcement of an illegal city ordinance imposing a license tax, where, in addition to the illegality of the tax, it is shown that, if the city is permitted to proceed to enforce it by the remedies provided, complainant will be called upon to defend a multitude of criminal prosecutions, and will suffer irreparable injury in its business. A federal court has jurisdiction of a suit to

enjoin the enforcement of an illegal license tax imposed on complainant's business by a city ordinance, and enforceable by the daily arrest of its employes, which it is alleged will result in serious interference with its business and a direct loss exceeding \$2,000. In such case the amount involved for jurisdictional purposes is not alone the amount of the tax demanded, but the value of complainant's right to conduct its business without being subjected to such tax." *City of Hutchinson v. Beckham*, 118 Fed. 399, 55 C. C. A. 333. "A bill, seeking a mandatory injunction to compel a defendant railway company to give complainant equal facilities with others for receiving and shipping cattle, alleged that the damage done by the refusal of such equal facilities was irreparable, and largely exceeded \$2,000. Held that, in the absence of a plea to the jurisdiction, this allegation was sufficient, though denied by the answer, and not sustained by any proof." *Butchers' & Drovers' Stockyards Co. v. Louisville & N. R. Co.*, 67 Fed. 35, 14 C. C. A. 290. See, also, *Texas & Pacific Ry. v. Kuteman*, 54 Fed. 549, 4 C. C. A. 503; *South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 141 Fed. 578, 73 C. C. A. 176; *Pine v. Mayor, etc., of City of New York* (C. C.) 103 Fed. 337; *Lord v. De Witt* (C. C.) 116 Fed. 713. This doctrine is now so well settled as to admit of no further discussion. It is equally well established that:

"The enforcement of a municipal ordinance, void for interference with interstate commerce, by criminal proceedings, with frequent arrests and other arrests threatened, will be enjoined." *Jewel Tea Co. v. Lee's Summit, Mo.* (C. C.) 189 Fed. 280; *Shawnee Milling Co. v. Temple* (C. C.) 179 Fed. 517; *Sylvester Coal Co. et al. v. City of St. Louis et al.*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566; *Dobbins v. City of Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *City of Hutchinson v. Beckham*, 118 Fed. 399, 55 C. C. A. 333.

[2] 2. It remains only to consider whether this ordinance is, in fact, as to this complainant an interference with interstate commerce, and imposes an unlawful tax and burden thereon. This court in granting the temporary injunction answered this question in the affirmative from the allegations of the bill, and the proofs have not altered the situation in any substantial particular. Fortunately, decisions of the Supreme Court of the United States have practically covered all the matters involved in this controversy. In *May v. New Orleans*, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165, the court held:

"That a state cannot, in the form of a license or otherwise, tax the right of the importer to sell, but, when the importer has so acted upon the goods imported that they have been incorporated or mixed with the general mass of property in the state, such goods have then lost their distinctive character as imports."

While this case dealt with foreign importations, the principle applies equally to goods shipped in interstate commerce. It remains only to inquire what "action" by the interstate shipper is necessary to subject the property to state taxation. Incidentally, it may be observed that interstate commerce is equally burdened, whether it be by direct tax upon the property, or by an indirect tax upon the party or his agent, in the form of a license fee for carrying on the business.

In *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295, it was said:

"When orders are given for goods sold in a state by an agent of a person employed to solicit them in another state, and the purchaser is not bound to pay for the goods until delivery and unless according to sample, the goods sent specifically to the customer in fulfillment of such orders are, until actually delivered, within the protection of the commerce clause of the Constitution, and a municipal ordinance requiring a license fee for the solicitation of orders for delivering goods not of the parties' own manufacture is void as an interference with interstate commerce against such an agent."

Here an Ohio corporation employed an agent to solicit in Pennsylvania retail orders to the company for groceries. When the company had received a large number of such orders, it filled them at its place of business in Ohio by putting up the objects of the several orders in distinct packages and forwarding them to its agent by rail, addressed to him. The agent alone had authority to receive the goods from the railroad, and, when he received them, he delivered them, as was his duty, to the customers, for cash paid to him. He then sent the money to the corporation. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. No shipments were made to the agent except to fill such orders, and no deliveries were made by him except to the parties named on the packages. The only difference between that case and the one at bar is that here the complainant ships to its own order, its agent alone having authority to receive the goods from the railroad for delivery and payment, and the further fact that in the Pennsylvania case each package was marked for the specific customer. This, the defendants contend, makes a vital distinction. In both cases, for convenience, the goods are shipped together in one large package, which is broken by the agent and the smaller parcels are then delivered to the persons ordering them. The defendants contend that under the facts the small package was the original package in the *Rearick* Case, and the larger package the original package in the case at bar. Reference to the original package cases, however, discloses that this feature is important only when the goods are shipped not for specific delivery to definite persons, but for general and indiscriminate sale in the regular course of business. *May v. New Orleans*, *supra*; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224.

In *Rearick v. Pennsylvania*, *supra*, the court said:

"The doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing state goods coming into it from outside. When the goods have been sold before arrival the limitations that still may be found to the power of the state will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale. * * * Commerce among the several states is a practical conception not drawn from the 'witty diversities' of the law of sales. The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might

have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce."

The case of *American Steel & Iron Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538, is then distinguished on the ground that:

"It dealt with a case where a mass of nails and iron wire was collected at Memphis from other states by a manufacturer for all purposes, some of the goods to be sold on the spot, some ultimately to be forwarded to purchasers in other states, but no package being consigned to or intended for any special customer."

Of course, so long as the goods shipped are kept under the control of the complainant for the purpose of ultimate delivery to the party ordering the same, they do not lose their identity as articles of interstate commerce.

In *Caldwell v. North Carolina*, 187 U. S. 622, 632, 23 Sup. Ct. 229, 233 (47 L. Ed. 336), the court said:

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two, instead of one, agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate."

In *Dozier v. Alabama*, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264, the question was whether where, under the contract to purchase a picture, the purchaser has the option to take at a specified price the frame in which the picture was to be delivered; both picture and frame being manufactured in and delivered from another state and remain the property of the vendor until paid for, the sale of the frame is a part of the original transaction and protected by the commerce clause of the Constitution. The court held that it mattered not at what particular time or place the title was conceded to pass, where the transaction was unquestionably one of interstate commerce. It was there said:

"The protection of the commerce clause of the federal Constitution extends beyond the strict lines of contract, and inseparable incidents of a transaction of interstate commerce based on contract are also interstate commerce. * * * No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the state of Alabama, if a sale was made. But as was hinted in *Rearick v. Pennsylvania*, 203 U. S. 507, 512 [27 Sup. Ct. 159, 51 L. Ed. 295], what is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed."

My attention has been called to the opinion of the Supreme Court of Missouri in *State v. Looney*, 214 Mo. 216, 97 S. W. 934, 99 S. W. 1165, 29 L. R. A. (N. S.) 412, in which a different conclusion was reached; but, inasmuch as that decision appears to be in conflict with

that of the Supreme Court of the United States in *Dozier v. Alabama*, *supra*, it is obvious that it must yield to the authority of the latter case.

It is apparent that the cases above referred to cover every important feature of that under consideration, unless a distinction arises from the single fact that the package was not labeled in the name of the specific customer ordering it. There is no doubt that the goods were ordered as a transaction in interstate commerce. They were shipped in interstate commerce, and preserved their identity as such until they came into the hands of the specific purchaser. The agent sold only upon order, and delivered only to those who had previously ordered. Is the mere omission to label the package sufficient to change the character of the entire transaction? I think not. To paraphrase the language of the Supreme Court in *Dozier v. Alabama*, "what is commerce among the states is a question depending upon broader considerations" than a mere label upon a package. It depends upon the facts disclosed by the proofs. These goods started in interstate commerce, and were preserved in interstate commerce until final delivery, and there is nothing in the record to the contrary. No doubt a case could arise under which the facts peculiar to it would lead to a different conclusion. In their brief defendants say:

"It can be readily seen how easily the tax laws of the states and municipalities can be evaded, if the transaction in this case is held to be interstate commerce. Of course, the agent testified that he did not sell to any one except the persons who had ordered goods, but it is the opportunity afforded by such a method of doing business of evading the law that condemns that method."

Cases, however, are decided upon what litigants, in fact, do, and not upon what they might or could do if they sought to evade the law. Here the undisputed evidence is that the complainant does not do that which would render it amenable to this ordinance. It does not sell to any one except the persons who have ordered goods. No doubt such persons might refuse such goods if they were not in accordance with contract, just as was their privilege in the *Rearick Case* and in the *Dozier Case*. In fact, it is disclosed by the testimony that some purchasers do fail to take the goods ordered, but in such cases complainant's agent does not sell indiscriminately to others, but ships the articles back to the branch house in Kansas City. What is done with them there does not appear, but certainly nothing with which the city of Lee's Summit or its officers can be concerned.

It matters not that complainant formerly shipped its goods from Kansas City, and changed its method in order to bring itself strictly within the protection of the commerce clause. If it is entitled to the protection of that clause, we may not be concerned with its motive, nor is it valid argument to urge that complainant's business introduces competition which diminishes the sales of local merchants. The commerce clause of the Constitution was designed to protect those doing business under its guaranties from being subjected to interference because of local prejudices which may exist in different localities. Presumably, every person who does business through the agencies of interstate commerce pays taxes and license fees at the point of legal

domicile. This is all that can be required of him. "A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting it." *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. It follows that as to all future enforcement of this ordinance the temporary injunction must be made permanent.

[3] It is believed, however, that this court is without jurisdiction to enjoin the prosecutions already pending when the bill was filed. Section 720 of the Revised Statutes (U. S. Comp. St. 1901, p. 581) provides that:

"The writ of injunction shall not be granted by a court of the United States to stay proceedings in a court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Provisions of this section relate only to the stay of proceedings begun in the courts of a state before any resort to the federal court. *Lanning v. Osborne et al.* (C. C.) 79 Fed. 657-662, and cases cited. See, also, the opinion of this court in *Kansas City Gas Co. v. Kansas City et al.*, 198 Fed. 500, District Court, Western District of Missouri, No. 3,793. With respect to prosecutions pending before the bill was filed, the temporary injunction heretofore granted will be dissolved.

A decree may be entered in accordance with the views expressed in this opinion.

UNITED STATES v. SANDOVAL.

(District Court, D. New Mexico. July 22, 1912.)

No. 14.

(Syllabus by the Court.)

1. UNITED STATES (§ 1*)—NATURE OF GOVERNMENT—EQUAL STATES.

The American form of government contemplates a union of equal states.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. STATES (§ 9*)—ADMISSION—POWER OF CONGRESS.

Congress may not, save in the exercise of a power conferred by the Constitution, reserve to itself, in the admission of a new state, police power exercised by the other states.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 4; Dec. Dig. § 9.*]

3. INTOXICATING LIQUORS (§ 1*)—REGULATION OF TRAFFIC—POLICE POWER.

The regulation of the sale of liquor is an exercise of the police power.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. STATES (§ 4*)—POWER OF STATES—REGULATION OF LIQUOR TRAFFIC—POLICE POWER.

Where such sale affects citizens of a state upon premises unconditionally owned by such citizens, the exercise of the police power thereover is ordinarily for the state, not for the nation.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 2; Dec. Dig. § 4.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. INDIANS (§ 31*)—CITIZENSHIP ON CESSION OF TERRITORY.

The Pueblo Indians of New Mexico were considered citizens of the republic of Mexico, and under the treaty of Guadalupe Hidalgo of 1848 they became citizens of the United States.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 23; Dec. Dig. § 31.*]

6. INDIANS (§ 14*)—LANDS—TITLE.

The Pueblo Indians of New Mexico hold their lands by unconditional patents from the United States, issued in recognition of titles granted them by the government of Spain centuries ago.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 31-36, 46; Dec. Dig. § 14.*]

7. INDIANS (§ 35*)—INTRODUCTION OF LIQUOR INTO "INDIAN COUNTRY"—POWER OF CONGRESS.

As to such Indians holding their lands under such tenure, it was not within the power of Congress, in admitting New Mexico as a state, to declare such lands Indian country, or to reserve to the federal government the power to regulate the liquor traffic with such Indians; the latter being a part of the police power, which necessarily went to the state upon its admission.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3545-3549.]

8. INDIANS (§ 35*)—INTRODUCTION OF LIQUOR INTO INDIAN TERRITORY—POWER OF CONGRESS.

The provisions of the New Mexico Enabling Act of June 20, 1910 (36 Stat. 557, c. 310), designed to the results last named, are void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

Felipe Sandoval was indicted for introduction of liquor into the Indian country, in violation of Act Jan. 30, 1897, c. 109, 29 Stat. 506. Demurrer to indictment sustained.

Stephen B. Davis, Jr., U. S. Atty., and Herbert W. Clark and Leroy O. Moore, Asst. U. S. Attys.

Francis C. Wilson, Sp. U. S. Atty., for Pueblo Indians of New Mexico.

Renehan & Wright, for defendant.

POPE, District Judge. The defendant, Felipe Sandoval, has been indicted under Act Jan. 30, 1897, c. 109, 29 Stat. 506, for "introducing liquor into Indian country, to wit, the Santa Clara Pueblo." The portion of that act here relevant is as follows:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

A demurrer has been interposed, which attacks the indictment as stating no offense against federal law. It seems clear that, independent of certain legislation, to be presently considered, surrounding the admission of New Mexico as a state, the demurrer would have to prevail. The precise question was considered by the Supreme Court of New Mexico in *United States v. Mares*, 14 N. M. 1, 88 Pac. 1128, being a prosecution under the act of 1897 for selling liquor to a Pueblo Indian, and it was there held, upon what we believe to be adequate reasoning, that the Pueblo Indians are not within the terms of the act of 1897. This much is not seriously contested.

The real controversy arises upon certain provisions of Act June 20, 1910, c. 310, 36 Stat. 557, enabling the people of New Mexico and Arizona to form a constitution and state government. It is therein enacted that the constitution of New Mexico to be framed shall provide—

"by an ordinance irrevocable without the consent of the United States and the people of said state * * * that * * * the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited."

The act further requires a similar ordinance to the effect—

"that the people * * * forever disclaim all right or title to * * * all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the United States."

It is further required by the act that the Constitution as framed shall contain an ordinance providing—

"that whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed state shall be allotted, sold, reserved or otherwise disposed of, they shall be subject for a period of 25 years after such allotment, sale, reservation or other disposal to all the laws of the United States prohibiting the introduction of liquor into Indian country, and the term 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them."

The Constitution of New Mexico as framed and approved by the President of the United States contains ordinances (declared to be irrevocable without the consent of the United States and the people of the state) containing in so many words the above-quoted provisions required by the Enabling Act. There is no doubt that those several provisions are broad enough to constitute lands now owned or occupied by the Pueblo Indians Indian country. If, therefore, the terms of the Enabling Act are to be given the effect resulting from its language, the indictment is good; otherwise not.

This brings up for determination the highly important and delicate question of the power of Congress to impose upon the admission of New Mexico the terms above disclosed. The solution of this involves a careful consideration of the status of the Pueblo Indians of New Mexico and of their land tenure. These questions, while most interesting, are largely fallow field. A long line of decisions has covered the subject. The first case discussing the matter was *United States v. Lucero*, 1 N. M. 422, decided in 1869. There the defendant was sued for the penalty imposed by Intercourse Act June 30, 1834, c. 161. 4 Stat. 730, for settling on lands belonging to "the Pueblo tribe of Indians of the pueblo of Cochiti." In sustaining a demurrer to the petition, the Supreme Court of New Mexico, speaking through Chief Justice Watts, points out radical differences in character between the Pueblo Indians and what are known as the tribal Indians, saying:

"They [the Spanish adventurers] found the Pueblo Indians, on their advent into New Mexico, a peaceful, quiet, and industrious people, residing in villages for their protection against the wild Indians, and living by the cultivation of the soil."

As to their land holdings it is pointed out that the Spanish acknowledged their title to the land upon which they were residing, and evidenced this by a written agreement dated as far back as 1689. 1 N. M. 445. The Lucero opinion further shows that so long as the Spanish rule continued in America these titles were respected, and that when Mexico became independent of Spain the Plan of Iguala, of February 24, 1821, conferred citizenship upon these Indians in the following declaration:

"That all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues."

It is further pointed out that on September 17, 1822, the Mexican Congress passed a preamble and act carrying into effect the fundamental principles of the Plan of Iguala in the following language:

"The sovereign Mexican constitutional congress, with a view to give due effect to the twelfth article of the Plan of Iguala, as being one of those which form the social basis of the edifice of our independence, has determined to decree and does decree:

"Article 1. That in any register, and public and private documents, on entering the name of citizens of this empire, classification of them with regard to their origin shall be omitted."

The Supreme Court of the United States in *United States v. Ritchie*, 17 How. 525, 15 L. Ed. 236, quoted in the Lucero Case, gives the reason for these provisions conferring citizenship upon the Indians without distinction of race as follows:

"The Indian race having participated largely in the struggles resulting in the overthrow of the Spanish power and in the erection of an independent government, it was natural that, in laying the foundations of the government, the previous political and social distinction in favor of the European or Spanish blood should be abolished and the equality of rights and privileges established. Hence the article to this effect in the plan of Iguala and the decree of the first congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the government had the effect necessarily to invest the Indians

with the privileges of citizenship as effectually as had the Declaration of Independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time and who adhered to the interest of the colonies."

When New Mexico became a portion of the United States under the treaty of Guadalupe Hidalgo in 1848, the guaranties of that treaty were to the effect that the citizens of New Mexico "can remain in New Mexico or remove to Mexico," and in either event their property rights are to be "inviolably respected." Recognizing the obligations imposed by the treaty, Congress in the eighth section of the act of July 22, 1854 (10 Stat. 308, c. 103), made it the duty of the Surveyor General of New Mexico to—

"make a report in regard to all Pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos respectively and the nature of their title to the land, * * * which report shall be laid before Congress for such action thereon as may be deemed just and proper with a view to confirm bona fide grants and give full effect to the treaty of 1848 between the United States and Mexico."

The Lucero opinion shows that under this direction of Congress the Surveyor General examined and reported upon the titles of the pueblos of New Mexico, finding 21 pueblos in all, with a total population of about 8,000 souls. He recommended the titles of 17 pueblos for confirmation as bona fide titles, among such being Santa Clara, the pueblo named in the present indictment; and Congress on December 22, 1858 (11 Stat. 374, c. 5), confirmed the titles as recommended, directing patents to issue, containing the following proviso:

"Provided, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

The public records show that patents issued in 1864 to most of those pueblos, including Santa Clara, covering what is known as the Indian league (being a league to each cardinal point from the church). Continuing its opinion the court says:

"This court has known the conduct and habits of these Indians for 18 or 20 years, and we say, without the fear of successful contradiction, that you may pick out 1,000 of the best Americans in New Mexico, and 1,000 of the best Mexicans in New Mexico, and 1,000 of the worst Pueblo Indians, and there will be found less, vastly less, murder, robbery, theft, or other crimes among the 1,000 of the worst Pueblo Indians than among the 1,000 of the best Mexicans or Americans in New Mexico. The Associate Justice now beside me, Hon. Joab Houghton, has been judge and lawyer in this territory for over 20 years, and the Chief Justice for over 17 years, and during all that time not 20 Pueblo Indians have been brought before the courts in all New Mexico, accused of violation of the criminal laws of this territory. * * * A law made for wild, wandering savages, to be extended over a people living for three centuries in fenced abodes and cultivating the soil for the maintenance of themselves and families, and giving an example of virtue, honesty, and industry to their more civilized neighbors, in this enlightened age of progress and proper understanding of the civil rights of man, is considered by this court as wholly inapplicable to the Pueblo Indians of New Mexico."

In the course of the opinion is found the following language:

"For centuries, the Pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. Since the introduction of the Spanish Catholic missionary into the country, they have mainly been taught, not only the Spanish language, but the religion of the Christian church. In every pueblo is erected a church, dedicated to the worship of God, according to the form of the Roman Catholic church, and in nearly all is to be found a priest of this church, who is recognized as their spiritual guide and adviser. They manufacture nearly all their blankets, clothing, agricultural and culinary implements, etc. Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, and their habits are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. The criminal records of the courts of the territory scarcely contain the name of a Pueblo Indian. In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in features, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof. This description of the Pueblo Indians, I think, will be deemed by all who know them as faithful and true in all respects. Such was their character at the time of the acquisition of New Mexico by the United States, and such is their character now."

It is further said:

"The Plan of Iguala, adopted by the revolutionary government of Mexico, 24th February, 1821, declares 'that all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues,' and that 'the person and property of every citizen will be respected by the government.' The treaty of Cordova, 24th August, 1821, and the Declaration of Independence of 28th September, 1821, reaffirmed these principles, as subsequently did the first Mexican Congress, by two decrees, one adopted 24th of February, 1822, the other 9th of April, 1823. The first: 'The sovereign congress declares the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin in the four quarters of the earth.' The other reaffirms the three guaranties of the Plan of Iguala: (1) Independence; (2) the Catholic religion; and (3) union of all Mexicans of whatever race. By an act of September 17, 1822, to give effect to the Plan of Iguala, it was provided that, 'in the registration of citizens, classification of them with regard to their origin shall be omitted,' and that there shall be no distinction of class on the parochial books. Upon the subject of citizenship of Mexico of the Indian races, in the case in the Supreme Court of United States *v. Ritchie*, Justice Nelson, who delivered the opinion of the court, says: 'These solemn declarations of the political power of the government had the effect necessarily to invest the Indian with the privileges of citizenship as effectually as had the declaration of independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies.'"

Concluding its very full opinion, the court says:

"That the Pueblo Indians were declared at that time 'Mexicans' and citizens, that they were recognized as such, no one familiar with the history of the Mexican government can question. That they are still recognized as citizens of the republic of Mexico is evidenced by the fact that the present president of that republic is a full-blood Pueblo Indian. * * * They, although still called Indians, have never, since the acquisition of this territory,

been subject to such legislation as that authorized by the Constitution, and found in the intercourse act of Congress. They should be treated, not as under the privilege of the government, but as citizens, not of a state or territory, but of the United States of America."

The same subject was considered by the Supreme Court of New Mexico in 1874, in *United States v. Santistevan*, 1 N. M. 583, and in *United States v. Joseph*, 1 N. M. 593. Each of those cases involved the question of whether the Indians of the pueblo of Taos were within the terms of the Intercourse Act, and in each instance it was held that they were not. In the *Santistevan Case*, at page 590 of 1 N. M., it is said:

"Those inhabitants of this territory, commonly known as the Pueblo Indians, were transferred with this territory by Mexico to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848, and, according to the terms of that treaty, have the same relations to the United States which they had to the republic of Mexico, both as regards their persons and property, at the time of the treaty. These relations can only be modified, regulated, or changed by Congress in accordance with the terms of this treaty. Articles 8 and 9 of this treaty contain the guaranties entered into by the United States as to persons and property transferred by Mexico to the jurisdiction of the former, and by them are secured to all such persons the same rights of property as are enjoyed by all citizens of the United States, and to such persons as should not elect within the time specified in the treaty to retain the character of Mexican citizens admission "to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution." According to the decree dated at Iguala, February 24, 1821 (section 12), these Pueblo Indians were made citizens of New Spain, which afterwards became the republic of Mexico. This section reads thus: 'Todos los habitantes de la Nueva Espana, sin distincion alguna de Europeos, Africanos ni Indios, son ciudadanos de esta monarquia, con opcion a todo empleo segun su merito y virtudes'—which is translated: 'All the inhabitants of New Spain, without any distinction of Europeans, Africans or Indians, are citizens of this monarchy, with eligibility to every office, according to their merits and virtues.' It might cursorily seem that the wild Indians are included in the term 'Indians,' in this section; but such is not the fact, as by the usage of Mexicans the term 'habitantes' is limited to persons having a place of abode, and does not embrace vagrants or nomads. The Pueblo Indians, however, had places of abode, and, consequently, came within this section, and were made citizens by it. The thirteenth section of the same decree says: 'Las personas de todo ciudadanos y sus propiedades seran respetadas y protegidas por el gobierno'—which is in English: 'The persons and property of every citizen shall be respected and protected by the government.' These quotations are from Galvani's collection of decrees, etc., of the Mexican nation, and others of like effect may be made from the same work. The term 'propiedades' in Mexican law means property of all kinds, real, personal, and mixed. The quotations above made show that the Pueblo people, or town Indians, were considered citizens, and that as to persons and properties there was no distinction made on account of origin, race, or caste, and the same work shows that, when the Mexican nation changed their monarchy of New Spain into the republic of Mexico, the status of these citizens with regard to persons and property was affirmed."

These cases went to the Supreme Court, and in *United States v. Joseph*, 94 U. S. 614, 24 L. Ed. 295, it is held, affirming the judgments below, that the Pueblo Indians of New Mexico hold complete title to their land, and are not Indian tribes within the meaning of the Intercourse Act of 1834. Quoting with approval certain expressions above reproduced from the *Lucero Case*, the court says:

"When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government. The Pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes, for whom the Intercourse Acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals. If the Pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and cannot for that reason be classed with the Indian tribes of whom we have been speaking."

Considering the title under which these Indians held their land, the court proceeds:

"We find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title, with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government. It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe. The Pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican Revolution—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States. With the purpose of carrying into effect this provision of that treaty, Congress directed the Surveyor General of New Mexico to make inquiry into all grants of the Spanish and Mexican governments, and to report to that body on their validity. Such reports were made from time to time, one of which included, and recommended for confirmation, this claim of 'the pueblo of Taos, in the county of Taos'—not the Pueblo Indians of Taos, but the pueblo of Taos; and by an act of Congress of December 22, 1858 (11 Stat. 374), the title was confirmed, and the Commissioner of the Land Office ordered to 'issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said Surveyor General, and cause a patent to issue therefor, as in ordinary cases to private individuals: Provided, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist.' It is unnecessary to waste words to prove that this was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right."

The status of the Pueblo Indians was a matter of further consideration by the Supreme Court of New Mexico in the Pueblo Indian Tax Case, 12 N. M. 139, 76 Pac. 307. There the court held the lands of these Indians to be subject to taxation. Citing the cases above referred to, it is pointed out that the Spanish conquerors "found them a peaceful, industrious, and civilized people, living in towns (pueblos) and following agricultural and pastoral pursuits." Nevertheless, it is said, "they seemed to have been considered by the Spanish as wards of the government and entitled to special privileges and protection," so that, while the Spanish crown as early as 1689 granted them certain lands, "certain restrictions were placed upon the alienation of their property." The court, proceeding, says:

"But a complete change took place in the status of these people when Mexico threw off the Spanish yoke. Among those engaged in that struggle for independence, this Aztec race far outnumbered the Mexicans, and its success was due in a large measure to their efforts. It was but natural and fitting that in the formation of the new government they should take a prominent, if not a leading, part, and that they should be placed upon an equal footing as to all civil and political rights."

The court, in support of its conclusion that the Pueblos were Mexican citizens, refers to the Plan of Iguala and the legislation of that period passed by Mexican authority (much of which has been above referred to), and says as to their present status:

"It is a matter of history, gathered by the writer from conversations with early residents of the country, that these people were, after the treaty of Guadalupe Hidalgo and down to the organization of the territory, and perhaps down to the act of 1854, *supra*, regarded by the people as citizens, and as possessed of all the rights of the same. They are reported to have participated in elections and held office in Pena Blanca and other places in the territory. They sat as grand and petit jurors in this same county of Bernalillo, while Judge H. S. Johnson presided over the same, at one term of court at least. It is reported that through the efforts of one John Ward, an agent appointed for them, there was a tacit agreement reached between them and the people of the counties where they resided that, as long as they refrained from voting, they should not be taxed. They thus drifted out of the political life of the territory. But no such agreement, if made, was of any binding force, either upon the Indians or the territory. We conclude, therefore, that the Pueblo Indians of New Mexico are citizens of New Mexico and of the United States, hold their lands with full power of alienation, and are, as such, subject to taxation."

In 1907 the Supreme Court of New Mexico again considered the subject in *United States v. Mares*, 14 N. M. 1, 88 Pac. 1128. There, as we have said above, the question was directly presented as to whether a prosecution would lie under the act of January 30, 1897, for the sale of intoxicating liquor to a Pueblo Indian. In holding that such prosecution would not lie the court says:

"The status of the Pueblo Indians of this territory has been subject to very full consideration by this court and by the Supreme Court of the United States in a number of cases. *United States v. Varela*, 1 N. M. 593; *U. S. v. Santistevan*, 1 N. M. 583; *Pueblo Indian Tax Case*, 12 N. M. 139 [76 Pac. 307]; *United States v. Joseph*, 94 U. S. 619 [24 L. Ed. 295]; quoted in *Ex parte Crow Dog*, 109 U. S. 572 [3 Sup. Ct. 396, 27 L. Ed. 1030]; *U. S. v. Ritchie*, 17 How. 525, 538 [15 L. Ed. 236]. From these decisions, the first two of which dealt with the very Pueblo here in question, their legal stand-

ing has been very definitely fixed. They have been judicially determined to be a people very different from the nomadic Apaches, Comanches, and other tribes 'whose incapacity for self-government required both for themselves and for the citizens of the country the guardian care of the general government.' They are not tribes within the meaning of the federal Intercourse Acts prohibiting settlement upon the land of 'any Indian tribe.' They are not wards of the government in the sense that this term has been used in connection with the American Indian. While Congress has as a mere gratuity from time to time provided agents and special attorneys for them, it has never attempted thereby to reduce them to a state of tutelage, or to put either them or their property under the charge or control of the government or its agents. On the contrary, they hold their lands and property by complete and perfect title antedating the sovereignty of the United States and recognized by its unconditional patent issued to them decades ago. They have full power to alienate their lands, and these, in the absence of any act of Congress to the contrary, are subject like other property to taxation by the territory. Finally, these Indians were, at the date of the treaty of Guadalupe Hidalgo, citizens of Mexico and of the United States. This being the status of the Pueblo Indians, as fixed by the decisions of this court and of the Supreme Court of the United States, it only remains to be determined whether the sale of intoxicating liquors to them is within the prohibition of the act of January 30, 1897 (29 Stat. 506, 3 Fed. St. Ann. 384). That act makes it penal to sell or give intoxicants to 'any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under the charge of any Indian superintendent or agent, or to any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship.' It is a sufficient answer to the present appeal to say that in our judgment the Pueblo Indians, as defined by the decisions above referred to, do not come within any of the three classes above referred to. The title to their lands is not held in trust by the government; they are not wards of the government, nor are they under the charge of any Indian superintendent or agent; they are not Indians over whom the government, through its departments, exercises guardianship."

[8] It thus being clear, in the light of the history of the Pueblos, that independent of the Enabling Act the sale of liquor to Pueblo Indians is not within the legislation of Congress, what effect, in the light of that history, have the provisions of the Enabling Act above quoted? For the government it is urged that the stipulations of the Enabling Act and of the state Constitution that pueblo lands shall constitute Indian country, and shall be subject to the exclusive jurisdiction of the United States, is valid upon the following reasons: That Congress is vested with plenary power to legislate as to the territories, and therefore has the constitutional right to segregate, in forming a new state, such areas as it sees fit, and to assume entire control of these latter in so far as this does not take from the owners of the land the right to possess and enjoy it as citizens of the United States, and that in making this provision as to Pueblo Indians' lands it has acted within such claim of constitutional powers. On the other hand, it is said by the defendant that restraint upon the sale of intoxicants is an exercise of the police power; that upon the creation of a new state the exercise of this power becomes one for the new sovereignty, and cannot, save under exceptional circumstances, be reserved by the general government; and that no such reservation can be made, as is here asserted, as to a people who are citizens, not wards, and as to lands held not by governmental per-

mission, contract, or sufferance, but by fee-simple title long antedating American sovereignty. It is further urged that New Mexico, in entering the Union, entered upon an equality with other states, and that it was and would be imposing an unwarranted condition, detracting from that equality, to say that a portion of the private property of the citizens of the state shall indefinitely, perhaps forever, be withheld from the police power of the new sovereignty.

The argument for the defense impresses me as serious, and upon careful consideration as persuasive, and leads to the decision that the demurrer must be sustained. To hold otherwise is to disregard, not only what impress me as well-defined principles, but also what constitute controlling precedents.

[1-7] Among the constitutional powers confided to Congress is that of creating new states from national territory. This, however, is to be exercised in a manner consistent with our form of government. The latter contemplates a union of equal states. Conditions may not be imposed upon admission that detract from this equality, save only where the provisions of the Constitution permit such conditions. When this latter situation is present, the conditions cannot accurately be said to interfere with this equality, since they derive their permissibility from a source as high as the principle of equality itself, to wit, the Constitution. *Prima facie* the withholding of a purely police power exercised by all the other states is void, since it has the effect to that extent to admit the state with less power over its people and over areas within its boundaries than is enjoyed by other states. As illustrative of the matter, suppose that Congress in admitting a state should reserve to itself the power to punish for all larceny committed upon lands owned by American citizens of German ancestry, or suppose it should reserve to itself the power to punish for all assaults committed within lands owned by American citizens of Italian birth. In each instance, of course, the regulation of the crime is a matter for the police power. Equally clear is it that to carve out of the police power of the state either of these matters would be to leave for delivery to the state only an incomplete sovereignty. A court in dealing with such a matter would hardly hesitate to hold that such reservation would be void, and as to the propriety of such a conclusion there would scarcely be a difference of opinion.

The distinction pressed upon us between what has just been suggested and the situation here involved is, however, that the land now sought to be reserved from the police power belongs to Indians, and may within the constitutional powers be created and perpetuated as Indian country, subject to federal control. In other words, it is said that, because an Indian is involved, constitutional power existed in Congress to place upon the state the condition that what was previously not Indian country must henceforth be deemed such as a condition to admission. But from what constitutional source proceeds the power of Congress to legislate as to the Indians? The origin of this power is suggested by District Judge Marshall in *United States v. Boss* (D. C.) 160 Fed. 132, when in referring to the liquor statute of January 30, 1897, he says:

"If it is to apply within a state it must be because of the status of the Indians for whose protection it was enacted, or of the locus of the forbidden act as being on a reservation."

The matter is more fully stated by the Eighth Circuit Court of Appeals, speaking through Circuit Judge Smith, in *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219. That case likewise deals with the matter of the Indian liquor traffic, and classifies congressional power to legislate as to the Indians as flowing from one of five sources: First, the treaty-making power; second, the power to regulate interstate commerce; third, the power to regulate commerce with Indian tribes; fourth, the ownership as sovereign of lands to which the Indian title has not been extinguished; fifth, the plenary authority arising out of the nation's guardianship of the Indians as an alien, but dependent, people.

Applying these in succession to the present situation, the power to legislate in the manner here involved cannot be attributed to the treaty-making power. The Pueblo Indians of New Mexico have never been parties to any treaty with the United States, nor has it ever been claimed that they were proper subjects for a treaty. Neither can this power exist as a result of the right to regulate interstate commerce. The stipulation of the Enabling Act applies indifferently to the introduction of intoxicants from within or without state lines, and it is not pretended that in the present case the liquor introduced was introduced from without the state of New Mexico. The power here asserted cannot be sustained as an exercise of the right to regulate commerce with Indian tribes. As we have seen, the Pueblo Indians are not tribes within the meaning of the Constitution. It cannot be upheld as a result of federal ownership of lands to which the Indian title has not been extinguished; for, as we have seen, the American government never owned the lands in question.

Nor can it flow from what the Circuit Court of Appeals has called "the plenary authority arising out of its guardianship of the Indians as an alien, but dependent, people." The Pueblos have never been wards of the nation. As we have seen, they occupied to some extent that position under the Spanish régime; but beginning with the independence of the Mexican nation in 1821 they became citizens, and when New Mexico became a part of our national domain they came under our sovereignty as citizens, and not as wards. No act of theirs, nor of our government since the treaty of Guadalupe Hidalgo, has changed their status, so as to subject them to national guardianship or to make them an alien and dependent people. True, as pointed out in *United States v. Lucero*, supra, Congress in 1854 appropriated \$10,000 to make them presents of agricultural implements and farming utensils. Act July 31, 1854, c. 167, 10 Stat. 330. True, in 1857 Congress appropriated \$3,750 for "expenses of surveying and marking the external boundaries of the Indian pueblos in the territory of New Mexico." Act March 3, 1857, c. 90, 11 Stat. 184. True, an attorney has of late years been provided for them at the expense of the government. Act March 3, 1909, c. 263, 35 Stat. 799. True, also, Congress, after the decision in the Pueblo Indian Tax Case, above

mentioned, relieved them from the payment of any taxes to the territory of New Mexico. 33 Stat. 1069. But these acts fall far short of establishing a resumption of guardianship over the Pueblos. On the contrary, they are rather to be deemed gratuities proceeding from a generous government to a poor, but deserving, portion of our population. The appropriations referred to in the first three instances were by Congress in the exercise of its constitutional power to appropriate the public moneys; the last, in the exercise of its power to legislate for the territories. Congress could with equal power have passed these acts in the interest of citizens not Indians, and the mere fact that they were Indians does not result in placing them in a condition of tutelage.

We have, therefore, left, as the sole basis upon which federal jurisdiction may be retained over these people, the fact that they are of Indian lineage. Is this enough? There is, from a governmental standpoint, no magic in the word "Indian." It has through the course of our legislation indicated a condition no less than a race. With the condition gone by the assimilation of the person into the body politic, and the release of his lands from governmental control by the issuance of unconditional patents, his race loses significance. If the mere fact that he be an Indian is of itself sufficient to justify his being held always subject to a species of federal police power, that power would seem, likewise, logically to extend to his remote posterity; for they, like him, have Indian blood in their veins calling for the national guardianship. The length to which this would go will be appreciated when we recall that high state officials and leading members of Congress have been of Indian race. Can it be that to sell to such citizens or to deliver at the home of such a citizen an intoxicant is a matter of federal concern? The question carries its own answer, and yet this is precisely what is claimed when it is asserted that to sell intoxicants to a Pueblo Indian citizen upon his own farm shall, so long as he, an Indian, owns it, be a matter to be regulated purely by Congress. Such, in my judgment, is a claim of power for Congress that it does not possess. More than this, it is a detraction from the police power properly belonging to the state, and, if upheld, has the effect to admit New Mexico shorn of powers possessed by every other state in the Union. It cannot, therefore, be sustained.

Coming to authority, two decisions of the Supreme Court seem peculiarly in point upon this question. *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; *Coyle v. Oklahoma*, 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853. In the *Heff* Case there was a conviction for selling beer to a member of the Kickapoo tribe of Indians in Kansas. The facts showed that the party to whom the liquor was sold was a citizen of the United States and of the state of Kansas, and by reason of having received an allotment of land in severalty he was by law declared to be subject to the laws, both civil and criminal, of the state in which he resided. In deciding that under the circumstances a conviction for the sale of liquor to such an Indian under the act of Congress of January 30, 1897, could not be sustained, the court says:

"In this republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction. It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a state whose laws forbid its sale, and neither does a license from a state to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the federal statute. *License Cases*, 5 How. 504 [12 L. Ed. 256]; *McGuire v. Commonwealth*, 3 Wall. 387 [18 L. Ed. 226]; *License Tax Cases*, 5 Wall. 462 [18 L. Ed. 497]. Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."

It is further said:

"But it is contended that, although the United States may not punish under the police power the sale of liquor within a state by one citizen to another, it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of section 8, art. 1, of the Constitution, which empowers Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress, having power to regulate commerce between the white men and the Indians, continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the state, and shall be a citizen of the United States, and therefore a citizen of the state. But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian, and only Indian, blood in his veins, he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

The court concludes as follows:

"But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state; and that

this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

While it may be, as suggested in *United States Express Co. v. Friedman*, 191 Fed. 673-680, 112 C. C. A. 219, *supra*, and *Mosier v. United States*, 198 Fed. 54, decided April 22, 1912, by the Eighth Circuit Court of Appeals, that the scope of the *Heff* Case has been narrowed by later cases, the decision has not been detracted from upon the point here material, and has, indeed, been strengthened in principle by the later case of *Keller v. United States*, 213 U. S. 147, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066. See, also, *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244, and cases cited.

In *Coyle v. Oklahoma* the question was as to the efficacy of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), to prevent the removal of the capital by act of the state Legislature. The Enabling Act had stipulated that it should remain at Guthrie until 1913. The constitutional convention, by ordinance declared irrevocable, had accepted this as a condition of admission. But the Supreme Court held the Enabling Act to be void and the stipulation ineffectual. In dealing with the matter the court classifies the conditions which Congress has exercised the power to impose in admitting states as follows:

"We must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject; and, third, compacts or affirmative legislation which operates to restrict the powers of such new states in respect of matters which would otherwise be exclusively within the sphere of state power."

The court proceeds:

"The only question for review by us is whether the provision of the Enabling Act was a valid limitation upon the power of the state after its admission, which overrides any subsequent state legislation repugnant thereto. The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original 13 states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union, if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is that, while Congress may not deprive a state of any power which it possesses, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this Union, and the constitutional duty of guaranteeing to 'every state in this Union a republican form of government.' The position of counsel for the appellants is substantially this: That the power of Congress to admit new states and to determine whether or not its fundamental law is republican in form are political powers, and as such uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers

which it would otherwise possess, and, therefore, not admitted upon 'an equal footing with the original states.'"

It is then further said:

"But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit states.' * * * This Union was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but, in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission."

The court further says:

"It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force, not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Willamette Bridge Co. v. Hatch*, 125 U. S. 1, 9 [8 Sup. Ct. 811, 31 L. Ed. 629]; *Pollard's Lessee v. Hagan* [3 How. 212, 11 L. Ed. 565]. No such question is presented here. The legislation in the Oklahoma Enabling Act relating to the location of the capital of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and, if it is to be upheld at all, it must be implied from the power to admit new states. If power to impose such a restriction upon the general and undelegated power of a state be conceded as implied from the power to admit a new state, where is the line to be drawn against restrictions imposed upon new states?"

The court concludes in the following language:

"Has Oklahoma been admitted upon an equal footing with the original states? If she has, she by virtue of her jurisdictional sovereignty as such a state may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot. In *Texas v. White*, 7 Wall. 700, 725 [19 L. Ed. 227], Chief Justice Chase said in strong and memorable language that 'the Constitution, in all of its provisions looks to an indestructible Union, composed of indestructible states.' In *Lane County v. Oregon*, 7 Wall. 76 [19 L. Ed. 101], he said: 'The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body

as the United States.' To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the republic was organized. When that equality disappears, we may remain a free people; but the Union will not be the Union of the Constitution."

If in the Oklahoma case the constitutional equality of a new state was invaded by a provision seeking to control for a limited time the location of its capital, it seems equally clear that that constitutional equality is interfered with in the case of New Mexico by the declaration that land held by its citizens under perfect title from a former sovereignty shall indefinitely constitute Indian country and be thus subject to federal control, to the exclusion of the police powers of the state. The possession of the police power is as essential to the full sovereignty of the state as the possession of the power to fix its seat of government.

Counsel for the government have cited a large number of cases, some of them quite recent, in which the courts have upheld the applicability of federal legislation as to Indians within the limits of a state. It is believed, however, that an examination of these cases will show that the federal power in any instance sustained was fairly referable to one or the other of the constitutional sources mentioned in the Friedman Case, *supra*, none of which are applicable here. Perhaps the case most nearly approximating the present one upon the facts is *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520. There the Supreme Court, reversing the lower courts, which had held that the prosecution would not lie (*Ex parte Dick*, 141 Fed. 5, 72 C. C. A. 667), decided that a prosecution under the liquor act of January 30, 1897, was sustainable, although the land upon which the liquor was introduced was owned in fee by citizens of such state. The court bases its decision upon the fact that the land in question was once property of the Indian tribe, and had been acquired by the United States subject to the condition that the acts of Congress relating to the introduction of liquor should remain in force over such territory for the limited period of 25 years, which period had not expired. The court says:

"In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a state, upon its admission into the Union, is thereafter upon an equal footing with every other state, and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the federal Constitution or by its own Constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any state within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes, Congress must have regard to the general authority which the state has over all persons and things within its jurisdiction. So, the authority of the state cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes."

The power of Congress in the matter was, as the court expressly says (208 U. S. 359, 28 Sup. Ct. 405, 52 L. Ed. 520)—

"based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians, and was not inconsistent in any substantial sense, with the constitutional principle that a new state comes into the Union upon entire equality with the original states."

The court, however, in the course of the opinion is careful to say:

"If this case depended alone upon the federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of *Culdesac*) the jurisdiction of the state, for all purposes of government, was full and complete. *Bates v. Clark*, 95 U. S. 204 [24 L. Ed. 471]; *Ex parte Crow Dog*, 109 U. S. 556, 561 [3 Sup. Ct. 396, 27 L. Ed. 1030]."

The recent case of *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201, decided June 10, 1912, by the Supreme Court of the United States, refers to the *Dick Case* and points out the source of the federal power there upheld. Of the other cases cited for the government, the federal power was in some instances sustained as flowing from treaty. *The Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667; *United States v. Forty-Three Gallons of Whisky*, 93 U. S. 188, 23 L. Ed. 846. In still other cases cited the jurisdiction was upheld under the power of Congress to regulate commerce between the states or with Indian tribes. *United States v. Holliday*, 3 Wall. 409, 18 L. Ed. 182; *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219; *Ex parte Charley Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248, Supreme Court of the United States, decided June 10, 1912. In still other cases the jurisdiction was sustained upon the power flowing from the government's right to administer its own property, as, for instance, in cases arising upon a reservation, or those in which the government held title in trust, or those in which, although title had passed to the Indians, there was an express prohibition against alienation for a certain period. *Farrell v. United States*, 110 Fed. 942, 49 C. C. A. 183; *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1; *Bowling v. United States*, 191 Fed. 19, 111 C. C. A. 561; *United States v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195; *United States v. Sutton*, 215 U. S. 291, 295, 30 Sup. Ct. 116, 54 L. Ed. 200; *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Hallowell v. United States*, 221 U. S. 323, 31 Sup. Ct. 587, 55 L. Ed. 750. *Clairmont v. United States*, supra, decided by the Supreme Court on June 10, 1912, illustrates the converse of the question, being a case in which the Indian title had without reservation been extinguished. The case of *Mosier v. United States*, supra (Eighth Circuit Court of Appeals, April 22, 1912), is perhaps an illustration of the power resulting from the national guardianship of the Indian as a dependent person. None of these cases, in my opinion, are applicable to the Pueblo Indians of New Mexico.

It is not overlooked, in making the present disposition of the case, that it is one of great importance to the Indians in question, and that

the effect of the decision may be to break down a safeguard which Congress and the framers of the New Mexico Constitution have attempted to provide for the Pueblo Indians. However, mere desirability of a result can furnish, as against constitutional limitation, no justification for an assumption of federal power, nor for a denial of state jurisdiction. The matter being purely one for the state, it will be assumed, as in *Ex parte Dick*, 141 Fed. 5, 72 C. C. A. 667, that the Legislature of the state will perform its duty in this respect. If, as suggested at the bar, state legislation already passed on the subject is fully adequate, it is to be anticipated that the state courts, by the enforcement of such statutes, will afford the Pueblo Indians the protection which Congress and the state constitutional convention have indicated a desire to give them. To assume otherwise is to say that representative government is a failure.

A judgment sustaining the demurrer and dismissing the proceedings will be entered.

TRUMAN v. INHABITANTS OF TOWN OF HARMONY.

(District Court, D. Maine. July 22, 1912.)

No. 686.

1. TOWNS (§ 52*)—BOND ISSUES—EXCESS OF DEBT LIMIT—VALIDITY.

That an issue of bonds by a town in aid of railroad construction exceeds the 5 per cent. debt limit prescribed by Const. Me. art 22, an amendment passed February 9, 1877, does not prevent a court in equity from enforcing liability to the extent that the town could legally borrow; no difficulty of accounting or in applying the proceeds of the bonds appearing.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 90-94; Dec. Dig. § 52.*]

2. TOWNS (§ 52*)—CONSTITUTIONAL DEBT LIMIT—INNOCENT PURCHASERS.

No one is presumed to be ignorant of the invalidity of bonds issued by a city or town in violation of the 5 per cent. debt limit prescribed by Const. Me. art. 22, passed February 9, 1877, and a holder of such bonds cannot recover on the ground that he is an innocent purchaser.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 90-94; Dec. Dig. § 52.*]

3. TOWNS (§ 46*)—DEBTS—AUTHORITY TO INCUR.

A town's right to borrow money depends upon the Constitution and laws of the state.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 81-84; Dec. Dig. § 46.*]

4. TOWNS (§ 52*)—BONDS—VALIDITY—PLEADING.

A bill for equitable relief by a holder of an excessive issue of bonds by a town, so far as the bonds were within the debt limit, is sufficient as against demurrer, though the bonds recite that they were issued at a meeting at which there was an invalid vote, where the bill shows that the bonds were legally voted, except as to the excess above the debt limit, at a previous meeting not recited in the bonds.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 90-94; Dec. Dig. § 52.*]

In Equity. Bill by Nathan H. Truman against the Inhabitants of the Town of Harmony. On demurrer to the bill. Demurrer overruled.

Thaxter & Holt, of Portland, Me., for plaintiff.

Merrill & Merrill, of Skowhegan, Me., for defendant.

HALE, District Judge. This case comes before the court upon defendant's general demurrer to the bill in equity. The material allegations of the bill are substantially as follows: After stating the jurisdictional facts, it alleges the holding of a meeting of the voters of the defendant town on June 20, 1895, at which the following vote was passed by a majority of 117 votes to 2:

"Moved that the town of Harmony vote to raise (\$8,500) eight thousand five hundred dollars to aid in the construction of a railroad from Hartland to Harmony village in said Harmony and authorize its selectmen to enter into a contract with any party that said road shall be built to Harmony village and to subscribe for stock in said road to said amount as soon as said railroad company shall be organized by law or special charter. To issue bonds of said town to said railroad company when organized for said amount at such time and rate of interest as shall be deemed advisable by said selectmen on these conditions: That said party give a guarantee to the satisfaction of a committee to be chosen by said town, that the balance of the money over and above (\$8,500) eight thousand five hundred dollars necessary for the construction and completion of said road and appurtenances to said Harmony village shall be subscribed and furnished said road equipped and operated. If however said railroad company prefer they need not give any guarantee to build said railroad. But the selectmen may issue said bonds and take stock in said railroad as above upon the completion of said road to Harmony village if within one year from date of this meeting."

The bill alleges further that a second special town meeting of the legal voters of said town was held May 11, 1896, at which a vote was passed by a majority of 81 votes to 42, extending the time of the contract to August 20, 1896; that no railroad had been built to said town of Harmony on July 13, 1896, nor any guaranty given; that on said July 13, 1896, a third special town meeting of the voters of Harmony was holden, at which it was voted by a majority of 149 votes to 41, in substance, that the votes of the town meeting of June 20, 1895, be ratified and confirmed, and the town be authorized to subscribe for and receive stock in said railroad company to the amount of \$8,500, and that the sum of \$8,500 be voted to the railroad company for said stock, and for the building and completion of the railroad to Harmony village; that the selectmen and treasurer of the town be authorized to issue the bonds of the town for such an amount, at a rate of interest not to exceed 4 per cent. per annum, and in such denominations, time, and form as they may deem to the advantage of the town; that they be further authorized to sell and deliver the bonds for the purpose of aiding said railroad company; and that the selectmen be authorized, upon receiving a sufficient guarantee that the road would be completed and operated to Harmony village within six months, to deliver the bonds, or proceeds thereof, to the railroad company.

The bill further alleges that, pursuant to the votes passed at these meetings, 17 bonds of the defendant town, of the par value of \$500

each, were issued, and the form thereof prescribed. The form of the bond contains a promise of the town of Harmony to pay the bearer \$500 August 1, 1916, at the Pittsfield National Bank, with interest at 4 per cent. per annum. The following statement is in the bond:

"This bond is one of a series of seventeen bonds of \$500.00 each, amounting in the aggregate to \$8,500.00, issued for the purpose of aiding the Sebas-ticook & Moosehead Railroad Company, and in conformity to the vote of said town, passed at a special meeting held July 13, 1896, which vote is recorded in the town records of the said town of Harmony."

Then follows the clause calling for the signature of the selectmen and treasurer, and the signatures of said officers; and then a description of the 40 coupons maturing every six months, giving the form of same, the details of which it is not necessary to state. The bill further alleges that all of said bonds were placed by the officers of the defendant town in the hands of the officers of the Sebas-ticook & Moosehead Railroad Company, with authority to negotiate and sell the same; that the bonds were sold and so negotiated; that all the bonds came into the hands of the plaintiff on November 24, 1896, who accepted the same as collateral security from one Joseph H. Johnson, then owner of the bonds, for a loan made at that time by the plaintiff to said Johnson for \$6,800; that the plaintiff accepted the bonds in good faith, believing them to be valid and legal, and believing that all the requirements of the votes passed at the various town meetings had been complied with, and believing that the defendant town was in good financial condition, and was able to pay, and would pay, the bonds, both principal and interest, at maturity; that the note for \$6,800 of said Johnson was not paid at maturity; that it has never been paid; that the said Johnson was insolvent and unable to meet the note; and that the plaintiff was obliged to accept the bonds in full satisfaction of the note, amounting with interest to more than \$7,000. The bill further alleges that the defendant town refused to pay the coupons on said bonds whenever they became due, though demand was made—that is, has ever since refused to pay the interest on the bonds at maturity of said interest—and, on information and belief, that the reason for the refusal to pay the interest was that the bonds were not binding as legal obligations on the town, because the bonds were issued in excess of the town's legal and constitutional authority, inasmuch as a debt was thereby created which, together with the outstanding indebtedness, exceeded 5 per cent. of the assessed valuation of the town, 5 per cent. being the limit allowed by article 22 of the Constitution of the state of Maine; that the assessed valuation of the defendant town for the year 1896 was \$171,777; that the permanent interest bearing debt of the town of Harmony at the date of the issuance of the bonds was approximately \$4,000; that, therefore, the additional indebtedness that the town could at that time have legally incurred was approximately \$4,500; that, by reason of the above facts, the plaintiff is without remedy at law to recover either the principal or interest on the bonds; that he is the owner of the whole issue of bonds; that he is ready and willing to deliver them up, canceling any part of the issue that the court may direct, if the

court shall decree that any part of the same is a legal obligation of the defendant town. The bill prays for an answer, for an accounting with the defendant town in order to ascertain what amount the valid indebtedness of the town is represented in the issue of bonds; that a decree may be entered declaring valid such portion of the bonds as the court may direct on the balance being canceled; and that the defendant town may be decreed to pay the interest due on the valid portion of the indebtedness, and for other and further equitable relief. To this bill the defendant filed a general demurrer, namely:

"That the bill does not contain any matter of equity whereon the court can ground any decree, or give to the plaintiff any relief against the defendant, and that it appeareth by the plaintiff's own showing by the bill that he is not entitled to the relief prayed for by the bill against the defendant."

[1, 2] 1. Was the bond issue of the defendant town void in toto by reason of its exceeding the constitutional debt limit of the town?

The plaintiff contends that, where a municipality issues bonds and creates a debt exceeding the debt limit imposed by law, in a suit in equity brought by a bona fide holder of the bonds, the court may declare such issue valid, and may enforce the same to the extent that the town might legally have borrowed, on the date when the bonds were issued.

Article 22 of the Constitution of Maine, an amendment passed February 9, 1877, and adopted by the people at the ensuing annual election, provides as follows:

"No city or town shall hereafter create any debt or liability, which singly or in the aggregate with previous debts or liabilities shall exceed five per centum of the last regular valuation of said city or town; provided, however, that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made."

This provision of the Constitution was intended to prevent municipalities of the state from becoming indebted to an extent which would threaten permanently to retard their growth. All acts in contravention of this provision are held by the court to be void. And no one is presumed to be ignorant of the invalidity of bonds issued in violation of it. If the issue of bonds is made without authority, the holder of such bonds cannot recover on the ground that he is an innocent purchaser. *Pendleton County v. Amy*, 13 Wall. 297, 304, 20 L. Ed. 579; *Aspinwall v. Commissioners of Daviess County*, 22 How. 364, 379, 16 L. Ed. 296. In *Hedges v. Dixon County*, 150 U. S. 182, 188, 14 Sup. Ct. 71, 37 L. Ed. 1044, in 1893 the United States Supreme Court held that, where a county issued bonds in excess of its authority as a donation on its part, a court in equity could not allow the surrender and cancellation of so much of the bond issue as might be found to exceed the limit authorized by law, and declare the residue of such bonds valid, and that it could not enforce the payment of such residue against the county. In speaking for the court, Mr. Justice Jackson said:

"What the county authorized and carried into execution in the present case, both by the vote and by the donation, was one entire transaction; and, if it

should be so reformed as to curtail the entire issue of bonds to such an amount as was within the constitutional limits of the county to donate, it would be something different from that which was voted by the county and carried into effect by the issue of the bonds. This would involve the making of a different donation from what the county voted and intended to make to the railroad company."

The court distinguished that case from *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026, where the county had voted a subscription of \$250,000 to a railroad company; and, where without authority the officers of the county issued bonds to the amount of \$300,000, the court held that the power to issue bonds was limited to \$250,000, and that the bonds in excess of that amount were unlawful and void. The *Dixon County Case* arose upon a distinct matter of donation. The court commented upon the fact that the purchasers of the bonds from the railroad company did not pay any consideration therefor to the county, so as to raise any equity against it for the amount of the bonds, or for any part thereof. In *Everett v. Independent School District* (C. C.) 109 Fed. 698, 702, a decision of the United States Circuit Court of the Northern District of Iowa, in 1901, Judge Shiras, afterwards Mr. Justice Shiras of the United States Supreme Court, said:

"The true purpose of the present suit is to ascertain what number or part of the bonds issued by the school district of Rock Rapids, as it existed in 1879, can be enforced against the several districts now representing the original district, without infringing the constitutional limitation; and I am not able to perceive the force of the argument, whereby it is sought to maintain the proposition that the constitutional provision prohibits judicial inquiry into the actual facts in order to determine whether the whole or any part of the indebtedness represented by the bonds in suit can be enforced without violating the constitutional limitation. If the contention of the defendant districts be sustained, it results in the holding that a municipal corporation, the indebtedness of which has not reached the limit, may issue bonds slightly in excess of the limit, sell the same for full value, use the money in paying off all its debts, and then repudiate the last issue of bonds, and by so doing wholly free itself from all liability at law or in equity. Such a rule would convert the constitutional provision which was intended as a protection against excessive taxation into a potent method of perpetrating frauds of the most unblushing character."

Judge Shiras also commented upon the *Dixon County Case*, and drew the distinction arising from the fact that the cause then before the Circuit Court did not involve the question of donation, but presented a case where distinct equities had arisen, and where the bonds had been issued upon a valuable consideration. The court held that the constitutional provision did not prohibit the inquiry on the part of a court in equity as to the actual facts, in order to determine whether any of the bonds issued could be enforced without violating the true meaning of the constitutional limitation. And this the court called the pivotal point in the case; and it further held that where a corporation, for value, has issued a series of bonds which it refuses to pay, on the ground that such issue increased its indebtedness beyond the constitutional limits, a court in equity, at suit of the bondholders, may inquire into the facts to ascertain what part, if any, of the debt thus created can be enforced without violating the con-

stitutional limit. Judge Shiras held substantially the same doctrine in the Lyon County Cases (C. C.) 82 Fed. 929; *Id.* (C. C.) 95 Fed. 325. When this question was first presented to courts of equity, the difficulty of making a proper accounting was encountered in cases where there were several issues of bonds, or where the contracts were incumbered by different requirements. In *Dillon on Municipal Corporations* (5th Ed.) 1911, § 203, is found an excellent statement of the equitable rule:

"Partial Validity of Obligation.—If the city has not reached the constitutional limit of its indebtedness at the time when the obligation is incurred, but has so nearly approached the limit that only a part of the amount agreed to be paid is within the limit and the remainder beyond, the question arises to what extent the obligation is valid. If the debt is evidenced by bonds which are issued and delivered at different dates, the bonds first issued and delivered are valid, although the remainder of the issue may exceed the constitutional limit. If, however, the bonds are issued at the same time, or as a part of one transaction, or if the contract calls for the payment of a gross sum, which in part only exceeds the constitutional limit of indebtedness, the just and equitable rule as we regard it has been adopted that each obligation should be void in a sum in proportion to the excess and valid as to the remainder."

I find no other decisions of the United States Supreme Court upon this subject which require discussion. Other federal courts have considered the question in *Francis v. Howard* (C. C.) 50 Fed. 44; *s. c.*, 54 Fed. 487, 4 C. C. A. 460; *Columbus v. Woonsocket Inst. of Savings*, 114 Fed. 162, 52 C. C. A. 118; *Keene Five Cent Savings Bank v. Lyon County* (C. C.) 97 Fed. 159; *Prickett v. City of Marceline* (C. C.) 65 Fed. 469. It will be seen that wherever the question has arisen in the federal courts in an action at law the courts have been compelled to hold that it was beyond their power to determine questions of the order in which the series of bonds were to be divided, or to make proper accountings. And in many cases courts of law have failed to take jurisdiction. The case at bar did not arise upon a donation. The defendant town subscribed for stock in a railroad. It must be assumed from the pleadings that the town in taking stock took, and intended to take, value. The bonds appear to have been issued upon a valid consideration. The town exceeded its debt limit in its issue of bonds; and the amount of this excess is shown in the bill. No question arises involving any difficulty of accounting or of the application of the proceeds from the sale of the bonds. The case presents none of the difficulties met with in many of the cases in equity on this subject in federal courts. In my opinion the fact that the issue of bonds in this case created a debt exceeding the limit of the indebtedness allowed by the Constitution of the state, ought not to, and does not, prevent a court in equity from enforcing the payment of such bonds to the extent that the town could legally borrow.

[3, 4] 2. Were the bonds issued and negotiated under a valid vote of the defendant town?

It must be said that whatever rights the defendant town had to borrow money it acquired by the Constitution and laws of the state of Maine. *Hooper v. Emery*, 14 Me. 375; *Alley v. Edgecomb*, 53

Me. 448. I have already referred to the constitutional provision forbidding a municipality from creating any debt exceeding 5 per cent. on its last valuation. At the time the defendant town attempted to issue the bonds in question, the Revised Statutes of the state of Maine of 1883 (chapter 51, § 135) provided as follows:

"A city or town by a two-thirds vote, at any legal meeting called for the purpose, may raise by tax or loan, from time to time, or all at once, a sum not exceeding in all five per cent. on its regular valuation for the time being, to aid in the construction of railroads, in such manner as it deems proper, and for such purpose may contract with any person or railroad corporation. At such meetings the legal voters shall ballot, those in favor of the proposition voting 'Yes', and those opposed, voting 'No'. The ballots cast shall be sorted, counted and declared in open town meeting and recorded, and the clerk shall make return thereof to the municipal officers, who shall examine such return, and if two-thirds of the ballots cast are in favor of the proposition, said officers shall forthwith proceed to carry the same into effect."

It appears by the plaintiff's bill that at the first meeting of the voters of the defendant town a vote was passed by more than the necessary two-thirds, providing for the issue of bonds. It appears further by the bill that a second special town meeting was held upon May 11, 1896; but no action was taken at this meeting which requires comment. On July 13, 1896, a third special meeting of the town was held. It was provided, however, in section 138 of chapter 51 of the Revised Statutes of Maine for 1883, that:

"Whenever a city or town has voted at any regular meeting thereof upon any question of loaning its credit to the taking of stock in, or in any way in aiding any person or corporation, said city or town shall not vote again upon the same subject except at its annual meeting."

When we examine the form of bonds set out in the pleadings, we find that they purport to have been issued "in conformity to the vote of said town, passed at a special meeting held July 13, 1896." And it is contended on the part of the defendant town that, inasmuch as it was forbidden to vote upon this subject at the meeting of July 13, 1896, the plaintiff cannot base the action of the town upon any authority not stated in the bond; but that the whole issue of bonds is void, both at law and in equity. The learned counsel for the defendant urges that the manifest purpose of the statute was to protect towns from hasty, dangerous, and ill-advised legislation; that the state wisely forbade towns from voting more than once at a special meeting upon a proposition to increase its debt limit, and that this provision is an absolute prohibition of action except at the annual meeting; that the recital in the bonds must be held as conclusive and final; that they were issued under a vote passed at an illegal special meeting; and that there can be no estoppel upon the defendant town to deny that it complied with the vote passed at the first meeting.

The plaintiff contends that the authority to issue the bonds which had been given by the town meeting of July 20, 1895, the first meeting, had never been revoked; that no additional power was attempted to be given by the meeting of July 13, 1896; that this third meeting sought merely to ratify the acts of the first meeting; that it appears by the bill that the conditions and requirements of the vote passed

at the first town meeting were complied with in the issuance of the bonds; that if the third town meeting, namely, that of July 13, 1896, had never been held at all, the power of the town to issue bonds could not have been questioned; that, if the third meeting could give no authority to issue the bonds, it certainly could not take away the authority which had been given by the vote passed at the first town meeting, namely, that of June 20, 1895.

In *Wilkes County Com'rs v. Coler*, 113 Fed. 727, 51 C. C. A. 399, the Court of Appeals for the Fourth Circuit held that if there was, in fact, an act which gave authority for the issue of bonds, such bonds were valid, notwithstanding they purported to have been issued under the authority of an illegal statute, and even though this illegal statute was recited as the authority for the issue. In speaking for the court, Judge Morris said:

"The recitals of the bonds in suit are as follows: That the bond is issued by authority of an act of the general assembly of North Carolina ratified the 20th day of February, A. D. 1879. This act being an invalid enactment, and not a law, so far as it undertakes to give power to issue bonds, this recital does not preclude inquiry as to whether or not there was such a law, and the existence of legislative authority. *Northern Nat. Bank v. Trustees of Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258. But the recital of an invalid act does not preclude inquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond could be upheld. *Wilkes County v. Coler*, 180 U. S. 506, 524 [21 Sup. Ct. 458, 45 L. Ed. 642]."

The court cited many other authorities. This decision of the Circuit Court of Appeals was confirmed by the Supreme Court in *Wilkes County Commissioners v. Coler*, 190 U. S. 107, 23 Sup. Ct. 738, 47 L. Ed. 971, where the court said that the invalidity of the act of 1879 as conferring power to issue the bonds did not estop holders of bonds from showing that there was in fact ample authority to issue the bonds. It appears to be well settled that, if there is any authority under which the bonds may be issued, the court will hold them valid, even though they purport to be issued by reason of some invalid authority; and even though the municipal officers issuing them assume that their only authority to issue came from what proved to be an invalid source. *Fernald v. Town of Gilman* (C. C.) 123 Fed. 797; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; *Dillon, Municipal Corporations* (5th Ed. 1911) § 936; *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760.

After a careful examination of the pleadings in the case before me, I am of the opinion that the allegations of the bill show that the vote of the first town meeting gave the town officers power to issue and negotiate the bonds therein described; and that, even though the bonds purported to have been issued by an invalid vote, they were authorized by a valid vote, the requirements of which were carried out by the town officers. The bill alleges that the bonds were issued "pursuant to the votes passed at these meetings," referring to all the meetings. If there is enough in the bill to show that the town officers derived power from the vote at any meeting to issue and negotiate the

bonds, the demurrer ought not to be sustained. I think it the plain duty of the court to overrule the demurrer, especially under the rule stated by the United States Supreme Court in *Kansas v. Colorado*, 185 U. S. 125, 145, 147, 22 Sup. Ct. 552, 46 L. Ed. 838, applying to suits in equity where the issues are raised on demurrer.

The demurrer is overruled. The defendant may answer further under the equity rules.

UNITED STATES V. THOMSON & TAYLOR SPICE CO.

(District Court, N. D. Illinois. June 17, 1912.)

No. 4,851.

FOOD (§ 5*)—FOOD AND DRUGS ACT—MISBRANDING.

Under regulation (c), adopted under Food and Drugs Act June 30, 1906, c. 3915, § 3, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1355), that "the use of a geographical name in connection with a food or drug product will not be deemed a misbranding, when by reason of long usage it has come to represent a generic term, and is used to indicate a style, type, or brand, but in such cases the state or territory where any such article is manufactured or produced shall be stated upon the principal label," coffee shipped from the port of Aden, Arabia, whether produced in Arabia or Abyssinia, may properly be labeled "Mocha," but the label must state in which of the two countries it was produced.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

Proceeding by the United States against the Thomson & Taylor Spice Company. Judgment for penalty against defendant.

James H. Wilkerson, U. S. Atty., and A. R. Hulbert, Asst. U. S. Atty.

Thomas Vent, for defendant.

LANDIS, District Judge. In this case the defendant company is charged with a violation of the misbranding section of the pure food law, in that there has been the use of the geographical name "Mocha" in connection with the sale of coffee grown in Abyssinia. Against the defendant it is urged the word "Mocha" can lawfully be used only to designate coffee grown in Arabia.

The facts are that on one side of the Red Sea is Arabia and on the other side is Abyssinia. Coffee is, and for centuries has been, grown in both of these countries. Up to about 200 years ago practically all of the Arabian product and a portion of the Abyssinian product was shipped out through the port of Mocha, located on the Arabian side of the Red Sea. Because of this fact, this coffee was called Mocha. At that time, owing to the formation of a sand bar obstructing the entrance to the harbor of Mocha, that port ceased to be the point of shipment for the coffee product, and since that time it has come out mainly through the port of Aden, in Arabia. This is the case now with respect to both the Arabian and Abyssinian product,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as it was up to 200 years ago with respect to both products at the port of Mocha.

The pure food regulation adopted under the authority conferred by the pure food law is as follows:

"(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when, by reason of long usage, it has come to represent a generic term, and is used to indicate a style, type, or brand; but in such cases the state or territory where any such article is manufactured or produced shall be stated upon the principal label."

It will be observed that Mocha is not a place where the coffee is manufactured or produced. As above stated, it is merely the port through which originally the coffee referred to found its way to market. This being true, the above regulation plainly requires the use of the word "Abyssinian" in connection with the word "Mocha" to cover coffee grown in Abyssinia, as the same law requires the use of the word "Arabian" in connection with "Mocha" to cover coffee grown in Arabia.

In view of the fact that it was agreed on all sides that this case was brought as a test to determine this question, the minimum penalty of \$1 will be imposed.

McGRAW TIRE & RUBBER CO. v. GRIFFITH et al.

(Circuit Court, S. D. New York. July 21, 1911.)

TRADE-MARKS AND TRADE-NAMES (§§ 59, 70*)—INFRINGEMENT—UNFAIR COMPETITION.

Some two years after complainants commenced the manufacture of automobile tires having the name "Imperial" and the words, "Made by the McGraw Tire & Rubber Company, E. Palestine, O.," moulded thereon, a large number of which were contracted for and purchased by defendants, the latter organized a corporation under the name "Imperial Tire Company," and began the sale of tires made for them by others with the name "Imperial" and the words, "Made by Griffith Tire & Rubber Company," or, "Made by the Imperial Tire Company," moulded thereon in obvious similarity to complainants' moulding. *Held*, that the use of the name was an infringement of complainants' common-law trade-mark, and its use in the name of the corporation constituted unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72, 81; Dec. Dig. §§ 59, 70.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Suit by the McGraw Tire & Rubber Company against Edward C. Griffith, the Automobile Tire Company, the Griffith Tire & Rubber Company, and the Imperial Tire Company. On motion for preliminary injunction. Granted.

Kenyon & Kenyon, of New York City, for complainant.

Graham & L'Amoreaux, of New York City, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

WARD, Circuit Judge. The complainant, a corporation and citizen of the state of Pennsylvania, filed its bill against the defendants, citizens of the state of New York, for infringement of its common-law trade-mark in the use of the word "Imperial" in connection with automobile tires and for unfair competition. The motion is for a preliminary injunction.

The use which the defendant Griffith or the Automobile Tire Company made of the word "Imperial" in the summer and fall of 1908 was insignificant, with no effect whatever upon the market, and in my opinion entirely insufficient to establish a common-law trade-mark. It was the complainant which made the word known and gave it value in connection with the large and increasing manufacture of unguaranteed tires, which it began in the fall of 1909. The words, "Imperial," "Made by the McGraw Tire & Rubber Company," and "E. Palestine, O.," were moulded upon them.

If Griffith or the Automobile Tire Company could be supposed to have any prior rights in the word "Imperial" in this connection, I think they abandoned it by the contract of May 3, 1910, under which they agreed to buy 7,500 unguaranteed tires from the complainant prior to November 1, 1910. These were to be of the Clincher and Dunlop types; the former the complainant might manufacture for any one at the same rates, but the latter only for the Automobile Tire Company. Down to November 1st it bought these tires to the cost of \$90,751.92, 5,200 of them being Clinchers. All of these were marked as above stated. No claim whatever was made of a prior right in the word "Imperial" except in connection with the suggestion of May 24, 1910, that the complainant should either sell all its tires to the Automobile Company or else have tires manufactured for it branded with another name than Imperial, which was never followed up.

January 5, 1911, the defendant Griffith organized the "Imperial Tire Company" under the law of the state of New York. It had a capital of \$5,000, and the incorporators were the defendant Griffith, his wife, and a gentleman from the office of his lawyers.

In April, 1911, the complainant heard that the defendants were selling tires made for them by others moulded with the words, "Imperial," "Made by Griffiths Tire & Rubber Company," or, "Made by the Imperial Tire Company," in obvious similarity to the complainant's moulding. April 4, 1911, it notified the defendants Griffith and the Automobile Tire Company that this was an infringement of its right, to which they replied April 5th, claiming a prior right to the use of the word "Imperial" and for the first time saying that they would insist upon it.

I feel quite clear that the defendants are infringing the complainant's trade-mark and are also guilty of unfair competition in organizing a corporation under the name "Imperial" Tire Company and advertising and selling tires as made by it or for it.

The motion for a preliminary injunction is granted.

THE MANUEL CALVO. THE TRANSFER NO. 19. THE CAR FLOATS
NOS. 40 AND 42.

(District Court, S. D. New York. May 7, 1912.)

COLLISION (§ 95*)—STEAM VESSELS—VIOLATION OF RULES.

A collision to the westward of the main ship channel in New York Bay between the steamship Calvo, passing out to sea, and a car float on the side of Transfer Tug No. 19, which had just passed out from the channel extending from the Pennsylvania Terminal at Greenville, N. J., held due solely to the fault of the tug in not assenting to the Calvo's signal of one blast, and either keeping her course and speed, if she was then coming into the ship channel and on a crossing course, or if she had straightened out, and on a meeting course, in not keeping to starboard, as required by the rules, instead of which she answered with two blasts and starboarded, keeping up the west side of the channel, in violation of the narrow channel rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Signals of meeting vessels in collision, see note to *The New York*, 30 C. C. A. 630.]

In Admiralty. Suit for collision by the Compania Transatlantica, owner of the Spanish steamship Calvo, against Transfer No. 19 and Car Floats Nos. 40 and 42, with cross-libel by the New York, New Haven & Hartford Railroad Company, owner of the Transfer and Car Floats. Decree for libellant.

Hunt, Hill & Betts, of New York City, for libellant.
Jas. T. Kilbreth, of New York City, for respondent.

WARD, Circuit Judge. There are some very material facts not in dispute. February 14, 1911, at about 4:30 p. m., the Transfer, on her way from the Pennsylvania Terminal at Greenville, N. J., to Oak Point, in the Bronx, with a car float on each side, came into collision with the steamer Calvo, bound from Pier 14, East River, on a voyage to sea. Flurries of snow were frequently occurring, but it was at all times possible to see vessels at a distance of a mile, and no fog signals were being blown. The collision happened west of the western side of the main ship channel, near the red buoy at the entrance of the Greenville channel, which runs from the Pennsylvania Terminal southeast to the ship channel. The starboard corner of No. 19's starboard float came into contact with the Calvo's port bow about six feet abaft the stem, doing considerable damage; neither vessel at the time having much headway. At the time of collision the Calvo was heading in toward the Jersey shore to the west, and the Transfer was heading about N. by W., so that the blow was nearly at a right angle.

The regular course up and down the main ship channel at this point is S. W. by S. and N. E. by N., and the Court of Appeals of this circuit has held in *La Bretagne*, 179 Fed. 286, 102 C. C. A. 651, that it is a narrow channel, within article 25 of the Inland Regulations. (U. S. Comp. St. 1901, p. 2870). It is therefore apparent that, if the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vessels were proceeding on the regular courses, the Calvo must have departed three or four points from her course and the Transfer four or five points from hers. It is also clear that, if both vessels had either ported or starboarded (which there was nothing to prevent them from doing), they would have passed each other in safety, and that the collision was the result of their steering in the same direction.

The pleadings of the Calvo allege that when coming down on the western side of the channel she discovered the Transfer on her starboard bow coming out of the Greenville channel, heading over to the eastward to Bay Ridge on a crossing course. The steamer thereupon blew one whistle and ported. The Transfer shortly after answered with two blasts and starboarded. The steamer blew another signal of one whistle and hard aported. The Transfer answered with a signal of two whistles, and continued her course to port until the collision happened.

The Transfer's pleadings say that as she came out of the Greenville channel she straightened up on the usual course N. E. by N. on the western side of the channel and blew the Calvo, which was coming down on the easterly side, a signal of two whistles, which was not answered. No. 19 blew a second signal of two whistles, which was not answered, and then she went full speed astern on her engines and blew the alarm. The Calvo ported and came across and into collision with the Transfer's starboard float, blowing a signal of one whistle just before the collision. Witnesses on each side testify that proper whistles were blown to indicate the intention of each vessel. If they were, neither vessel heard the signals of the other in time to conform to them.

The steamer was certainly the better provided with persons in charge of her navigation. The captain, pilot, first, second, and third officers, a quartermaster at the wheel, and another pilot on his way to the station boat, were on the bridge, and the boatswain on lookout at the bow. On the Transfer a deckhand was standing on lookout on the second or third outside car of the starboard float; the master and another deckhand (who was not called as a witness) being in the pilothouse.

The pilot in charge of the steamer and the passenger pilot both testify that the Transfer was first seen when coming out of the Greenville channel on the steamer's starboard side on a crossing course, and that the steamer thereupon blew one whistle and ported. This is also the account pleaded, but the master and officers of the steamer and the lookout all testify that the Transfer when first seen was on a meeting course dead ahead, and I so understand the expression in the translation of the steamer's log that the Transfer was sighted "on our bow." Moreover, counsel for the Transfer, when stating its defense, as is usual when depositions are being taken by the libellant before answer filed, said that when the vessels discovered each other they were on meeting courses, but starboard to starboard; the Transfer being on the western and the Calvo on the eastern side of the channel. However, the Transfer's pleadings when filed stated, and

her witnesses at the trial testified, that they saw the steamer as they were coming out of the Greenville channel on a crossing course.

If this latter account be adopted, the Transfer was clearly at fault as the privileged vessel for not holding her course, as well as for insisting upon going up on the wrong side of the channel.

The great weight of testimony is that the vessels began to navigate with reference to each other when they were less than a mile apart on meeting courses; the Calvo S. W. by S., and the Transfer N. E. by N.

The Transfer's pleadings state, and her master testified, that it was in this situation that he blew his first signal of two whistles, and the witnesses from the steamer's company also testified that it was in this situation that she first blew her signal of one whistle and ported.

If the Calvo were then on the eastern side of the channel, there was no necessity for any exchange of signals, and I do not believe that in such a situation whistles would have been blown, still less that the Calvo would have deliberately run across into a wholly unnecessary collision on the anchorage grounds. The master of the Transfer, who showed a complete unfamiliarity with the steering and sailing rules, instead of holding his course out of Greenville channel, admits that he starboarded, and the lookout testified that when he reported the steamer the master said:

"I ain't going to cross her anyway. I am going to keep on this shore."

I think that, when about straightened up ahead of the Calvo, he starboarded again with the intention of doing this. At the same time the Calvo, for the purpose of passing port to port in accordance with the law (Inland Regulations, art. 18, rule 1), blew one whistle and ported. The Transfer did not answer, but bore to port, whereupon the steamer blew another signal of one whistle, hard aported, stopped her starboard engine, and went ahead on her port engine full speed, with the intention of turning as sharply as possible to starboard. Then, seeing the collision to be inevitable, she went full speed astern on both engines. On the other hand, the Transfer, when she heard the signal of one whistle from the Calvo, replied with two, then blew an alarm, and went full speed astern. I think the Transfer solely at fault, and that by her improper navigation she put the Calvo into an embarrassing and critical situation. Even if it should now appear wiser for the Calvo to have gone full speed astern at once, instead of trying to escape by porting, it should, I think, be considered an error, and not a fault, on her part.

There will be a decree in favor of the libellant, with costs, and dismissing the cross-libel, with costs.

NEW YORK MACKINTOSH CO. v. FLAM et al.

(District Court, S. D. New York. July 18, 1912.)

1. TRADE-MARKS AND TRADE-NAMES (§§ 3, 59*)—VALIDITY AND INFRINGEMENT.

The word "Bestyette" is sufficiently distinctive to constitute a valid trade-mark for waterproof capes and cloaks, but is not infringed by the use of the word "Veribest" by a defendant on similar garments.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7, 68-72; Dec. Dig. §§ 3, 59.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 57*)—INFRINGEMENT.

The copying by defendants on their business cards and stationery of a picture used by complainant as a trade-mark on its goods does not constitute an infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. § 57.*]

In Equity. Suit by the New York Mackintosh Company against Isaac Flam and others. On final hearing. Decree for defendants.

Joseph L. Levy, for complainant.

Bernard Cowen, for defendants.

HOLT, District Judge. This suit is brought to restrain the alleged infringement of two trade-marks. The complainant is a manufacturer of ladies' and girls' waterproof cloaks and capes. In 1907 the complainant registered in the Patent Office, as a trade-mark to be used on clothing, the word "Bestyette," and in 1910 it registered as another trade-mark a picture of a girl wearing a rain cape. The proof shows that the complainant since 1904 has used the mark "Bestyette" by attaching to a certain class of rain capes a woven or printed label on which the word is shown, and since 1908 has used the pictorial mark by printing it on the boxes containing the goods and by tagging to the goods a printed label bearing such picture. The defendants are engaged in the same business as the complainant, in the manufacture of rain coats and capes. They make similar goods, and have attached to their capes the word "Veribest" as a trade-mark, and have had printed and used, upon certain business cards, billheads, and order forms, copies of the complainant's pictorial trade-mark.

The bill, in addition to allegations of the infringement of the trade-marks, contains allegations of unfair competition in trade. But, as all the parties to this suit are citizens of New York, this court has no jurisdiction of a suit between them on the ground of unfair competition, and the complainant's counsel did not, on the hearing or in the brief submitted, claim to recover on that ground. It should therefore be clearly apprehended, at the outset, that the sole question in this case is whether the complainant's trade-marks have been infringed.

[1] The defendants claim, in the first place, that the complainant's trade-mark, "Bestyette," is invalid, because the word is simply descriptive of the character or quality of the goods. Undoubtedly, if

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the complainant had attached to its goods the sentence, "These rain capes are the best yet made," or some contracted form of such sentence, as, for instance, "Best Rain Capes Yet Made," or "Best Yet Made," or "Best Yet," the statement would be simply descriptive, and the usual commendation of a vendor, and could not be a valid trade-mark. "Bestyette," when spoken, sounds the same as "Best Yet," and undoubtedly the claim that it is merely a descriptive word has much weight. But, in trade-marks, the impression produced on the sight of the buyer is the main thing; and, upon the whole, I think that the compounded and fantastically spelled word "Bestyette" is sufficiently distinctive to be a trade-mark. Moreover, the evidence shows that it was used exclusively by the complainant more than 10 years before registration, and therefore the provisions of section 5 of the Trade-Mark Act of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. 724 [U. S. Comp. St. Supp. 1911, p. 1459]) apply, that, in such a case, the fact that the term was originally descriptive does not prevent registration.

The defendants also claim that, assuming that the word "Bestyette" can be a valid trade-mark, their use of the word "Veribest" for their trade-mark does not infringe it. I think it clear that no dealer can be prevented from asserting, by an advertisement printed on the goods, or in any other manner, that his goods are the best, or the best yet, or the very best. If the word "best" is included in a queer compound word oddly spelled, used as a trade-mark, that does not prevent other dealers from using the same word in the same way, so long as the word first created is not imitated too closely.

The question, therefore, comes back to the usual one in trade-mark cases: Does the defendants' trade-mark imitate the complainant's so closely as to deceive the public into supposing that they are purchasing the complainant's goods when purchasing the defendants'? In all this class of cases, undoubtedly, regard must be had to the fact that many of the public are hasty, heedless, and easily deceived. But, after all, the question in all such cases is: Would the public actually be deceived? Each case must be determined on its own facts; but, in this case, I cannot believe that any one, seeing the label "Veribest" on a cape, would believe it to be the "Bestyette" cape because of such label. The similarity of the capes in shape, style, and color might lead to such belief; but the trade-mark alone, it seems to me, would not.

The case brought by the complainant in this court against Wangrow, in which it was held that the word "Bestever" infringed "Bestyette," differs essentially, in my opinion, from this case. The words "Bestyette" and "Bestever" begin alike, and look much alike, and I entirely concur in the decision of that case; but the decision reached in that case does not seem to me to require a similar decision in this case. The just rights of the owners of trade-marks should be upheld; but, in deciding such cases, the importance of maintaining the general freedom of trade should not be overlooked.

[2] The defendants claim, also, that the complainant's pictorial trade-mark is invalid. They assert that it is merely a picture of the article sold. Undoubtedly a mere picture of an article of merchandise cannot be made a trade-mark to be attached to such article. Such a

trade-mark is prohibited from registration by section 5 of the Trade-mark Act as a "device descriptive of the goods." Nor, in my opinion, can a garment maker, by adopting, as a trade-mark, a picture of a person wearing a garment, prevent other dealers from adopting a similar trade-mark, provided it is not so close an imitation as to naturally lead to confusion. It is the common practice of dealers in clothing to advertise their goods by pictures of persons wearing them, and no one, under the guise of adopting a trade-mark, can obtain the exclusive right to such pictures. But, while the question here is again a close one, I think that the complainant's picture is sufficiently distinctive to be a valid trade-mark. The defendants' picture on their cards, letter heads, and orders is an exact copy of it. They could have adopted a picture of a girl wearing a rain cape, without copying the complainant's picture. But their picture is such a complete reproduction of the complainant's trade-mark that it would clearly have infringed it, if it had been attached to the defendants' capes, or to the boxes in which they were shipped.

But the difficulty with this branch of the case is that there appears to be no proof that it was so attached. On the hearing, after inspecting the pictures on the defendants' business papers, and perceiving that they were literal copies of the complainant's trade-mark, and assuming that the defendants tagged the same picture to their goods and boxes, I was of opinion that the trade-mark was infringed. But on a careful examination of the record I find no proof that the defendants ever used the picture as a trade-mark. A trade-mark is something attached to the goods, or the receptacles containing them, which the buyer sees, and by which the goods become known to the buyer. It seems strange that the defendants should have copied this trade-mark on their business papers, and should have abstained from attaching it to their goods; but such a use of it on their business papers, while affording strong proof of unfair competition in trade, is, in my opinion, no proof of infringement of the trade-mark.

There is obviously much in this case to suggest an intentional and close imitation of the complainant's goods and business methods by the defendants. The complainant put on the market a rain cape distinctive and attractive in style and color. The defendants exactly imitate it. But there is no law which prevents any one from making clothes like another. If a tailor, or dressmaker, or garment maker of any kind, creates a novel and attractive garment, any rival can copy it. The devising of the word "Veribest" as a trade-mark was probably suggested by the complainant's trade-mark, "Bestyette"; and I have no doubt that the defendants directly copied the complainant's pictorial trade-mark in the picture on their business papers.

The question of unfair competition is not before me. If the complainant thinks it exists, it has a remedy by suit in the state courts. The sole question here is whether the defendants have infringed the complainant's trade-mark. I cannot see that they have.

A decree is directed for the defendants, but, under all the circumstances of the case, without costs.

In re HAMMONDS.

(District Court, E. D. Kentucky. August 17, 1912.)

1. BANKRUPTCY (§ 396*)—EXEMPTIONS—TITLE TO PROPERTY CLAIMED.

That a bankrupt purchased property claimed as exempt without intending to pay for it affords no ground of objection to the exemption by his trustee, since the purchase vested title in the bankrupt, subject only to the personal right of the seller to reclaim the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 396*)—EXEMPTION—PROPERTY PURCHASED WITH NONEXEMPT PROPERTY.

A bankrupt's right to hold as exempt personal property specifically exempted from execution by the laws of the state, without qualification, is not affected under the law of Kentucky by the fact that he purchased such property with nonexempt property on the eve of the bankruptcy, and with the intention of claiming the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.*]

In the matter of J. W. Hammonds, bankrupt. On review of order of referee allowing and denying exemptions. Affirmed in part and reversed in part.

Geo. G. Brock, of London, Ky., for creditors.

Hazlewood & Johnson, of London, Ky., for bankrupt.

COCHRAN, District Judge. This cause is before me on two petitions for review. One is filed by the bankrupt, who was a merchant, and the other by certain creditors. Each relates to the matter of exemptions. The referee disallowed to the bankrupt on his exemption claim two mules and a cow. It is of this order so doing that the bankrupt complains. He allowed to him his claim for sufficient provisions, including breadstuff and animal food, to sustain his family for one year. It is of this order so doing that the creditors complain. The evidence heard by the referee bearing on these claims has not been sent up with the rest of the papers; but, as I am able to dispose of the case without having it before me, I will not delay its disposition until I get it.

The articles disallowed and allowed were such as the statutes of Kentucky provide shall be exempt to a debtor. They allow, amongst other things, two work beasts or one work beast and one yoke of oxen, two cows and calves, and such a sufficiency of provisions. No question is made in the record as to those articles being such as those statutes provide shall be so exempt.

[1] The ground upon which the creditors claim that the provisions allowed should not have been set apart as exempt is that they had been purchased with no intention to pay for them. The referee found against this claim in matter of fact—i. e., he held that they had not been so purchased—and on this ground denied the claim. If the necessities of this case required that I should pass

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on this question of fact, of course, I would have to have before me the evidence heard by the referee, but the necessities of the case do not so require. Even if it be a fact that the provisions set apart to the bankrupt had been purchased by him with the intention of not paying for them, the creditors, as such, have no right to complain of the action of the referee in setting them apart. Notwithstanding such intention, the title thereto passed from the sellers to the bankrupt. Because thereof the sellers were entitled to reclaim their property. But this right did not prevent the passage of the title. The effect thereof was to make the title which the bankrupt acquired what is termed in *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993, a "defeasible title." In order to reinvest the sellers with title, a rescission of the contract of sale was essential. The fact that immediately upon the sale the sellers had the right to recover their goods in replevin is not against this. The bringing of such a suit is a "judicial rescission," which is a substitute for a "rescission in pais" effected by a mere demand. 1 *Bigelow on Fraud*, p. 77. This right of rescission and recovery of the goods were personal to the sellers. It could not have been asserted as against the trustee had not the provisions been set apart as exempt, and can be asserted as against the bankrupt, notwithstanding they have been set apart as exempt. It follows from this that the petitioning creditors, as such, are not interested in the question as to whether the provisions were purchased with an intention not to pay for them. And on this ground their petition for review is overruled. In so far as the decision in the case of *In re Woolcott* (D. C.) 140 Fed. 460, is in conflict with this position it is not approved.

[2] The ground upon which the referee disallowed the bankrupt's claim to the two mules and the cow, notwithstanding they are such articles as are called for by the statutes of exemption of Kentucky and the bankrupt had none others answering thereto, was that they had been purchased with nonexempt property on the eve of bankruptcy in contemplation of bankruptcy proceedings and pursuant to advice of counsel, in order that, in case of the institution of such proceedings, they might be claimed as exempt. The referee so finds, and his finding of fact in this particular is not questioned by the bankrupt. So the evidence heard by the referee is not needed on this point. The bankrupt gave for the two mules \$500, which he paid for with a horse at \$125, cash \$200, and merchandise out of his store \$125. He gave for the cow \$64.15 and paid for it by the assignment of a good account on one of his debtors. It must be accepted, therefore, in disposing of this petition, that we have here a deliberate conversion of nonexempt property into exempt property in contemplation of bankruptcy proceedings with the view of claiming the property as exempt on the institution of such proceedings followed by such a claim. It should be noted that, as to the mules, it is conceded that the claim of the trustee is burdened with a right in favor of the bankrupt to the extent of \$125, on account of the horse which was itself exempt and which partly paid for the mules.

The question as to whether the mules save to the extent of the \$125 on account of the horse and the cow are exempt depends entirely on

the state law. The Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]) § 6, expressly provides that it shall not affect the allowance to the bankrupt of the exemptions prescribed by the state laws. The meaning of this provision cannot be other than that, if under the state law the bankrupt would be entitled to certain exemptions as against his creditors, he is entitled to the same exemptions notwithstanding the bankrupt law and the institution of bankruptcy proceedings thereunder. In 1 *Loveland on Bankruptcy*, p. 898, it is said:

"Whether property which would ordinarily be exempt from seizure on attachment or execution is liable to be administered for the payment of the debts of the bankrupt when such property was purchased on the eve of the bankruptcy depends upon the law of the state of the bankrupt's domicile. In some states it has been held that a bankrupt is not entitled to exempt property which has not been paid for, or which has been paid for with the proceeds of nonexempt property prior to the time of bankruptcy. In some states the bankrupt has been allowed an exemption out of such property."

The question then comes to this: What is the law of Kentucky on this subject? Does it affect the debtor's right to hold a certain article of the kind prescribed as exempt that he purchased it with nonexempt property, and in order that he might have this property to that extent in an exempt condition? The statute is absolute. It provides that a debtor of the kind covered by it shall be entitled as against his creditors to the exemptions prescribed in it without any qualification whatever. Under it therefore, one who has purchased property of the kind that is nonexempt, and not paid for it, may convert it into property of the kind that is exempt with the deliberate purpose of having his property in an exempt condition, and hold the property so purchased exempt as against the creditor whose crediting has enabled him to acquire it. This looks hard on the creditor. But it is presumed that one so giving credit will have it in view when he gives it. What is here said has reference only to exemptions of personal property. It is not true of the homestead exemption. In the case of *Northington v. Boyd*, 12 Ky. Law Rep. 227, Judge Bowden of the superior court said *arguendo*:

"If a prior debtor, anticipating a levy and having three work beasts, but only one cow, sells one of the work beasts and buys another cow, we do not suppose the latter could be taken, though it were admitted that he did so in order to hold in this way the value of the work beast."

It is clear, therefore, that the bankrupt was entitled to hold the two mules and the cow, notwithstanding the circumstances under which they were acquired, as exempt from administration herein. The referee thought that the matter was controlled by section 67, subsec. "e," of the Bankrupt Act, providing that conveyances and transfers of property made by a debtor with intent to hinder, delay, or defraud his creditor shall be void as to them. But that section has no application. It has in view dispositions of property made by the debtor to others with such intent, and provides that such property may be followed up and subjected to his debts. A transaction which the law permits could not have been intended to be covered by the section.

The rightness of the transaction from a moral point of view is not involved here. The fact that the bankrupt was a sickly man and had a wife and six children dependent on him, to which allusion has been made, did not make it right. Mr. Waite, in his work on *Fraudulent Conveyances*, § 47, though recognizing that such a transaction involves no "legal fraud," characterizes it as "a species of petty fraud."

The order of the referee in relation to the two mules and the cow is reversed, and the bankrupt will be allowed to retain them as exempt.

UNITED STATES v. HOM YOUNG.

(District Court, S. D. New York. July 3, 1912.)

ALIENS (§ 32*)—CHINESE EXCLUSION—PROCEEDINGS—EVIDENCE.

Evidence considered, and *held* insufficient to establish the claim that defendant, admittedly a person of the Chinese race, born in China, was the son of a father who was born in San Francisco, and for that reason a citizen and entitled to enter and remain in the United States, conceding that such fact, if established, would give him that right.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.*

What Chinese persons are excluded from the United States, see note to *Wong You v. United States*, 104 C. C. A. 538.]

Proceeding for deportation of Hom Young to China. From an order of deportation, he appeals. Affirmed.

Henry A. Wise and John Neville Boyle, for the United States.
Max J. Kohler, for defendant.

HOLT, District Judge. This is an appeal from an order of a United States commissioner directing the deportation of the defendant. The defendant's claim is that he is an American citizen, and therefore entitled to remain in this country, because his father, although of the Chinese race, was born in this country.

By a decision of Commissioner Dudley in 1901, in a proceeding to determine the right of Hom Chung, the alleged father of the defendant, to remain in this country, it was adjudicated that Hom Chung was entitled to remain in this country, because he was an American citizen born in San Francisco. But the evidence to prove that the defendant is the son of Hom Chung is as unsatisfactory as usual in Chinese cases. The defendant was arrested at Buffalo, with four other Chinamen, under circumstances which satisfy me that they had all just come surreptitiously from Canada. The defendant, when examined, gave admittedly entirely untruthful testimony, and clearly should be deported, if he is not an American citizen. No claim was then made by him that he was entitled to enter because he was an American citizen by virtue of his father's citizenship. The claim now made may be valid; but every Chinaman, coming to this country, must be aware of the importance of the fact of the birth in this country of a person of the Chinese race on the question of American citizenship and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—37

right to enter, and, if the defendant is Hom Chung's son, the probability is that he would have claimed citizenship through the right of his father when he first arrived.

The letter written by the defendant at Ellis Island, addressed "Dear Father," would undoubtedly be weighty evidence in his favor, if it were clear that it was sent to Hom Chung. The envelope was addressed to Lai Ming, 29 Pell street, N. Y., and there is nothing to show that Lai Ming was not the person, or that Hom Chung was the person, for whom it was intended, except the fact that Hom Chung lived over Lai Ming's store at 29 Pell street. But it seems to me that, if Hom Chung is Hom Young's father, much more evidence could have been obtained and would have been produced to corroborate the claim. The evidence produced for the defendant is substantially as follows:

Hom Chung testifies that he was born at San Francisco in 1879; that he went to China in 1883, when 4 years old; that he remained there 17 years, until 1900; that in 1896, when 17 years old, he married in China a Chinese woman; that the defendant is his son, and was born in China in January, 1897; that in 1900 he (Hom Chung) came to this country, and has lived here ever since; that his son, the defendant, remained in China until he was 15 years old; that he then came to Canada, and was there several months until he came to Buffalo, where he was arrested; that he (Hom Chung) had received letters from his wife from China, and from his son from Canada, but had destroyed them. His brother, Hom Wing, testifies that he was in China in 1898, and there saw the defendant, then 3 years old, with his mother. Dook Doo Huk testifies that in 1908 he went to China, taking a letter and \$50 in greenbacks given him by Hom Chung for the defendant, and that he delivered the letter and the money to the defendant there.

This is substantially all the evidence to support the defendant's claim that he is Hom Chung's son. Hom Chung testifies that he did not know that his son was coming to this country. Why was he not notified of his coming? Why was he not applied to for money? Who did help this boy of 15 to come? Why did he first go to Canada and stay there for several months? If he wrote from Canada to Hom Chung at New York, why did not Hom Chung take any steps to have his son join him in New York? On the whole, while it is impossible to feel any certainty what the truth is from such a record, I do not think that the defendant has established, by adequate proof, that he is the son of Hom Chung.

Moreover, it does not seem to me that the legal proposition on which the defense is based is beyond controversy. Is it true that, if Hom Young is the son of Hom Chung, he is an American citizen in the full sense of that term? It may be assumed that a child of an American citizen, born abroad, may, on attaining majority, elect to be an American citizen by virtue of his father's citizenship. But, as I understand the rule of international law, he has, during his minority, a kind of double citizenship. He may elect, on coming of age, to be a citizen of the country of his birth, or of the country of which his

father is a citizen. That being the case, I doubt whether Hom Young is to be deemed now to have the full rights of an American citizen under the exclusion acts, even if he is a son of Hom Chung. Hom Chung, according to his own story, left this country when an infant 4 years old, went to China, the native country of his parents, lived there 17 years, married there, and then in 1900 left his wife, who apparently has never been away from China, and his infant son in China. The son remained there until he was 15 years old, and now, coming to this country, claims to be entitled to the full status of an American citizen, because his father was born in San Francisco in 1879. Such a claim seems to me extreme.

However, without passing on this question of law, the decision of the case may properly rest on the insufficiency of the proof of the main question of fact.

The commissioner's order, appealed from, is affirmed.

In re T. A. McINTYRE & CO.

In re McIntyre.

(District Court, S. D. New York. August 20, 1912.)

BANKRUPTCY (§ 314*)—PROVABLE DEBTS—LIABILITY AS INDORSER—NECESSITY OF NOTICE.

Under Negotiable Instruments Act N. Y. (Consol. Laws 1909, c. 38) §§ 172, 185, 186, which provide that, where a party has been adjudged a bankrupt, notice may be given either to the party himself or his trustee, and that "notice of dishonor is not required to be given to the drawer * * * where the drawer and drawee are the same person," or "to an indorser * * * where the indorser is the person to whom the instrument is presented for payment," where the maker and indorser of notes were partners, and were adjudged bankrupts, both as partners and individually, before the notes matured, and the same trustees were appointed for all the estates, notice of nonpayment on the maturity of the notes was not necessary to bind the estate of the indorser.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

In the matter of T. A. McIntyre & Co. and Thomas A. McIntyre, Jr., bankrupts. On review of order of referee expunging claim of Anna Knox McIntyre against the estate of Thomas A. McIntyre, Jr. Reversed.

Sullivan & Cromwell (Emery H. Sykes, of counsel), for Anna Knox McIntyre.

Irving L. Ernst and D. Raymond Cobb, for trustee.

HOLT, District Judge. This is a petition to review an order of a referee expunging a claim of Anna Knox McIntyre against the individual estate of Thomas A. McIntyre, Jr. The claim was based upon two notes, for \$2,500 each, made by Thomas A. McIntyre, Sr., the former husband of Anna Knox McIntyre, in payment for property transferred by her to him, and indorsed by Thomas A. McIntyre, Jr.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thomas A. McIntyre, Sr., and his son, Thomas A. McIntyre, Jr., were partners in the firm of T. A. McIntyre & Co. The firm and each of its members was adjudicated a bankrupt in April, 1908. At the time of the adjudication the two notes were not due. By their terms one became due October 1, 1908, and the other February 1, 1909. Thomas A. McIntyre, Sr., died July 29, 1908. Thomas A. McIntyre, Jr., was appointed his executor, and qualified, in December, 1908. The trustees in bankruptcy of the firm were also the trustees of each individual member. The referee has held that the individual estate of Thomas A. McIntyre, Jr., has been discharged from liability on the notes by reason of the fact that notice of the nonpayment of the notes was not given to the indorser at the times the notes by their terms respectively matured.

The question in this case is a novel and somewhat difficult one. It is obvious that notice of nonpayment of the notes to the indorser in this case would have been an almost meaningless formality; but that is often the case, where such notice is held to be strictly necessary in order to charge an indorser. But in my opinion the question is determined by the provisions of the Negotiable Instruments Act of New York. Section 172 of that act provides as follows:

"Where a party has been adjudicated a bankrupt, * * * notice may be given either to the party himself or his trustee."

Section 185 provides:

"Notice of dishonor is not required to be given to the drawer in either of the following cases: Where the drawer and drawee are the same person."

Section 186 provides:

"Notice of dishonor is not required to be given to an indorser in any of the following cases: * * * (2) Where the indorser is the person to whom the instrument is presented for payment."

In this case the trustees in bankruptcy of the firm and of Thomas A. McIntyre, Sr., individually, and of Thomas A. McIntyre, Jr., individually, were the same persons. Under section 172, above quoted, they were the proper persons upon whom a demand should have been made against the maker, or to whom notice should have been given to charge the indorser. Under section 185, the maker and indorser of the notes, whose position in commercial law is analogous to that of the drawee and drawer of a draft, both being represented by the same trustees, notice of dishonor, in my opinion, was not required to be given to the indorser. Also, under section 186, notice of dishonor is not required to be given to an indorser, where the indorser is the person to whom the instrument is presented for payment. That is to say, the trustees of the indorser, being the trustees of the maker, were the persons to whom the instrument was to be presented for payment.

The referee states in his opinion that the notes in question were not provable debts against Thomas A. McIntyre, Jr., at the time of his bankruptcy, and that they could not become provable debts until after demand and protest for nonpayment at maturity, or a waiver of such demand and notice by the indorser. The counsel for Mrs. McIntyre argues that, as the notes, by the terms of the Bankrupt Act, were

provable against the maker after bankruptcy before maturity, they could be similarly proved against the indorser before maturity; that is, that the contract of the indorser was subject to be affected by bankruptcy in the same way as the contract of the maker. It seems to me unnecessary to decide this question. A demand is not necessary to charge the maker of a note at its maturity. A demand of the maker is necessary to charge an indorser, because it is a necessary preliminary to a notice of nonpayment to an indorser. The referee held that notice of dishonor must have been given to the indorser at the maturity of the note, or that the indorser must have waived such notice, in order to hold his estate. Admittedly no such notice was given; but there is evidence in the case which it is claimed establishes that Thomas A. McIntyre, Jr., waived such notice.

The referee states in respect to this evidence that he does not think that the indorser, after bankruptcy and the appointment of the trustees, had the right or power to waive demand and protest of these notes, and thus impose a liability upon his individual estate in favor of his mother, to the detriment of the rights of other creditors. But as the New York statute substitutes the trustee in bankruptcy as the person to whom notice may be given, it seems to me immaterial to consider whether Thomas A. McIntyre, Jr., did waive notice, or whether he had power to waive notice. If the trustees of his individual estate had been different persons from the trustees of his father's estate, the question would have arisen whether formal notice of the dishonor of the note at maturity to the trustees of his individual estate could be dispensed with, or had been waived; but as the trustees in bankruptcy of the father and son are the same persons, I think, under the provisions of the New York statute, no notice of nonpayment of the note was necessary to be given to them.

My opinion is that the referee's order expunging these claims should not be affirmed, and that the proof of the two notes should stand.

In re DESMOND & CO.

(District Court, N. D. Alabama, S. D. August 21, 1912.)

No. 11,686.

LANDLORD AND TENANT (§ 109*)—PROVABLE CLAIMS—RENT—RE-ENTRY BY LANDLORD.

Where, on the bankruptcy of tenants, their trustee refused to assume the lease, but sold the property on the premises, to be removed by the end of a month, for which he paid rent, and at the expiration of that time the purchaser by his direction delivered the keys to the authorized agent of the landlords, who accepted the same, and further agreed that the purchaser might leave certain fixtures in the building for a time without rent, such acts constituted a re-entry, which terminated the lease and released the estate from the further payment of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350-365, 368, 369; Dec. Dig. § 109.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of Desmond & Co., bankrupts. On review of order of referee disallowing claim of E. Solomon and E. H. Levi for rent. Affirmed.

A. Latady, of Birmingham, Ala., for petitioners.

R. C. Redus, of Birmingham, Ala., for trustee.

GRUBB, District Judge. This matter comes on to be heard upon the petition of claimants to review the order of the referee disallowing their claim for rent for the unexpired term of their lease. After the bankruptcy of the tenants, the trustee occupied the leased premises during one month—that of March—and paid rent for use and occupation for that month. The trustee elected not to take the lease. The trustee sold the personal property of the bankrupt on the leased premises, and the purchaser was to remove it from the premises before April 1st. The trustee delivered the keys of the rented premises to the purchaser to enable him to remove the goods purchased, which were stored there, and directed the purchaser to then deliver the keys to the landlords' agent. There were certain fixtures on the leased premises, as to the ownership of which between the landlords and the purchaser a question arose. The purchaser instructed the drayman he had employed to remove the purchased goods to deliver the keys to the premises to the landlords and to offer to sell to them the fixtures for a stipulated sum, rather than remove them. The landlords' agent went with the drayman to the rented premises for the purpose of determining by inspection the character of the fixtures. The question as to the right to them as between the landlords and the purchaser from the trustee remaining still unsolved after the visit and inspection, the purchaser's drayman asked permission of the landlords' agent to occupy the leased premises with the fixtures until it was settled, without paying rent during such occupancy, and the landlords' agent granted such permission. The agent was shown to have authority to re-enter for the landlords and to make such an arrangement on their behalf. The evidence as to whether the keys were delivered by the drayman to this agent in person is in conflict. They were found in the office of the agent, and the referee found, and, as I see it, correctly, that the evidence showed that they were delivered to the agent by the drayman, and accepted by him.

The question is whether these facts, so found by the referee, constitute a re-entry on the part of the landlords, so as to relieve the estate of the burden of paying rent for the unexpired term of the lease, as it would otherwise be required to do under the authority of the case of *Martin v. Orgain*, 174 Fed. 772, 98 C. C. A. 246. The claimants' contention seems well founded that the trustee could not surrender the term, in view of the fact that he had elected not to assume it, and that it still belonged to the bankrupt, who alone was competent to make the surrender. So the solution of the question involved depends upon whether the landlords re-entered, so as to terminate the lease. Such a re-entry must be made with the intention of terminating the lease. This intention may be expressed, or may be deduced from

the circumstances under which it was made. If the circumstances are such as to indicate the intent on the part of the landlords to resume a dominion of the leased premises inconsistent with the continuance of the lease, a re-entry, within the meaning of the lease, will be implied from them. An acceptance of the keys from the tenant or his representative may or may not constitute such a re-entry depending upon the circumstances of the acceptance. The isolated fact of delivery and acceptance would probably not suffice. An entry by the landlords' agent merely to inspect the character of the fixtures on the rented premises would not constitute a re-entry. In this case, however, the landlords' agent, who was authorized to re-enter, undertook to agree that the trustee's purchaser might occupy the leased premises rent free until the question of ownership and right to remove the fixtures was determined as between them. This permission could have been granted only by a landlord in possession, and is inconsistent with the idea that the landlord recognized the lease as still subsisting in the bankrupt or his trustee. In connection with the simultaneous acceptance of the keys and the physical entry of the agent, it is persuasive that the landlords' agent understood that he had resumed dominion over the leased premises, and had re-entered them, in the sense of the lease, with the effect of terminating the lease and re-vesting the landlords with possession of the premises.

For these reasons, the order of the referee is confirmed, and the petitioners are taxed with the costs of the review.

THE WRESTLER.

THE TRANSFER NO. 22.

(District Court, S. D. New York. April 30, 1912.)

COLLISION (§ 95*)—TUGS WITH TOWS MEETING—FAULT.

A collision at night in the Greenville Channel in upper New York Bay, which is 800 feet wide, between tows alongside of two meeting tugs which approached each other on opposite sides of the channel, green to green, so that it was their duty under the rules to pass starboard to starboard, *held* due to the fault of the tug passing down which attempted to so pass in accordance with the signals of the other, but failed because she would not mind her helm. The other *held* not in fault for not stopping until her second signal, which immediately followed the first, was not answered.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

In Admiralty. Suit for collision by the New York, New Haven & Hartford Railroad Company, owner of Car Float No. 52, against the steam tug Wrestler, the River & Harbor Transportation Company, claimant; and cross-libel against the tug Transfer No. 22, New York, New Haven & Hartford Railroad Company, claimant. Decree for libellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Burlingham, Montgomery & Beecher, of New York City, for libelant.

James T. Kilbreth, of New York City, for claimant.

WARD, Circuit Judge. This is a libel and cross-libel.

January 19, 1910, at about 4 p. m., Transfer No. 22, with a car float on each side, entered the Greenville Channel in the Upper Bay under one bell on her way to the float bridges at the Pennsylvania Terminal. This is a straight dredged channel nearly a mile long and 800 feet wide, running from the Main Ship Channel about northwest and southeast. As she proceeded up on the south side of the channel, her master saw the tug Wrestler with a car float on her port side coming out from the Greenville float bridges on the northerly side of the channel. The tugs were showing green to green, and No. 22 blew a signal of two whistles, which, not being answered, she immediately repeated, and, seeing the Wrestler coming over toward her, stopped, blew an alarm, and went full speed astern. The Wrestler blew an alarm, stopped, and backed, but the port corner of her float came into contact with the starboard corner of No. 22's port float.

At the trial and upon the argument the cross-libelant relied greatly upon the Transfer's violation of the narrow channel rule. Article 25 of the Inland Regulations (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]). This was not pleaded at all, and I attach very little importance to the contention. It had nothing to do with the collision. Article 18, rule 1, of the Inland Regulations, made it under the circumstances the duty of the vessels to pass starboard to starboard. The cross-libel shows clearly that the master of the Wrestler understood this, and he intended and tried to do so, but was prevented, as he states in his pleading, by the fact that the tug did not mind her helm, "either from the steering gear sticking or from some other cause." This was what brought about the collision. If it was from the gear sticking, the proofs show that he had a similar experience the evening before, and therefore no accident attributable to it the morning after could be regarded as inevitable. If it occurred because the master threw the wheel over too suddenly, or because the float on his port side prevented the starboard helm from operating as it should, these were matters in respect to which the tug was negligent.

The case of the Gladiator and Transfer No. 19, relied upon by the cross-libelant, is different. In it the Circuit Court of Appeals inculpated the Transfer also because her master was at fault for not stopping on either horn of a dilemma, viz., if he thought the tug was disabled, the duty to stop was obvious. If, on the other hand, he thought she was deliberately backing into her slip, the case was one of special circumstances, and he should have aided the maneuver. In the case under consideration, Transfer No. 22 had no reason to suppose the Wrestler unmanageable, and the situation was not one of special circumstances, but one regulated by the Inland Rules which made it the duty of the vessels to pass starboard to starboard.

The collision being fully explained by the clear fault of the Wrestler, there is no reason to be astute in looking for fault on the part of Transfer No. 22.

The cross-libelant contends that the Transfer had no right to continue when the Wrestler did not answer her first signal, but I think the Transfer had no ground for failing to understand the intention of the Wrestler until he had received no answer to its second signal, which was immediately repeated. Then it did stop, blow an alarm, and reverse full speed astern. If the failure of the Transfer to stop and reverse sooner had in any way misled the Wrestler, there would be some reason for inculping the Transfer, but it did not. The cause of the collision being, as I have stated, that the master of the Wrestler found himself unable to perform the very movement which the Transfer invited, which the law required and which he intended to accomplish, the usual interlocutory decree may be entered in favor of the libelant, and the cross-libel dismissed, with costs.

GILLEN v. CITY OF NEW YORK.

(District Court, S. D. New York. May 1, 1912.)

COLLISION (§ 95*)—STEAM VESSELS MEETING IN FOG—MUTUAL FAULT.

A collision in the early morning, in a fog, between a tug with a barge in tow, passing down Red Hook channel, and a ferryboat, passing up, held due to the fault of both; the tug being in fault for being on the eastern or Long Island side of the channel, and the ferryboat for going too fast in the fog, and for not stopping when she heard the signal from the tug forward of her beam, as required by Article 16 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2880]).

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision rules, speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

In Admiralty. Suit for collision by Henry Gillen, owner of the steam tug Henry Gillen, against the City of New York, owner of the ferryboat Bay Ridge. Decree for libelant for half damages.

Foley & Martin, of New York City, for libelant.

A. R. Watson, of New York City, for respondent.

WARD, Circuit Judge. February 6, 1908, at about 7:40 a. m., the tug Henry Gillen, with the barge Harold astern on a hawser five or six fathoms long, came into collision with the ferryboat Bay Ridge in the Red Hook channel; the ferryboat going between the tug and tow, parting the hawser, and doing considerable damage.

The story of the tug is that she was going down the starboard side of Red Hook channel, and, seeing the ferryboat coming up on the port side 400 or 500 feet off, blew a signal of one whistle. Although the vessels were then on clearing courses, the ferryboat blew an alarm, starboarded, and came right across the channel for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tug and tow, whereupon the tug hooked up full speed, but was unable to clear the ferryboat. The witnesses for the tug admit that she was blowing fog signals, but say that it was possible to see a distance of 700 or 800 feet.

The ferryboat's witnesses say that she left her slip at Thirty-Ninth street, South Brooklyn, at 7:30 a. m., and held her usual course, due northwest, 1½ minutes, to get clear of the flats and the sea fence at Erie Basin, and then ported on a course due north, which brings her up the starboard side of Red Hook channel, and slowed; that the fog was dense, so that it was not possible to see more than 75 to 100 feet. The pilot of the ferryboat heard one blast of a whistle a little on her starboard bow, and then another, when he stopped, blew an alarm, and reversed. The tug Gillen loomed up about ahead on a course crossing the ferryboat's bows about southwest. Immediately afterwards the Harold was seen, and the collision occurred in the way I have stated.

The main contention between the parties is as to the thickness of the fog and whether the place of collision was on the eastern side of Red Hook channel, as the witnesses from the ferryboat say, or on the western side, as the witnesses from the tug say. I do not believe the account given by the witnesses for the tug. It is incredible that, if the tug and the ferryboat were on clearing courses and visible 700 or 800 feet off, the ferryboat would have left her regular course and deliberately steered over, so as to run between the tug and her tow. I believe that the fog was as thick as the witnesses from the ferryboat say, and that the tug was feeling her way down on the wrong side of the channel along the Brooklyn shore. The vessels did not discover each other until the danger of collision was imminent. Then the tug made an ineffectual attempt, by hooking up, to get across the ferryboat's bows. The captain of the Gillen threw his wheel over to port, hooked up his engines, blew an alarm, and left the pilot house through the window, and told a passenger who was with him to go out of the door immediately before the collision. No better proof of the emergency could be given.

But I think the ferryboat is also to blame, because she was going too fast in the fog. The damages inflicted show this, and the failure to examine the engineer as a witness is highly corroborative of it. She was also at fault for not stopping her engines when she heard the first signal forward of her beam, as required by article 16 of the Inland Rules.

The libellant may have a decree for half damages.

THE BUNKER HILL.

(District Court, S. D. New York. May 7, 1912.)

SEAMEN (§ 29*)—PERSONAL INJURIES—LIABILITY OF VESSEL.

A seaman cannot recover from the ship, for an injury received through the negligence of the master, beyond the expense of his maintenance and cure and his wages to the end of the voyage.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

In Admiralty. Suit by Forest Carson against the steamer Bunker Hill. Decree for respondent.

James J. Macklin, of New York City, for libelant.

Harrington, Bigham & Englar, of New York City, for claimant.

WARD, Circuit Judge. August 4, 1911, at 1:30 a. m., the steamer Bunker Hill, while on a voyage from New York to Boston, ran ashore in Vineyard Sound. The first pilot was in charge, and went on duty at 1:10 a. m., instead of at midnight, as he should have done. The master had turned in. The libelant, who was one of the pantry-men, testifies that the shock of the stranding threw him out of his berth, which was an upper one, to the floor. The steamer returned to New York, arriving there August 5th, and the libelant was paid off the next day, without making any complaint whatever. No bones were broken, nor is there any evidence of contusions, except he says there was a little bruise on the skin on his right side, from which he suffered pain. August 7th, beginning to suffer severe pain, he applied plasters without any relief, and then went August 9th to the Brooklyn Hospital, where he was operated on for appendicitis. Traumatic appendicitis is extremely rare, as appears from Dr. Howard J. Kelly's work on that subject.

There can be no doubt that the stranding was negligent, but the master was guilty of no negligence in connection with it. The libelant contends that the first pilot, being at the time in charge, is to be regarded as master, and not as his fellow servant. Therefore he says he is entitled to indemnity. Assuming that the libelant's appendicitis was the result of the fall from his berth, which I do not believe, and that the first pilot is to be regarded as master, which I do not think, the libelant is not entitled to indemnity. It has not been decided in the federal courts whether the master is a fellow servant of members of the crew. To put it most favorably for the libelant, the question was reserved in *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, Mr. Justice Brown summing up the law on the subject in the third and fourth propositions:

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negli-

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gence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

See, also, *The City of Alexandria* (D. C.) 17 Fed. 390.

All the libelant is entitled to receive, being a seaman, is medical treatment and expenses of his cure, so far as possible, and wages to the end of the voyage. That learned judge, Addison Brown, held in this district that the liability for the expenses of cure continued for a reasonable time after the termination of the voyage. *The W. L. White* (D. C.) 25 Fed. 503. Whereas Judge (afterwards Mr. Justice) Henry B. Brown held that the duty did not extend beyond the termination of the contract of service, *The J. F. Card* (D. C.) 43 Fed. 92. The libelant has received his wages down to the termination of the voyage, and there was then no necessity for medical treatment. Now he is cured of the appendicitis without any expense to him.

The libel is dismissed, without costs.

THE TRANSFER NO. 16.

(District Court, S. D. New York. April 29, 1912.)

COLLISION (§ 95*)—TUGS WITH TOWS MEETING—FAULT.

A collision in East River between the tows of two tugs meeting at the same time that two other vessels were also meeting *held* due solely to the fault of the tug going up against an ebb tide in failing to stop or back until the other down-bound tug, which was crossing diagonally, should get out of the way.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

In Admiralty. Suit by the Baltimore & Ohio Railroad Company, owner of the tug *Narragansett*, against the Transfer No. 16; New York, New Haven & Hartford Railroad Company, claimant. Decree for libelant.

Harrington, Bigham & Englar, of New York City, for libelant.
James T. Kilbreth, of New York City, for claimant.

WARD, Circuit Judge. August 23, 1910, the libelant's tug *Narragansett*, with lighter *Connellsville* on her starboard and light float No. 60 on her port side, was coming down the East River below Corlear's Hook, a little on the Brooklyn side of midchannel. Just ahead of her, also going down the river, was the tug *Water Front* with three garbage scows tandem, making a total length of about 500 feet. The steamer *Seaboard* was coming up the river close to the Brooklyn shore, and Transfer No. 16 with a loaded car float on each side was coming up on the New York side of midchannel. The *Water Front* blew a signal of two whistles, which was intended to advise the *Narragansett* that she was going to round to on a port helm and tie up her tow at Clinton on the New York side. All the vessels concerned understood this perfectly. The *Water Front's* tow swung across No. 16's course, and, the river at this point being not

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quite 1,500 feet wide, necessarily took up a large part of it. The Narragansett answered the Water Front with two blasts, starboarded, and then exchanged a signal of one blast with the Seaboard. No. 16 exchanged a signal of one whistle with the Water Front. For the purpose of carrying out these engagements and passing between the tail of the Water Front's tow and the Seaboard, the Narragansett stopped her engines and drifted with the tide, which at this point sets a little diagonally onto the New York shore and passed very close to the Seaboard. No. 16 ported so as to pass between the tail of the Water Front's tow and the Narragansett and slowed. It was as the vessels were approaching in this situation that the lighter Connellsville on the starboard side of the Narragansett came into contact about midships with the after corner of No. 16's starboard float.

The libelant says the collision was caused by No. 16 starboarding when very close to the Narragansett, to correct her porting for the Water Front's tow, and as I think also to go into the New York shore so as to get the benefit of the eddy at Corlear's Hook, and this threw the after corner of the starboard front into the Connellsville. The claimant of No. 16, on the other hand, says the collision was caused by the Narragansett's failure to correct the set of the ebb tide by starboarding. At this time, however, the Narragansett's engines were stopped, and she had no steerageway.

I think the libelant's account is the true one, and that the dangerous proximity of the vessels would have been avoided if Transfer No. 16, which was coming up against the ebb tide, had seasonably stopped, or, if necessary, backed, as she could easily have done, until the Water Front had completed her swing across the river.

There may be the usual interlocutory decree for the libelant.

THE WILLIAM F. ROMER.

CENTRAL HUDSON STEAMBOAT CO. v. NEW YORK CENT.
& H. R. R. CO.

(District Court, S. D. New York. May 1, 1912.)

COLLISION (§ 105*)—VESSELS ENTERING AND LEAVING SLIPS—NEGLIGENCE OF WATCHMEN.

Libelant's steamer approached her slip on North River, with the intention of backing in, which maneuver, owing to her length, necessitated her covering a large part of the entrance to the adjoining slip beyond. Respondent's tug, with a car float on each side, was backing out of the latter slip, and a collision occurred between the steamer and one of the floats, although both vessels did what they could to prevent it after the situation was known. The steamer signaled by a long blast when a quarter of a mile away to give notice of her approach to the two watchmen maintained by libelant on the pier between the two slips, which was covered; but the signal was not heard on the tug, nor was the slip signal given by the latter heard by the steamer. *Held*, that libelant failed to sustain the burden of proof resting upon it to show fault on the part of the tug or floats, and entitle it to recover, and, further, that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its own watchmen were negligent in failing to note the movement of the tug and prevent the collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

In Admiralty. Suit by the Central Hudson Steamboat Company, owner of the steamer William F. Romer, against the New York Central & Hudson River Railroad Company. Decree for respondent.

Kneeland, Harison & Hewitt, of New York City, for libelant.

Wallace, Butler & Brown, of New York City, for respondent.

WARD, Circuit Judge. May 26, 1910, the libelant's steamer William F. Romer arrived at Pier 24, North River, with the intention of backing into her berth on the north side. This is accomplished by making a line fast from a chock about 15 feet forward of the stern on the port side to the northwest corner of the pier and then swinging around. The steamer being 236 feet long and the pier 75 feet wide, she necessarily covers a large part of the slip between Piers 23 and 24 in performing this maneuver. The latter pier is covered. As the Romer was approaching Pier 24, the respondent's tug No. 17 backed out of the slip between 23 and 24, pulling two railroad floats lashed together, into the river. The Romer's engines, which were stopped at the time, were immediately put full speed astern. The tug went ahead to push the floats back; but seeing that, if she continued so doing, the Romer would run into her, threw off the line and backed across the Romer's bow. The northerly float came into collision with the Romer's port bow.

The witnesses of both parties made an entirely favorable impression on me. I believe that the Romer did blow a long blast at Desbrosses street, a quarter of a mile above the place of collision, although no one on No. 17 or on the floats heard it. This signal is not required by law, but is intended to notify the watchman on the pier to be ready to attend to the steamer's lines, as well as to give general notice of her approach. I also believe, though no one on the Romer heard them, that No. 17 gave the usual long slip whistle when she was starting to back out of the slip some 400 feet from the river end, and repeated this signal when near the end of the pier. The law required her to do this, and it was all she was bound to do.

On this state of facts I must hold that the libelant has failed to sustain the burden of proof lying on it. There is, in addition, a failure of care on the part of its watchmen imputable to it as negligence. The maneuver the Romer was about to make necessitated her covering a large part of the slip between 23 and 24. The libelant had two watchmen on the pier. The doors, or some of them, on the south side of the shed, were open, and it would have been perfectly easy for them to see whether anything was moving out, or about to move out, of the slip when the Romer was a quarter of a mile away. If this had been done, no collision would have happened.

The libel is dismissed, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THE LOYAL

(District Court, S. D. New York. August 20, 1912.)

1. SALVAGE (§ 23*)—SAVING OF CARGO—LIABILITY OF VESSEL—UNSEAWORTHINESS.

The owner of a lighter, which, after taking on a load and while still lying at the dock, sprang a leak from no obvious cause, *held* liable for salvage services to a tug, which pumped her out and kept her from sinking, saving her cargo, on the ground that she was unseaworthy.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 53, 54; Dec. Dig. § 23.*]

2. SHIPPING (§ 207*)—LIMITATION OF LIABILITY—GROUNDS—PERSONAL CONTRACTS OF OWNER.

The owners of a vessel are not entitled to limit their liability for their own personal contracts, but only for contracts made by the master or other agent on the credit of the ship.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 643, 644; Dec. Dig. § 207.*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

In Admiralty. Suit by O'Brien Bros., owners of the tug O'Brien, against the lighter *Loyal*, the F. W. Jarvis Company, claimant, and the Apollinaris Company, Limited. Decree against the Jarvis Company.

Foley & Martin, for libellant.

Carter, Ledyard & Milburn (Edmund L. Baylies and J. M. R. Lyeth, of counsel), for owner of the lighter *Loyal*.

Wallace, Butler & Brown (James K. Symmers, of counsel), for owner of cargo.

HOLT, District Judge. This suit was brought by the owners of the steam lighter O'Brien against the lighter *Loyal* and the cargo on board of 622 cases of mineral water, belonging to the Apollinaris Company, to recover a claim for salvage. The lighter *Loyal* was owned by the F. W. Jarvis Company, and that company had a contract with the Apollinaris Company, Limited, to lighter in and about the harbor of New York the consignments of mineral water to be received at New York by the Apollinaris Company. On September 16, 1911, the lighter *Loyal* took on board 622 cases of mineral water from the steamship Kroonland, then lying at Pier 61, North River, to be taken to Driggs' Stores, foot of Clinton street, East River. The lighter stopped overnight at Pier 61, and there sprang a leak, and was in danger of sinking. The tug O'Brien, while passing, was signaled to pump the water out of the *Loyal*, and towed her to Fortieth street, Brooklyn, continuing pumping until the next day, when she was delivered to her owner.

[1] The original libel was brought against both the *Loyal* and the cargo of mineral water, but process was never served on the lighter, so that the suit was originally brought simply against the cargo. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Apollinaris Company, as owner of the cargo, appeared and brought in the F. W. Jarvis Company, as owner of the *Loyal*, by proceedings by petition under the fifty-ninth rule, claiming that the *Loyal* was unseaworthy, and that the F. W. Jarvis Company is therefore responsible for any amount due from the Apollinaris Company to the owners of the tug *O'Brien* for salvage. Thereupon the F. W. Jarvis Company took proceedings to limit its liability, and the *Loyal* was sold in said proceedings for \$5. I think, on the evidence, that the *Loyal* was unseaworthy. She sprung a leak, from no obvious cause, while lying at a dock in the harbor. I think, if the *O'Brien* had not come to her rescue, she would have sunk, with the probability of damage to the cargo, and that the *O'Brien* is therefore entitled to recover salvage.

[2] The Apollinaris Company, the owner of the cargo, claims that, if any recovery for salvage is had, it should be had against the F. W. Jarvis Company, on the ground that the vessel was unseaworthy. I think that that claim is correct. The F. W. Jarvis Company claims that it is not liable, except for the value of the lighter, because of the proceedings to limit its liability. In my opinion, the F. W. Jarvis Company was not entitled to limit its liability in this case. The owners of a vessel are not entitled, under the Limitation of Liability Act, to limit their liability for their own personal contracts. They are only entitled to limit their liability for contracts made by the master, or other agent, on the credit of the ship. *Richardson v. Harmon*, 222 U. S. 106, 32 Sup. Ct. 27, 56 L. Ed. 110; *Hughes' Admiralty*, p. 308.

It is admitted that the value of the cargo was \$3,158. I think that 10 per cent. on the value of the cargo, or \$315.80, is a sufficient amount to allow for salvage services. Of this amount, one-fourth should be divided between the captain and the crew, in amounts proportionate to their rate of wages. The captain should be given another amount, equal to his share, out of the remaining three-fourths, and the balance should be awarded to the libelants as owners of the salving vessel.

YOUNG et al. v. UNITED ZINC COS. et al. †

(Circuit Court of Appeals, First Circuit. September 10, 1912.)

No. 977.

CORPORATIONS (§§ 457, 458*)—CONTRACTS—ULTRA VIRES.

A contract by which a zinc mining company, which owned and was opening mines, sold and agreed to deliver zinc concentrates at the rate of 100 tons weekly for three years, commencing at a future date, was not ultra vires, in the absence of affirmative proof that it did not have reasonable expectation of producing the quantity of ore sold; nor was its subsequent purchase of ore from others to fill the contract ultra vires, where it failed to produce sufficient from its own mines.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1808, 1809, 1810; Dec. Dig. §§ 457, 458.*]

Appeal from the District Court of the United States for the District of Massachusetts.

Suit in equity by Royal Bosworth Young and others against United Zinc Companies and others. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 194 Fed. 461.

Royal B. Young, of Boston, Mass. (Walter H. Foster, Charles S. Hill, Charles M. Ludden, Henry P. Mason, and Reuben A. Reese, on the brief), for appellants.

Samuel Williston, of Cambridge, Mass. (Hollis R. Bailey and James A. Nelson, on the brief), for appellees.

Before PUTNAM, Circuit Judge, and BROWN and HALE, District Judges.

BROWN, District Judge. This is an appeal from the decree of the District Court dismissing a bill brought by Royal B. Young and others, as stockholders of the United Zinc Companies, a mining corporation, to restrain further performance of a contract for the sale and purchase of zinc concentrates, and for an accounting of profits received by certain of the defendants from part performance of the contract.

The defendants are the United Zinc Companies, Beer, Sondheimer & Co., a copartnership, and the National Zinc Company, to which the contract was assigned by Beer, Sondheimer & Co.

Relief was sought on the ground that the contract and acts under it were ultra vires of the charter of the United Zinc Companies.

By the written contract between the United Zinc Companies and Beer, Sondheimer & Co., dated July 31, 1907, the United Zinc Companies agreed to deliver 15,600 tons (of 2,000 pounds) of zinc concentrates, delivery at the rate of 100 tons weekly at the mill bins in Joplin district, Missouri. It is provided:

"This contract shall begin by thirty (30) days' notice to the parties of the second part at any time from September to November, 1907, and continue in force for three (3) consecutive years thereafter, except as herein otherwise

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—38

† Rehearing denied November 15, 1912.

provided, and the total deliveries shall amount to not less than fifteen thousand six hundred (15,600) tons."

The complainant contended that the contract was *ultra vires*, because not limited to such ore as the United Zinc Companies might produce from its own mines, and that it was a contract for "speculative dealing in ore as merchandise, not within the scope of the charter of the United Zinc Companies."

It is charged that Beer, Sondheimer & Co., at the time of making the contract, knew that the United Zinc Companies was not producing and might not produce all of the ore called for by the contract; that the National Zinc Company had knowledge of the fact that the United Zinc Companies might purchase, and later that it did actually purchase in the open market, substantially all of the ore delivered under the contract. It is also charged that at the time of the execution of the contract the United Zinc Companies was producing but 30 or 40 tons per week; that this production was discontinued in November, 1907; that the total shipments under the contract were about 9,830 tons, of which but about 175 tons were produced by the United Zinc Companies from its mines.

The District Court found as follows:

"The Zinc Companies was then opening and operating a mine or mines of its own in the Joplin territory, and had mining rights in other mines in that territory.

"I find as a fact that the contract was entered into in good faith by the contracting parties, and that the Zinc Companies at the time had an expectation that it might soon, if not at the beginning, produce sufficient ore from its own mining properties and mining rights to enable it to fulfill the contract. It unfortunately resulted, however, as sometimes happens in mining enterprises, that its particular properties could not be made to produce ore in sufficient quantities, except at a very much larger expense than was at first supposed; and it was found that it could buy in the open market Joplin ore, produced from mines more favorably situated at a very much less cost than it could be produced from its own mines and the Zinc Companies proceeded to do this, buying considerably more than its own mines produced in order to fulfill the contract."

Upon an examination of the record and briefs, we find no reason to differ with these conclusions of fact.

The question whether the contract for future delivery of ore not then mined was *ultra vires* must be determined from the charter, the terms of the contract, and the circumstances at the time of its execution. If valid when made, the contract did not subsequently become invalid. The question of the legal power to make the contract is distinct from the question of the legality of the purchases made in order to perform its requirements. The fact that the contract for the sale of zinc concentrates does not contain any express limitation to ore produced by the United Zinc Companies from its mines is insufficient to make a case of *prima facie* invalidity of the contract.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers." *Railway Co. v. McCarthy*, 96 U. S. 267, 24 L. Ed. 693.

No authority is presented which supports the proposition that a corporation, authorized to sell its product, cannot, in the exercise of reasonable judgment and in good faith, contract for the future delivery of a fixed amount of goods, although the goods have not then been produced. A contract for future delivery, based upon reasonable provision for future production, is a common transaction, and an ordinary method of conducting business. To provide by contract a market for goods to be produced in future may be good business judgment, and we see no reason why a mining corporation should be limited in its contractual ability by the amount of goods on hand. A corporation could not relieve itself from the obligation of such a contract merely by discontinuing production found to be unprofitable.

Upon the face of the contract there appears no legal impossibility of performance by the United Zinc Companies through acts fully within its charter powers. The contract being on its face valid, the burden of proving invalidity is upon the party making the assertion. *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183. It is the ordinary rule that contracts for goods to be delivered at a future date are valid, even though the seller has not the goods, nor any other means of getting them than to go to the market and buy them. This rule might be subject to modification in the case of a manufacturing or mining corporation. Notice that a corporation chartered for mining or manufacturing had no present or prospective means of producing the article for future delivery, but intended from the outset to go into the market to purchase the commodity, might make applicable the doctrine of *ultra vires*. In the present case, however, there is neither legal nor proven physical impossibility or improbability that the United Zinc Companies could perform by acts fully within the scope of its charter powers.

It may be noted that, although the contract was made in July, 1907, deliveries could not be called for before September, and it is not proven to have been impossible or impractical to have enlarged the production in that time. Under its charter powers the companies could lease or otherwise acquire mines, mining rights, and lands, and it was a lessor of a number of mines.

Complainants urge that there is not sufficient evidence to support the contention that the United Zinc Companies might have produced enough ore from its own mines to meet the requirements of the contract, and state that it is no part of the appellants' case to refute these contentions, and that, if these facts are asserted by the appellees, the burden is on them to prove them. We think upon this point the complainants are in error. The burden is upon them to show the invalidity of a contract in writing, and to establish that it was *ultra vires*.

We have already said that upon its face the contract is not *ultra vires*, since it is one that could be performed within the charter powers. If the complainants contend that it was *ultra vires* by reason of matters in pais, because it was known that the company did not have the business ability or the physical means to produce the ore,

the complainants have the burden of proof. The presumption of validity must be overcome by positive testimony. Even if we assume that the defendants had full knowledge that, after deliveries were called for, these deliveries were of ores purchased on the open market, this would not affect the case, unless there were proof of a mutual understanding at the time of the contract that this should be done. The testimony shows that it was contemplated that during the earlier part of the contract it would be necessary to buy from its lessees or on the open market. We have no doubt, if it was considered desirable, in order to secure a market for the production throughout a long period, to make temporary purchases to fulfill the obligation for a limited period, that this would be a proper exercise of an incidental power.

The complainants further insist that the purchases of ore to fulfill the contract were *ultra vires* acts. We may concede that if, at the outset, both parties contemplated a mere merchandizing of ore, the contract would be held *ultra vires*; but we are of the opinion that if this is not proved, and the contract was valid when made, it would be within the legitimate power of the corporation to fulfill its obligation in the cheapest way. Having assumed a legal obligation which it had authority to assume, it was liable to damages for its nonperformance. It would be unreasonable to hold that, if it was more profitable to close its mines and to use its money for the purchase of ore, instead of for the excavation of ore, it could not do so. This would be in no sense a speculative dealing in ore, but merely such reasonable method of discharging its obligation as is incident to the right to incur a contract obligation.

We, therefore, are unable to accept the proposition that the purchase of ores to meet a previous contract was itself *ultra vires*. It seems quite clear that the provision in favor of the United Zinc Companies, whereby it had an option to suspend deliveries in case spelter went below five cents, unless the other party was willing to pay the same price as when spelter was quoted at five cents per pound, does not in any way invalidate the contract, nor affect the question of *ultra vires*.

We see no sufficient reason for disagreeing with the conclusions of fact and law of the District Court.

The decree of the District Court is affirmed, with costs to the appellees.

GUAN LEE v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

Nos. 1,814, 1,815, 1,816, 1,838, 1,839, 1,840.

1. ALIENS. (§ 32*)—CHINESE—DEPORTATION PROCEEDINGS—EVIDENCE.

In Chinese deportation proceedings against certain alleged Chinese persons, evidence held to justify a finding that they belonged to the excluded class, and were unlawfully in the country.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EVIDENCE (§ 333*) — CHINESE — DEPORTATION PROCEEDINGS — EVIDENCE — STATEMENT OF DEFENDANT.

Where, in Chinese deportation proceedings, an inspector testified that he took defendant's statement through an interpreter, that he wrote down everything that the interpreter told him, and the interpreter testified that he interpreted correctly, the written statement was admissible, though the inspector did not testify that he could not recollect what defendant said without referring to the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1277, 1259-1265; Dec. Dig. § 333.*]

What Chinese persons are excluded from the United States, see note to *Wong You v. United States*, 104 C. C. A. 538.]

3. EVIDENCE (§ 333*)—CHINESE—DEPORTATION PROCEEDINGS—EXAMINATION BEFORE INSPECTOR.

Under Act Cong. March 3, 1901, c. 845, § 3, 31 Stat. 1093 (U. S. Comp. St. 1901, p. 1328), regulating the issuance of warrants in Chinese deportation proceedings and Regulations Rule 23, par. "a," p. 54 (Edition June 22, 1911), declaring that, before taking a Chinese laborer before a justice, judge, or commissioner and swearing out a warrant for his commitment and trial, full opportunity shall be afforded him to produce his certificate or other evidence of his right to remain in the country, it is proper for a Chinese inspector to examine a Chinaman as to his right to remain in the country through an interpreter before causing his arrest, and such examination is admissible in the absence of an objection and proof that defendant's statement was obtained through duress or improper influence, and was involuntary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333.*]

Seaman, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Illinois.

Chinese deportation proceedings by the United States against Guan Lee, Guan Hen Lun, Moy Ah Toy, Chin Kong Poy, Lum Seong, and Jew Sam. From a decree ordering deportation, each of the defendants appeal. Affirmed.

Thomas E. & Frank T. Milchrist, for appellant Guan Lee.

James H. Wilkerson, U. S. Atty., John F. Voigt, Asst. U. S. Atty., and Edwin W. Sims, for the United States.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge. [1] It appears from the record in No. 1,814 that the appellant Guan Lee, about the middle of June, 1908, together with his cousin Ah Foon, also the appellant in No. 1,815, came from Hong Kong, China, to Vancouver, and immediately went to Montreal, where they stayed a week, and then went to Windsor, Canada, remaining there six or seven weeks, and then came from Windsor, Canada, to Chicago, Ill., in a box car loaded with brass tubing, reaching Chicago August 19, 1908. At Windsor Ah Foon paid a man \$25 to put the two into a car bound for Chicago. They were told in Hong Kong that without papers they could not go to the United States through San Francisco; and in Montreal they were told they could not get into the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States without papers. Nevertheless they went to Windsor, and when there was an opportunity for a fraudulent and secret entry, they availed themselves of it, and were arrested in Chicago for deportation shortly after their arrival there. The record further shows that the appellant Guan Lee, who it is admitted is a person of Chinese descent, at the hearing testified, through Charlie Kee, a Chinese interpreter, that he was 24 years old, was born in San Francisco in the United States; that his father and mother told him that they took him to China when he was 3 or 4 years old; that he lived in China with his mother until he came to the United States; that his father is now in China, and that his father bought his ticket and gave him \$100 to pay for train, etc., to the United States; that he lost his money in Windsor, Canada, and that his cousin paid \$25 to "one of the American men" to put him on the train (in the box car) to come to the United States; that people said they didn't have any paper of any kind, and that they could not board a passenger train; that he expected to do anything in the United States. The evidence introduced in his behalf at the hearing failed to satisfy both the commissioner and the District Court that he was lawfully entitled to remain in the United States, and the United States commissioner and the district judge, after considering all of the evidence on both sides, found against the appellant as "by the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof to the satisfaction of such justice, judge or commissioner, his lawful right to remain within the United States.'"

The record in No. 1,815 shows substantially the same facts as in No. 1,814. In No. 1,816 appellant testified he was born in San Francisco, but he told the interpreter when he was taken into custody that he was born in Ne On village, China. In No. 1,839 substantially the same facts appear as in 1,816; it being also shown that appellant paid the Canadian head tax of \$500.

In No. 1,840 the facts are substantially as in 1,839, except that appellant's testimony that he was born in San Francisco agrees with his statement to the interpreter when arrested. He says he returned to China and then came back to the United States via Vancouver and Toronto, paying the Canadian head tax of \$500. Like the others, he came in by the "underground railroad," managed by white men who are accustomed to put these emigrants into box cars bound for the United States for the small consideration of \$25. The testimony did not satisfy the commissioner, or the District Court, nor does it satisfy us, that any of these appellants had a lawful right to remain in the United States. As held in the case of Chin Bak Kan, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, a mere assertion of citizenship is not enough to overcome the heavy burden of proof cast upon a Chinaman seeking to remain in the country. The facts on which such a claim rests must be made to appear. The decrees in the cases referred to should all be affirmed.

This leaves only No. 1,838 to be considered. There are material differences between this and the other cases. In the first place, Chin Kong Poy, the appellant, testified before the district judge: That he was 31 years old, and was born in San Francisco. He lived there 14 or 15 years, and in Chicago 15 or 16 years. That his father's name was Chin Rung Ngon, in the Chinese grocery business with the firm of Quong Yet Woo, 740 Commercial street, San Francisco. Lived over the store. Attended Chinese school while in San Francisco, teacher's name Lee Yen. Remembers names of some of the school boys, Yu Hock, Yu Wah, Moy Chung, and Non Tome. Came to Chicago about one year after father and mother went to China (1895). His maternal uncle, Moy You, came to Chicago with him. In San Francisco they lived four or five blocks from the bay. It is downhill from where they lived to the bay. Not married. He gave Mr. Thompson, the inspector, his family name and his school name. Lives at Sixty-Sixth and Wentworth avenue, Chicago. On cross-examination he testified, when asked if he did not tell the interpreter when arrested that he had been in China more than 10 years, that he told him that his father and mother went to China, that his father, and not he, came back on a merchant's paper. He further said the inspector told him, through the interpreter, that, if he did not talk, they would put him in jail, and he did not know what he was talking about. His uncle, Moy Yu, testified in corroboration of the foregoing. Moy Yu Oak also testified that appellant was brought to his laundry by Moy Yu 16 years before, when he was about 15 years old, and he had known him ever since. He worked in that laundry about a year. Appellant also testified where he had worked in Chicago, and that is in part corroborated by Moy Yu.

From the printed record of the testimony as so summarized, and without seeing the witnesses, the evidence would seem to show enough, perhaps, to justify appellant's right to remain in the country were it not for the testimony of the interpreter and inspector, as to appellant's statements when he was arrested. Almost everything in the rest of the evidence is flatly contradicted by this statement, except he says he was born in California. He admits going to Detroit and Ann Arbor, which explains why he happened to be arrested; the immigration officers no doubt believing he had come from Windsor, Canada, on one of the underground railroad routes.

[2] When arrested, appellant was taken to the office of Ward E. Thompson, the inspector, where he was questioned through an interpreter, Edward B. Kan. Mr. Kan testified that the questions were asked by Mr. Thompson in English, translated into Chinese, and put to appellant, and the answers translated into English, and that the interpreting was correctly done, but did not testify what appellant said. Mr. Thompson testified to substantially the same facts, except that he does not understand the Chinese language. He says he wrote down everything the interpreter told him appellant said, among other things that he was born in San Fran-

cisco, and had been in this country ever since. Thompson did not expressly testify that he could not recollect what appellant said without referring to the written record of appellant's statement. Objection was made that, although the witness might properly refer to the paper for the purpose of refreshing his memory, he should not be permitted to read the statement for any other purpose; no opportunity to cross-examine being afforded, and the examination was not made under oath. The objection was overruled, and the witness allowed to read his report by question and answer.

[3] It is urged for the appellant that the practice of investigation by inspectors in case of detention of suspected Chinese persons is an unwarranted infringement upon their rights. This procedure, however, is necessary to any efficient administration, affords the Chinaman an opportunity to show any evidence he may have of his right to remain, or otherwise present his side of the case, and is also supported by the rules of the department.

The inspectors of the immigration service are authorized by statute to file complaint in Chinese cases. Section 3, Act of March 3, 1901 (31 Stat. p. 1093), reads as follows:

"That no warrant of arrest for violations of the Chinese-exclusion laws shall be issued by the United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

The rule in regard to the arrest of Chinese reads as follows (rule 23, paragraph "a," p. 54, Regulations Governing the Admission of Chinese, Edition of June 22, 1911):

"Chinese found in the United States engaged in laboring pursuits and not having in their possession a certificate issued under either the act of May 5, 1892, or the act of November 3, 1893, or other satisfactory evidence of their right to be and remain in the country, are subject to arrest and deportation. Full opportunity to produce the certificate or other evidence shall always be accorded, under proper safeguards, before taking a Chinese laborer before a justice, judge, or commissioner of a United States court and swearing out a warrant for his commitment and trial."

It was the duty, therefore, of Inspector Thompson to find out whether Chin Kong Poy was lawfully here, and to learn this by examining him in order to decide whether he should be arrested and brought before a commissioner for deportation. While it is true that such an examination may be improperly conducted by officers who may have grown narrow and rigid by reason of constant dealing with a special class of cases, and who may have become overzealous, or too anxious to make a record with their superior officers, yet this question is not properly before us. Had an objection on this ground been made, it would have been the duty of the trial judge to take evidence as to whether or not this Chinaman's statement was voluntary, and, if found to have been made

under duress or improper influence by the inspector or interpreter, to rule the statement as inadmissible. No objection of this kind was made, so that the only question presented is whether the inspector's testimony, supplemented by that of the interpreter, was properly admitted.

Mr. Thompson testified that he wrote down everything the interpreter told him appellant said, and the interpreter says he correctly interpreted. It is undeniable that reading from the notes must be more persuasive and satisfactory, and furnish a truer account of the real statement of appellant than any attempted reproduction of what occurred by the inspector's statement of any present memory he may have had. "Remember yourself by papers, if you have any. No man will hinder you." Downes' Trial, 5 How. St. Tr. 1209, 1213. "The propriety of the rule * * * may be inferred from its necessity. And the occurrences of everyday furnish abundant proof that the ordinary transactions of life could not be carried on upon any other principle." *State v. Rawls*, 2 Nott. & McC. (S. C.) 333. "To exclude such a record, when honestly made, would be to reject the best and frequently the only means of arriving at the truth." *Halsey v. Sinesbaugh*, 15 N. Y. 485; *Insurance Co. v. Weides*, 14 Wall. 379, 20 L. Ed. 894. These quotations are taken from 1 Wigmore's Ev. § 735. The witness testified from his past recollection of what appellant said, taken down by him at the time. The statement admitted meets all the tests of the decisions. It was taken down at the time, it was correctly written, the witness having guaranteed its accuracy, he wrote it himself, the original writing was produced, and inspection and cross-examination were allowed. The authorities are examined by Mr. Wigmore (sections 744-754), and the writing is abundantly brought within them. A clear case of past recollection is established, of much greater probable accuracy than any possible present recollection.

The statement thus having been properly admitted, the only remaining question is whether or not it was also necessary for the interpreter to have testified to the correctness of the statement, in addition to stating that he correctly interpreted. This question will now be considered.

Bearing in mind that appellant is a party, and that it is his own statement which was sought to be proved, the law is well settled in favor of admissibility without the necessity of even calling the interpreter. When a conversation takes place between a person whose declaration is admissible in evidence and another, and they call in or assent to the use of an interpreter in order to enable them to speak with each other, each one adopts a mode of intercommunication in which they necessarily assume that the interpreter is trustworthy, and which makes his language presumptively their own. In *Commonwealth v. Vose*, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813, the case was this:

"Thomas S. Vose was convicted of committing an abortion on one Mary Tallon. At the trial of the case in the superior court one Berube was called

as a witness to testify in behalf of the government, and testified, through Adelard Perron, a police officer, who acted as interpreter for him at this trial, that he (Berube) went with the said Mary on a certain night to defendant's house, and when they (Berube and the said Mary) had entered the house of defendant a conversation in the French and English languages took place between the said Mary Tallon and defendant, and that Mrs. Vose, the wife of defendant, acted as interpreter for them on this occasion, and the questions were put by the defendant Vose to Tallon and by her to him. It was in evidence that defendant's wife was a French woman, and that she could converse in the French and English languages, and that the said Mary was French, and that she could neither speak nor understand the English language, that the defendant could neither speak nor understand the French language; and it was not shown at the trial that Berube could understand language addressed to him in English, except imperfectly. Berube was allowed to state the conversation carried on between defendant and Mary on the night in question to show that she went there to have an abortion performed, and that defendant agreed to perform it. Defendant excepted to Berube's testimony. Exceptions overruled."

The opinion by Judge Knowlton in its entirety is as follows:

"The defendant excepted to the admission in evidence of a conversation between him and the deceased person carried on through an interpreter, he speaking English and she French, and the witness understanding only French. When two persons who speak different languages, and who cannot understand each other, converse through an interpreter, they adopt a mode of communication in which they assume that the interpreter is trustworthy, and which makes his language presumptively their own. Each acts upon the theory that the interpretation is correct. Each impliedly agrees that his language may be received through the interpreter. If nothing appears to show that their respective relations to the interpreter differ, they may be said to constitute him their joint agent to do for both that in which they have a joint interest. They wish to communicate with each other, they choose a mode of communication, they enter into conversation, and the words of the interpreter, which are their necessary medium of communication, are adopted by both, and made a part of their conversation as much as those which fall from their own lips. They cannot complain if the language of the interpreter is taken as their own by any one who is interested in the conversation. Interpretation under such circumstances is *prima facie* to be deemed correct. How far either would be bound by it if the interpreter should prove false may depend on a variety of circumstances which it is unnecessary to discuss. In a case like the present, we are of opinion that either party, or a third party, who hears the conversation, may testify to it as he understands it, although for his understanding of what was said by one of the parties he is dependent on the interpretation, which was a part of the conversation. The fact that a conversation was had through an interpreter affects the weight, but not the competency of the evidence. *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539; *Greenl. Ev.* § 183; *Fabrigas v. Mostyn*, 20 State Tr. 171."

This case was followed by *Commonwealth v. Storti*, 177 Mass. 339, 58 N. E. 1021, where the opinion was by Chief Justice Holmes, now Mr. Justice Holmes of the United States Supreme Court, and in which he said:

"An objection was taken to the stenographer's evidence on the ground that it was hearsay, as he merely put down what the interpreter reported. But, without seeking for further possible answers, it is enough to repeat that the interpreter testified that he reported correctly. See *Com. v. Vose*, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813. It would be refining too much, and not in the direction of accuracy, to say that the confessions, although taken down in their English translation, should have been proved in Italian, and then translated for the jury. The English was the most accurate evidence attain-

able at the time of the trial. *Camerlin v. Palmer Co.*, 10 Allen [Mass.] 539, 541."

The same rule has been held in the following cases: *Meacham v. State*, 45 Fla. 71, 33 South. 983, 110 Am. St. Rep. 61; *Sullivan v. Kuykendall*, 82 Ky. 483, 489, 56 Am. Rep. 901; *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947; *Wise v. Newatney*, 26 Neb. 88, 42 N. W. 339, and *Miller v. Lathrop*, 50 Minn. 91, 52 N. W. 274. See, also, *Wigmore on Evidence*, § 668. We have no hesitation in applying these authorities, and in concluding that the testimony of the interpreter was sufficient, and that of the inspector as clearly admissible. Appellant's deportation having been ordered by both the commissioner and the trial judge, and being justified by the evidence, the decree should be affirmed.

The decrees in Nos. 1,814, 1,815, 1,816, 1,838, 1,839, and 1,840 are affirmed.

SEAMAN, Circuit Judge (dissenting). I concur for affirmance of the orders appealed from excepting in the case of the appellant Chin Kong Poy. The facts in that case, as plainly differentiated in the opinion, leave no room, as I believe, for application of the rule under which the other cases are affirmed.

The order rests alone on the notes of the inspector of all statements made by the Chinaman (after his arrest) through an interpreter called by the inspector for the examination. I am not satisfied that the notes were competent evidence for any purpose, without verification by the interpreter. If admissible, however, I am of opinion that they furnish no ground for the deportation order, under the appellant's testimony as to his actual statements and the corroborations of his further testimony that he was born in San Francisco and continuously remained in this country, in San Francisco 15 years and in Chicago thereafter, at places of residence named. *Prima facie* the appellant is a native of this country, and not subject, as I believe, to the harsh rule of the statute as to the burden of proof; but his testimony impresses me as sufficient to overcome that burden, unless it is impeached or controverted. I believe, therefore, the order should be reversed for retrial of the issue, whereupon the appellant's testimony may be inquired into and tested.

TOY DIP V. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,831.

EVIDENCE (§ 333*)—CHINESE—DEPORTATION PROCEEDINGS—DECLARATIONS—PRELIMINARY EVIDENCE.

Where a Chinese inspector examined defendant by means of an interpreter and reduced defendant's answers to writing as each answer was given by the interpreter, and the latter testified that he interpreted correctly, the statement comprising the answers so written was admissible

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

without proof by the interpreter as to what questions were put to defendant and what answers were given.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333.*]

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Chinese deportation proceedings by the United States against Toy Dip. From a decree of deportation, defendant appeals. Affirmed.

Amos W. Marston and Daniel J. Ward, for appellant.

James H. Wilkerson and John F. Voight, for the United States.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge. This appeal presents the same questions as *Chin Kong Poy v. United States* (No. 1,838) 198 Fed. 599, 117 C. C. A. —, heard at the last session, and decided herewith.

This is not one of the underground railroad cases heard at the last session, nor was appellant arrested by the inspector before the regular warrant issued, as is sometimes done. Appellant was unfortunate enough to be arrested by the state authorities for rape, from which arrest he was later discharged, either by acquittal or otherwise. Learning that he was in jail Howard Ebey, Chinese inspector, and Edward Kan, Chinese interpreter, went there and asked him some questions. The questions were asked by the inspector in English, and put by the interpreter in Chinese, the answers interpreted into English and written down by the inspector. The questions were not written. As is customary in these cases, the district attorney did not prove by the interpreter what questions were put to appellant, nor what answers he gave, merely asking him if he did the interpreting correctly. He said he did. The inspector was then called, and under proper objection allowed to read his notes of the answers of appellant, as taken down by him, and state his recollection of the questions, which he did not write down. The witness stated that he wrote down the answers of appellant to the questions he asked, as given to him by the interpreter, and that as each answer was given he would write it down. Further, he testified as a matter of present recollection that appellant said he was born in China, and had been in the United States 18 years. While the inspector did not expressly say that he wrote the answers correctly, it would be excessive refinement to construe his testimony otherwise. He wrote down the answers, as given, the very answers, and no others.

The ordinary rules of evidence should be as strongly applied to these Chinese exclusion cases as in any others, and we have no disposition to slight them. On the contrary, in view of the some-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

what harsh and summary character of the proceedings, care should be taken, especially by the trial courts, to insure a fair trial. Evidence of the statements of a foreigner, often under substantial arrest, without counsel, unable to speak our language, perhaps ignorant of the use proposed to be made of his statements, should be admitted only under the same rules applicable in other cases. These rules were complied with in the case under consideration, and the decree is affirmed in accordance with the Chin Kong Poy Case referred to.

NATIONAL SURETY CO. v. AROSIN et al.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1912.)

No. 2,849.

1. COUNTIES (§ 99*)—SUBROGATION (§ 7*)—DEPUTY AUDITOR—"MISCONDUCT IN OFFICE"—LIABILITY ON OFFICIAL BOND.

A deputy county auditor in Minnesota, authorized by law to act in the name of his principal and for whose official acts the auditor and his bondsmen were responsible, not only to the county, but to any person injured by his "misconduct in office" (Gen. St. Minn. 1894, §§ 710, 5951), issued spurious refund orders on the county treasurer in favor of fictitious payees, purporting to be for the refunding of invalid tax sale certificates. He procured the orders to be authenticated by the chairman of the county board, and they were presented to the county treasurer, who indorsed thereon that there were no funds available, but that they would be paid with 7 per cent. interest when there was money in the treasury for the purpose. Such deputy forged the names of the fictitious payees to assignments and sold the orders to a state savings bank, to which they were paid by the treasurer with interest a year later. The deputy auditor bore a good reputation, and his integrity had never previously been questioned. The bank was expressly authorized by statute to invest funds in such orders, and had done so before in the usual course of business. On discovering the forgeries, the county brought suit on the auditor's bond and recovered a judgment which was paid by the surety, which then brought suit against the bank. *Held* that, although the orders were not negotiable, the bank was not chargeable with any negligence in their purchase, but that the loss was one caused by the "misconduct in office" of the deputy auditor for which the surety was liable, and that it could not recover over against the bank.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 144-146, 148; Dec. Dig. § 99; * Subrogation, Cent. Dig. §§ 17, 18, 21-23, 25-28; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4532, 4533.]

2. SUBROGATION (§ 7*)—AUDITOR—LIABILITY ON BOND.

The same deputy auditor also made certain false redemption warrants to fictitious payees, forged indorsements on the same and presented them to the county treasurer who paid them, either in cash or by checks on a bank which paid the checks on the forged indorsements of the payees' names by the deputy. *Held*, that the primary cause of the loss was the official misconduct of the deputy in making the warrants for which the auditor's surety was liable, and that it could not recover over against either the treasurer or the bank.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-23, 25-28; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit in equity by the National Surety Company against Otto H. Arosin and others. Decree for defendants, except defendant W. R. Johnson, and complainant appeals. Affirmed.

Edmund S. Durment (Albert R. Moore, on the brief), for appellant.

Edward P. Sanborn, for appellees National German-American Bank and Arosin.

John D. O'Brien (Dillon J. O'Brien, on the brief), for appellee State Savings Bank.

Harris Richardson, for appellee United States Fidelity & Guaranty Co.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. This case has been here before. The defendant and appellee the State Savings Bank demurred to the bill. The demurrer was sustained. Judgment was entered dismissing the bill as to the State Savings Bank. The plaintiff and appellant, the National Surety Company, appealed to this court. The judgment was reversed. *National Surety Co. v. State Savings Bank*, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421. After the case had been remanded, the defendants answered. The case was tried by Judge Lochren upon the admissions in the pleadings and upon an agreed statement of facts. Judgment was rendered in favor of all of the defendants except Johnson, and the plaintiff has again appealed.

[1] 1. So far as the State Savings Bank is concerned it is not necessary to restate the facts which appear in the report of the former appeal.

Upon that appeal the court, after referring to section 5951, Gen. St. Minn. 1894, which provides that the bond of the county auditor shall stand as security for any person injured by his official delinquency, and to section 710 of the same statutes, which gives an action to any person injured by misconduct in office of the auditor, said:

"Accordingly, if the bank had been injured by reason of its purchase of the orders from Bourne, and that injury had been occasioned by Bourne's official delinquency or misconduct in office, it might have recovered its loss from the Surety Company. If, by virtue of these statutes, the bank could have recovered from the Surety Company, as a matter of course the Surety Company cannot now recover from the bank. We are therefore to inquire whether, if the bank had failed to secure payment of its refunding orders from the county treasurer, its loss or injury would have been so produced by the misconduct in office of Deputy Auditor Bourne as to subject the surety of the auditor to liability for it."

After considering this question the court held that the Surety Company would not be liable. The court so held because it was of opinion that the negligence of the bank prevented a recovery. That this is so plainly appears from the opinion.

At page 24 of 156 Fed., at page 190 of 84 C. C. A., 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421, it is said:

"On the contrary, the nonnegotiability of the orders, and possibly the intervention and activity of Bourne, as shown by the bill, should have attracted the attention of the bank and warned it against purchasing the orders without making diligent inquiry concerning their validity."

And again at page 25 of 156 Fed., at page 191 of 84 C. C. A., 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421:

"Right here is the radical and decisive difference between the position of the county and that of the bank. While the payment by the county was, in the ordinary course of business, reasonable and probable, the purchase of the orders by the bank on the assignments made in the name of myths by Bourne was not the natural or probable consequence of their issue. No one could have reasonably anticipated that a bank or any rational person would disregard the law which makes a nonnegotiable chose in action in the hands of an assignee subject to every defense existing in favor of the maker against the assignor, purchase a nonnegotiable order of the kind in question, and pay the purchase price thereof to one who was not the payee named therein, without inquiring into the genuineness of the assignment and the genuineness of its execution. Such a purchase would be out of the ordinary course of business, unnatural, improbable, incapable of anticipation, and in no legal sense the natural and probable consequence of the issue of the orders."

And again on the same page:

"Taking an assignment of nonnegotiable security, it was bound to inquire, not only whether all steps had been taken to create a legal liability against the county, but also as to the genuineness of the assignment of the right of the original payees. If such inquiry had been made at the places and of the officers plainly suggested on the face of the securities themselves, the bank would have unquestionably learned the fact that they were bogus and fraudulent, and saved itself from any possible loss. In such circumstances failure to make inquiry was culpable negligence."

And again at page 28 of 156 Fed., at page 194 of 84 C. C. A., 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421:

"The bank may not have been morally culpable; but its failure to discharge the duty of making inquiries suggested by the nonnegotiable character of the orders which it purchased, and by other circumstances attending the transaction, was an act of omission equally as effective to occasion injury to the county as many affirmative acts of commission could have been. Such inquiry at the auditor's or treasurer's office would have quickly disclosed that the payees were entitled to nothing, that they were myths, and that misrepresentation, fraud, and forgery were being practiced upon the county. Ignorance in fact occasioned by indulging indifference to almost obvious danger and negligence of the grossest sort is entitled to little consideration by a court of conscience. The bank's negligence operated as effectually to defraud the county as any willful or intentional participation in the fraudulent scheme could have done."

If nothing more appeared upon this appeal than appeared upon the former appeal, this judgment would have to be reversed. But more does appear. The only allegations in the bill relating to the State Savings Bank were to the effect that Bourne having made these documents and having written thereon a transfer thereof to the bank and having signed such transfer with the name of the fictitious payee delivered the papers to the bank and received from it its check for \$7,352.49. There was nothing to show that this

bank had ever bought one of these orders before. There was nothing to show that any one else had ever bought one before. There was nothing to show that the bank had ever seen one before. There was nothing to show that the transaction was had in the usual course of business.

But it now appears, in the agreed statement of facts, that:

"For many years before said purchase by said Savings Bank said system of issuing refunding orders had been in operation in said Ramsey county, and they had been frequently bought and sold and transferred as in this case, and the said State Savings Bank had upon several other occasions purchased such refunding orders in the same way, and that no question had ever been made by anybody as to the validity of said orders or the method of purchasing them, and all of such refunding orders issued prior to the one hereinbefore admitted to be unauthorized were in fact authorized and valid."

It also now appears that at the time the Savings Bank bought these orders Bourne was of good reputation in the community where he lived and in St. Paul, Minn., trusted, and believed to be honest.

So skillfully was the work of Bourne done, and so strong was the belief in his honesty, that these papers and all the fraudulent papers involved in this case were, after they had been paid by the county treasurer, credited to him, and his accounts which included these papers and payments were audited by the board of auditors of Ramsey county at the times and in the manner provided by statute without the fraud being discovered. This fact appears for the first time upon this appeal.

It will have been noticed that the court upon the former appeal laid great stress upon the fact that no inquiry was made by the Savings Bank at the auditor's or treasurer's office before its purchase of the documents. It now appears, however, in the agreed statement of facts and for the first time, that these orders were prior to the purchase by the Savings Bank presented to the county treasurer who then and there indorsed them as follows:

"St. Paul, Minn., Apr. 12, 1899.

"No funds to the credit of this account. Will be paid as soon as there is money in the treasury, for that purpose, with interest at the rate of 7% from date of this indorsement.

O. H. Arosin, Co., Treas.,

"Per. H. Mayer, Cashier."

It is true that it does not affirmatively appear that the Savings Bank took the papers to the treasurer's office. Nor does it appear that it did not. But it is immaterial who took them there. The information contained on the indorsement was all the information which the bank could have obtained if one of its officers had himself presented the papers to the treasurer.

As the case now appears, there was nothing in the transaction to excite the suspicion of the bank. It purchased these orders as it and others had purchased them before. Bourne was a man of good character. It is entirely consistent with the facts agreed upon to infer that some of the valid orders theretofore purchased by the Savings Bank had been purchased from Bourne himself. The law of Minnesota expressly authorized the Savings Bank to pur-

chase such documents. They not only bore the genuine signature of the auditor and of the chairman of the county commissioners, but they had stamped on them the positive promise of the county treasurer to pay the orders when the treasury was in funds. The signature of the treasurer to this promise was genuine.

Upon the case now presented we agree with the court below that there was no negligence on the part of the Savings Bank and that the plaintiff is not entitled to recover as against it.

[2] 2. The case as to the other defendants and appellees is this: Bourne made certain false redemption warrants in much the same way that he manufactured the refunding orders. The names inserted in these warrants were with two exceptions fictitious. He wrote the names of the fictitious persons on the backs of the warrants, presented them to the county treasurer, Arosin, defendant and appellee, who paid them. This payment was sometimes made by the treasurer in cash, but more frequently by check to the order of the fictitious person on the defendant and appellee the National German-American Bank which was a depository of the county funds. When the payment was made by check, Bourne indorsed the name of the fictitious payee thereon and collected the check, sometimes by presenting it directly to the National German-American Bank, but more frequently by presenting it to some other bank. In all cases, however, the National German-American Bank eventually paid the checks and charged the amount thereof to the county.

The plaintiff seeks to hold the defendant Arosin and the defendant and appellee the United States Fidelity & Guaranty Company surety on Arosin's official bond, on the ground that the law required the treasurer to pay only by check and that when he made some payments to Bourne in cash over the counter he violated this law.

It seeks to hold the National German-American Bank on the ground that it wrongfully paid out money of the county on forged indorsements.

The same rule, however, must be applied to these three defendants as was applied to the State Savings Bank. The primary cause of the loss was the manufacture by Bourne of the false warrants and orders. For his official misconduct the plaintiff was liable. The evidence does not show any negligence on the part either of Arosin or of the National German-American Bank. There can be therefore no recovery against either of them.

The decree of the court below is affirmed, with costs.

HYDE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1912.)

No. 3,733.

(Syllabus by the Court.)

CRIMINAL LAW (§ 1210*)—POST OFFICES—USE OF MAILS TO DEFRAUD—SENTENCE FOR SEVERAL OFFENSES CHARGED IN SAME INDICTMENT.

A single sentence for several offenses committed within the same six calendar months and charged in the same indictment may exceed the maximum of the punishment prescribed for a single offense under section 5480, Rev. St. (U. S. Comp. St. 1901, p. 3696).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3298-3301; Dec. Dig. § 1210.*]

Nonavailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

In Error to the District Court of the United States for the District of South Dakota.

Charles L. Hyde was convicted of using the mails to defraud, and brings error. Affirmed.

Charles G. Laybourn, of Minneapolis, Minn. (Charles P. Bates, of Sioux Falls, S. D., and Marshall A. Spooner and Edward Lucas, both of Minneapolis, Minn., on the brief), for plaintiff in error.

Edward E. Wagner, U. S. Atty.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. This writ presents two questions, the sufficiency of the indictment and the validity of the sentence of the defendant below for three offenses of misusing the post office establishment of the United States in executing a scheme to defraud, in violation of section 5480, Rev. St. (3 U. S. Comp. St. 1901, p. 3696). The complaint of the indictment is that it does not set forth the necessary elements of the scheme to defraud. The indictment contained three counts, but the scheme to defraud was averred in the same words in each count. The first count alone will therefore be considered. This count contained averments that the scheme was that the defendant proposed, by sending letters, circulars, and maps to one Kummer, and to others to the grand jury unknown, through the mails "to sell certain worthless and undesirable lots in and around the city of Pierre, S. D., for and at a price far in excess of their real value, by in said letters, circulars, and maps as aforesaid, falsely, knowingly, and fraudulently misrepresenting the advantages, surroundings, and value of said lots, and by falsely, knowingly, and fraudulently misrepresenting the business interests and advantages of the said city of Pierre"; that this scheme was to be executed by opening correspondence with Kummer by means of the post office establishment; that in pursuance of this scheme the defendant on January 26, 1909, wrote and deposited in the post office a letter and a map whereby he offered to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sell to Kummer five lots which are specifically described in the indictment, for \$400, represented that this was a low price therefor, recommended the purchase as an investment sure to be profitable, and stated that there were two street railways along the streets of Pierre, one of which ran along the street adjoining these lots, while in fact the lots were worthless as city lots, \$400 was an exorbitant price for them, there was no street railway in Pierre and none along the street adjoining these lots, as the defendant well knew.

The misuse of the post office department by the deposit in or receipt from it of a letter is the gravamen of this offense, but the scheme to defraud and the intention to use the post office department to effect it are indispensable, though less important, elements of the offense. *Brooks v. United States*, 146 Fed. 223, 227, 76 C. C. A. 581, 585. In their discussion of the objections to this indictment counsel for the defendant below segregate the allegations of the scheme to defraud from the averments of the acts done in pursuance thereof and then assail the sufficiency of the former as though they stood alone. It is true that no essential element omitted from the charge of a scheme to defraud can be imported into it from subsequent averments of acts done in pursuance of it (*United States v. Britton*, 108 U. S. 199, 205, 2 Sup. Ct. 531, 27 L. Ed. 698); but the subsequent averments of the execution of the scheme may be considered to determine the sense in which the terms which charge the scheme are used (*Dealy v. United States*, 152 U. S. 539, 545, 14 Sup. Ct. 680, 38 L. Ed. 545; *Stearns v. United States*, 152 Fed. 900, 904, 82 C. C. A. 48; *Smith v. United States*, 157 Fed. 721, 725, 85 C. C. A. 353). The first objection to the indictment is that the allegations of the scheme only state legal conclusions and practically attempt to charge the device to defraud in the words of the statute. But the words of the statute say nothing of the intended sale of worthless lots in and around the city of Pierre at exorbitant prices by means of mailed letters, circulars, and maps misrepresenting the advantages, surroundings, and value of the lots and the business interests and advantages of the city of Pierre. The averments of the indictment thus go far beyond the terms of the statute and set forth the general nature of a scheme to defraud.

Counsel contend that the real estate which the defendant proposed to sell was not described in the charge of the scheme, nor in the averments relative to the execution thereof, with sufficient definiteness to enable the defendant to prepare his defense, or to avail himself of a conviction or acquittal in defense of another prosecution for the same crime. But the gist of this offense was the misuse of the mails by the depositing of the letter and the map, and it is to the part of the indictment that describes these that we must look to ascertain whether or not the real estate was sufficiently described to render a conviction a defense against another prosecution. The scheme to defraud may be, and often is, common to several separate offenses, for the deposit of each letter in execution of the scheme is an offense, and hence it is not necessary in the description of the scheme specifically and accurately to describe every piece of property that may be or become one of the subjects of the scheme. A de-

scription which clearly identifies and appries the defendant of the nature of the scheme is sufficient in the charge thereof. This indictment falls far within these rules. In the charge of the scheme it describes the property as "worthless and undesirable lots in and around the city of Pierre, S. D.," and this was sufficient, for this part of the indictment provided it was followed in the part which set forth the gist of the offense with a certain description of the property which became the subject of the execution of the scheme on which the indictment was based. *Dealy v. United States*, 152 U. S. 539, 543, 14 Sup. Ct. 680, 38 L. Ed. 545. The charge of the scheme was so followed in this indictment. In the allegations of the execution of the scheme the indictment contains an averment that, in the letter which the defendant posted, he offered to sell to Kummer lots 10, 11, 12, 13, 14, and 15, in block 19 fronting on Duluth and Carlton streets, and when that description is read, as it must be, in the light of the previous allegation that the scheme was to sell worthless lots in and about the city of Pierre, the contention that the real estate which was the subject of the offense was not sufficiently described to enable the defendant to prepare his defense and to protect him from a second conviction for the same crime becomes untenable.

Another argument to defeat the indictment is that it contains no averment that the representations and statements in the letters and maps to be used in the scheme to defraud were untrue, or that they were known to be untrue by the defendant, or that the defendant intended thereby to deceive or defraud any of those to whom they were to be sent. But the indictment contained allegations that the defendant devised a scheme to defraud Kummer and others, which consisted in this, that he "unlawfully, wrongfully, and fraudulently proposed" by sending letters, maps, and circulars through the post office department to sell worthless lots in and about Pierre, at prices far in excess of their real value "by in said letters falsely, knowingly, and fraudulently misrepresenting the advantages, surroundings, and value of said lots, and by falsely, knowingly, and fraudulently misrepresenting the business interests and advantages of the said city of Pierre." It is plain, from even a cursory reading of this charge, that the statement in this part of the indictment that the defendant "proposed" to sell these lots meant that he proposed, not to another, but to himself, to sell them as charged. To propose to one's self, however, is to intend, and hence the indictment charges that the scheme was that he intended to sell worthless lots for much in excess of their value by "knowingly misrepresenting" the advantages, surroundings, and value thereof and the business and advantages of Pierre, by means of these letters, maps, and circulars. Knowingly misrepresenting is representing that which is not true with knowledge that the representation is false, and an intent to sell worthless lots for prices far in excess of their value by making representations of their advantages, surroundings, and value that one knows to be false is an intent to deceive and defraud by false representation which the representer knows at the time to be un-

true. The conclusion is that this indictment was sufficient, and that the demurrer to it was properly overruled.

The indictment contained three counts which charged three separate offenses committed within six months pursuant to the same scheme to defraud. The defendant was found guilty of each offense charged and sentenced for each offense to imprisonment for 15 months and to pay a fine of \$500; the imprisonment for each of the three offenses to run concurrently. It is specified as error that this sentence was in excess of the power of the court. Section 5480 prescribes for each offense punishment by a fine of not more than \$500 and by imprisonment for not more than 18 months, or by both such punishments, and declares that "the indictment, information or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court shall give a single sentence and proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device." It is insisted that this paragraph of the section prohibits a sentence of more than a fine of \$500 and an imprisonment of 18 months for any three separate offenses committed within the same six calendar months and charged in the same indictment. The opinions of the courts which have been called to our attention in the cases in *Re Henry*, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174; *Blitz v. United States*, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; *Re De Bara*, 179 U. S. 316, 322, 21 Sup. Ct. 110, 45 L. Ed. 207; *Howard v. United States*, 75 Fed. 986, 995, 997, 21 C. C. A. 586, 595, 597, 34 L. R. A. 509; *De Bara v. United States*, 99 Fed. 942, 945, 946, 40 C. C. A. 194, 197, 198; *Hanley v. United States*, 123 Fed. 849, 853, 59 C. C. A. 153, 157; *Hanley v. United States*, 127 Fed. 929, 62 C. C. A. 561—have been read and considered. While in the case of *In re De Bara*, 179 U. S. 316, 21 Sup. Ct. 110, 45 L. Ed. 207, the sentence of imprisonment for three years there in question was based on many counts of eleven indictments which had been consolidated for trial, our conclusion is that the following statement in the opinion of the Supreme Court in that case was intended to, and does, state the rule upon this subject in the case of separate offenses charged in the same indictment as well as in the case of such offenses charged in different indictments under section 5480. Speaking of the power of the court to inflict punishment under this section, the Supreme Court said:

"To it is confided the power to adapt the punishment to the degree of crime. It may sentence the full penalty upon one offense. It may, though it is not required to, do more upon three offenses, and in a single sentence of one day, or of eighteen months, or three times eighteen months, it may express its views of the criminality of a defendant, and, to use the language of the statute, 'proportion the punishment especially to the degree in which the abuse of the post office establishment' enters as an instrument 'in the defendant's fraudulent scheme and device.'"

Under this rule the sentence in this case was not excessive, and the judgment below must be affirmed.

HALL-BAKER GRAIN CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1912.)

No. 3,694.

(Syllabus by the Court.)

1. FOOD (§ 2*)—STATUTES—CONSTRUCTION.

The purpose of the Pure Food Act of June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), was (1) to protect purchasers from injurious deceits by the sale of inferior for superior articles, and (2) to protect the health of the people from the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. FOOD (§ 14*)—"ADULTERATION"—"MISBRANDING"—STATUTORY PROVISIONS.

The H. Company, at Kansas City, Mo., on April 3, 1909, contracted to sell to the W. Company at Ft. Worth, Tex., 5,000 bushels of No. 2 red wheat, according to the Missouri official state grades. On April 29, 1909, the H. Company ordered the operator of a public elevator where it stored its grain to ship to the W. Company in fulfillment of this contract No. 2 red wheat. The operator loaded and sent to the W. Company a car of wheat. After this wheat was loaded, the official inspector of the state of Missouri at Kansas City inspected, adjudged, and certified this wheat to be No. 2 red wheat. An invoice of it was forwarded to the W. Company dated May 3, 1909, showing that it was shipped under the contract of April 3, 1909, and subject to Kansas City weights and grades. The wheat arrived in Texas without change. The Texas inspector, the federal inspector, and other witnesses there found it to be, and it was, wheat of another and less valuable grade. None of the officers or employes of the H. Company had any knowledge of this fact, or anything to do with the grading or shipping, except to order the operator of the public elevator to ship No. 2 red wheat.

Held, the H. Company was not guilty of misbranding or of adulterating within the meaning of sections 7 and 8 of the Pure Food Act (Act June 30, 1906, c. 3915, 34 Stat. 768, 769 [U. S. Comp. St. Supp. 1909, pp. 1190, 1191]).

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 10-13; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 1, pp. 210-212.

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

In Error to the District Court of the United States for the Western District of Missouri.

The Hall-Baker Grain Company was convicted of misbranding a car load of mixed wheat and of adulterating it by mixing with inferior wheat, and brings error. Reversed and remanded for new trial.

Edwin C. Meservey, Frank Hagerman, and Henry A. Bundschu, (Haff, Meservey, German & Michaels, of counsel), for plaintiff in error.

Leslie J. Lyons, U. S. Atty. (Thad. B. Landon, Asst. U. S. Atty., on the brief), for the United States.

Before SANBORN and HOOK, Circuit Judges.

SANBORN, Circuit Judge. The defendant below, the Hall-Baker Grain Company, a corporation, engaged in the purchase and sale of grain at Kansas City, Mo., was convicted of misbranding a car load of mixed wheat, No. 2 red wheat, and of adulterating the same by mixing other inferior wheat with it, in violation of the Pure Food Act of June 30, 1906, 34 Stat. 768, sections 7 and 8, U. S. Comp. Stat. Supp. 1909, pp. 1191, 1192. It attacks the judgment against it on many grounds, one of which is that there was no substantial evidence of the charges against it and the court below refused to instruct the jury, as it requested, to return a verdict in its favor.

The defendant was found guilty of misbranding under the second, and adulteration under the fourth, count of the indictment. The second count was based on these provisions of section 8 of the act:

"That for the purposes of this act an article shall also be deemed to be misbranded, * * * in the case of foods, first, if it be an imitation of, or offered for sale under, a distinctive name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser."

And the second count charged that the mixed wheat was offered for sale by the defendant as No. 2 red wheat, and that it was labeled No. 2 red wheat, when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof.

The fourth count was founded on this declaration of section 7 of the act:

"That for the purposes of this act an article shall be deemed to be adulterated in the case of food, first, if any substance has been mixed and packed with it so as to reduce, or lower, or injuriously affect its quality or strength; second, if any substance has been substituted in whole or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed."

And the fourth count charged that each of these things had been done to the car load of wheat. There was evidence tending to establish these facts: Kansas City, Mo., was a grain market. There was a public elevator capable of containing 1,000,000 bushels of wheat, operated by a corporation which had no interest in this transaction, which classified wheat purchased by the defendant and other dealers according to its quality and grade as it came to it and was inspected by the official Missouri inspectors and stored it in its various bins, so that wheat of the same grades or qualities went into the same bins and those of different grades and qualities into different bins. On receipt of orders from the owners of this wheat to ship out wheat of any grade, the elevator company loaded it out of the bin containing that grade of wheat into a car, that car load of wheat was then inspected by an official inspector of the state of Missouri and certified to be of the grade and character which he found and adjudged it to be. There were rules for this inspection that had been established pursuant to laws of the state of Missouri and the inspection was made by officers of the state. One of these rules was that No. 2 red wheat was "to be sound, well cleaned, dry, red winter wheat, weighing not less than 59 pounds to the measured bushel."

On April 3, 1909, the defendant agreed to sell 5,000 bushels of No. 2 red wheat according to Missouri state inspection and Kansas City weights to the Walker Grain Company at Ft. Worth, Tex. On April 29, 1909, the elevator company, pursuant to an order from the defendant, loaded into a car 45,000 pounds of wheat which an official inspector of the state of Missouri inspected, adjudged and certified to be No. 2 red wheat, and caused this car load of wheat to be forwarded to the Walker Grain Company in Texas. No officer or employé of the defendant ever saw this load of wheat, or had anything to do with its shipment, except to order the elevator company to ship a car load of No. 2 red wheat. There was an invoice of this wheat dated May 3, 1909, which stated that the Walker Grain Company bought of the defendant on April 3, 1909, this and another car load of "2 red wheat. * * * K. C. Wts. and Grades." No. 2 red wheat is a soft wheat, containing not over 5 per cent. of hard wheat, and soft wheat which contains from 20 per cent. to 45 per cent. of hard wheat is No. 2 or No. 3 mixed wheat, or some other grade of wheat, and the mixture of such a percentage of hard wheat with No. 2 red wheat depreciates its value in the Southwestern markets. This wheat was delivered to the consignee in Texas in the same condition that it was when inspected in Kansas City. When this load of wheat arrived in Texas, it was inspected by a Texas inspector, a federal inspector and others, who found it to contain from 20 per cent. to 45 per cent. of hard wheat. They differed in their estimates of the percentage of hard wheat in it and in the grade of mixed wheat to which it belonged, but agreed that it was not No. 2 red wheat. It is impracticable to keep the crops of wheat of different farms separate in the transportation of and traffic in this article from the purchaser to the consumer, and it is generally bought and sold by official or established grades, according to the inspection of specified officers or persons. Such officers or persons sometimes differ in their judgments of the grades to which specific lots belong. Wheat generally contains some hard wheat and some soft wheat. Some wheat is very hard and some very soft. There are many degrees of hardness and of softness of wheat which pass imperceptibly into each other, and there is no fixed and clear line of demarcation whereby all wheat may be indubitably separated into hard wheat and soft wheat. No other facts were disclosed at the trial which are material to the question before us.

[1] The act for the violation of which the defendant was convicted is entitled "An act for preventing the manufacture, sale or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicine and liquors." This title and the act itself, when carefully read and considered, demonstrate the fact that the sole purpose of its enactment was (1) to protect purchasers from injurious deceptions by the sale of inferior for superior articles; and (2) to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health. The clauses of the act

under which the defendant was convicted were evidently enacted to prevent the injurious deceit of purchasers. But where in the facts that were proved and that have been recited is there any evidence of any intent to accomplish deceit, or of any violation of the provisions of this law?

[2] The first charge was that the car load of wheat was offered for sale under a distinctive name of another article of food, to wit, No. 2 red wheat, when it was in fact mixed wheat. The proof was that the defendant offered to sell and sold 5,000 bushels, not of No. 2 red wheat, but of such wheat as under the laws of Missouri the official inspector of that state at Kansas City should decide and certify to be No. 2 red wheat, that it delivered the load of wheat in question pursuant to that contract and that this load of wheat was such wheat as under the laws of Missouri the official inspector of that state at Kansas City did adjudge and certify to be No. 2 red wheat. Concede that the inspector was mistaken, and that the wheat was in fact mixed wheat. Nevertheless it was the wheat which the Missouri inspector adjudged and certified to be No. 2 red wheat, and the wheat that he should so adjudge and certify and no other, whatever its actual grade, was the article the defendant offered to sell and sold. It was the undoubted right of the parties to this sale to make the Missouri official inspector the arbiter between them of the character and grade of the wheat in which they dealt, and to make his decision and inspection an ineradicable term of its description. That they did, when they agreed that the wheat sold should be No. 2 red wheat according to the Missouri inspection, and, as the defendant offered and sold no other, there was no evidence in this case that he offered one article under the distinctive name of another.

The second charge was that the wheat was labeled and marked No. 2 red wheat when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof. But there was no evidence that it was ever labeled or marked at all. The government offered the invoice of the wheat in evidence, over the objection of the defendant, to prove a label, but this invoice contained a provision similar to that in the contract of sale to the effect that the wheat was to be governed by the Missouri grades, and the wheat had been already inspected and graded No. 2 red wheat by the official inspector several days before the invoice was issued. There was no evidence of any false labeling to deceive purchasers here.

The fourth count of the indictment charged (a) that other grades of wheat had been mixed with the wheat shipped so as to injuriously affect it; (b) that other grades of wheat had been substituted in part for the No. 2 red wheat pretended to be sold; (c) that a part of the No. 2 red wheat had been abstracted and a like quantity of wheat of inferior grade substituted; and (d) that the wheat was mixed and packed with other grades of wheat whereby damage and inferiority was concealed. But, as has already appeared, the proof was conclusive that the wheat sold and delivered was the identical article offered for sale, to wit, that wheat which under the laws of Missouri the official inspector of that state should and did adjudge

and certify to be No. 2 red wheat. There was no evidence that any other grade of wheat was ever mixed with that wheat or substituted in part for it, or mixed or packed with it, or that any part of it had been abstracted. The proof was that on the order of the defendant the operator of the public elevator loaded it into the car, the official inspector tested it, adjudged and certified it to be No. 2 red wheat, it was hauled without mixing, abstraction, or substitution, to the consignee in Texas, where other inspectors found it to be mixed wheat, and there the evidence on this subject ceases. There was no evidence to sustain the conviction of this defendant on either count of this indictment.

The act of Congress was not enacted to catch and punish merchants who are conducting their business by customary and approved methods with no intent to deceive purchasers, or to injure the public health, for the mistakes of third persons over whom they have no control, nor for trivial errors of their own, which at first blush may seem to bring their action within the inhibition of the law, but by which in reality they violate neither its letter nor its spirit. Many other questions of law arose at the trial, and were discussed by counsel at the bar. But the conclusion which has been reached renders it unnecessary to consider them, and because there was no evidence to sustain any of the charges in this indictment the judgment below must be reversed and the case must be remanded to the court below for a new trial; and it is so ordered.

LINDEKE et al. v. CONVERSE.

(Circuit Court of Appeals, Eighth Circuit. August 26, 1912.)

No. 122.

(*Syllabus by the Court.*)

1. BANKRUPTCY (§ 443*)—REVISION OF PROCEEDINGS—NATURE AND SCOPE OF REMEDY.

A denial of a motion to dismiss an application of a bankrupt for a discharge on undisputed facts presents a question of law reviewable by a petition to revise under section 24b of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 443.*]

2. BANKRUPTCY (§ 443*)—REVISION OF PROCEEDINGS—DISCRETIONARY ORDERS.

Such a denial is discretionary with the bankruptcy court, but only in the same sense in which final orders and decrees in equity are so.

Substantial errors in the interpretation or application of the principles and rules of equity jurisprudence governing the matter may be reviewed and corrected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 443.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 410*)—DISCHARGE OF BANKRUPT—APPLICATION—LACHES.

Conscience, good faith, and reasonable diligence are requisite to call a court of equity into activity in one's behalf.

The debtor was adjudged a bankrupt on January 4, 1906. In June, 1906, she signed an application for her discharge and left it with her attorney. He did not file it until April 26, 1907, when he procured a permissive order of the bankruptcy court on an affidavit which failed to show that he or the bankrupt had been unavoidably prevented from filing it within the year. Between April 26, 1907, and September 12, 1911, neither the bankrupt nor her attorney took any action to bring the application to a hearing. On the latter day they procured an order for a hearing on October 16, 1911, which was met by creditors by a motion to dismiss the application for the discharge for want of prosecution.

Held, the motion should have been granted. The bankrupt failed to exercise that reasonable diligence requisite to call a court of equity into action on her behalf.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. § 410.*]

Petition to Revise Order of the District Court of the United States for the District of Minnesota.

Petition by Albert H. Lindeke and others, as Lindeke, Warner & Sons, to revise an order denying their motion to dismiss for want of prosecution the application of Julia D. Converse, bankrupt, for discharge. Petition granted, with directions to grant the motion to dismiss.

E. Howard Morphy, Frank H. Ewing, and John M. Bradford, for petitioners.

F. H. Peterson and Edwin Adams, for respondent.

Before SANBORN and HOOK, Circuit Judges, and SMITH McPHERSON, District Judge.

SANBORN, Circuit Judge. The question in this case is whether or not the facts presented to the court below on a motion of creditors of the bankrupt to dismiss her application for a discharge for want of prosecution presented lawful grounds for the grant of that motion. This question is raised by a petition to revise which is not challenged by demurrer or answer, and these are the material facts which it discloses: Julia D. Converse was adjudged a bankrupt on January 4, 1906. There was much litigation between her and her creditors until May 21, 1906, when the District Court denied an application to punish her for contempt unless she should comply with an order of the referee to pay \$5,500 to the trustee in bankruptcy. On June 5, 1906, she signed an application for a discharge and left it with her attorney. She stated in an affidavit made November 13, 1911, that she was not aware that anything further was to be done by her relative to the matter and did not know what action was taken, or was necessary to be taken until the year 1911. But during all this time a learned member of the bar was her attorney in this matter. He knew the law and the practice, and his knowledge in this regard was her knowledge. The bankrupt's application was not filed within the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

year, nor until April 26, 1907. Then it was filed pursuant to a permissive order of the District Court made on that day, and the only basis for that order was an affidavit made by her attorney on April 26, 1907, to the effect that he had been the attorney of the bankrupt since June, 1906, that she made and left with him her petition for her discharge in that month, that her estate was not then ready to close up and he did not then present it, that he "was very busy during the fall of 1906 and was obliged to be away from home and his office much of the time up until the 1st of January, 1907, and since said date has been obliged to be away at St. Paul attending the session of the Legislature until the present time, and that it has not been the fault of said bankrupt that her petition for discharge was not filed before." This affidavit fails to show that the attorney was either absent or too busy to take the requisite time, perhaps 10 minutes, to mail this petition to the clerk of the court with directions to file it, during the months of June, July, and August, 1906. It fails to show that either the bankrupt or her attorney were "unavoidably prevented" from filing this application within the year. Act of July 1, 1898, 30 Stat. 544, c. 541, § 14a; U. S. Comp. Stat. p. 3427.

The application for the discharge was filed on April 26, 1907, and nothing was done by the bankrupt or her attorney to prosecute the application or to bring the matter to a hearing until September 12, 1911, when they caused an order to be made that a hearing should be had upon the application on October 16, 1911. On that day the creditors who have presented this petition made a motion to dismiss the application for the discharge for want of prosecution, upon an affidavit of their attorney that the application for the discharge should have been opposed if it had been brought to a hearing within a reasonable time, on the grounds that the bankrupt, who had been and was conducting a general store at Detroit, Minn., when she was adjudicated, had, with intent to conceal her true financial condition, failed to keep books of account or records from which her financial condition could be ascertained, that within four months preceding the filing of the petition in bankruptcy she had transferred and concealed some of her property with intent to defraud her creditors, and that she had refused to obey orders of the court and to answer material questions approved by the court, that it would be difficult now, and almost impossible, properly to resist her application because nearly six years had elapsed since the commission of the acts constituting the grounds of opposition, that the testimony of the bankrupt's clerks in November and December, 1905, of the officers and clerks at that time of two banks at Detroit, Minn., and of other witnesses, would be necessary, that if these witnesses could be procured the facts and circumstances which could have been shown within a reasonable time after the date of the petition for the discharge cannot now be distinctly remembered by the witnesses, that these witnesses and their testimony could have been procured in 1906, that material testimony has been lost by reason of the long delay in

bringing the petition to a hearing, and that he is informed and believes that the petition has not been brought on for a hearing for the purpose of postponing the latter until the evidence of the bankrupt's acts and doings, which could be properly set forth in specifications in opposition to the discharge, should be lost or forgotten and the witnesses should be scattered. In her affidavit in opposition to the motion the bankrupt stated that the reasons for opposition to her discharge suggested by the foregoing affidavit were unfounded in fact. She made no denial, however, that material evidence upon the issues suggested had been lost by the delay, nor did she make any denial that the purpose of the delay had been to cause the loss of this evidence, save that she stated that she did not know it was necessary for her to do more than to sign her petition—an ignorance that in view of the knowledge of her attorney can hardly avail.

[3] The facts which have been recited seem to cry aloud for a dismissal of the application for the discharge. Counsel for the bankrupt, however, present three arguments in support of the action of the court below. They say that the fifth rule of the District Court of Minnesota provides that in case of voluntary bankruptcy, unless there be special reasons for earlier action, no application of the bankrupt for his discharge will be granted until the referee shall have certified that the case is closed, and they state in their brief that so far as they have been informed the estate is not yet closed. But there is no allegation or proof that the estate has not been closed in the record in this case upon which this court must act. Moreover, the rule of the court below does not prohibit the hearing and denial or the decision to grant a petition for a discharge before the closure of the estate has been certified. Its only purpose evidently was to prevent the actual issue of a discharge in voluntary cases until the reasons for refusing it had presented themselves. The bankruptcy law, which must prevail here, requires a judge to hear the application "at such time as will give parties in interest a reasonable opportunity to be fully heard" (section 14b), and that time certainly is not, in ordinary cases, six years after the adjudication. The rule cited was no excuse for the long delay in the case at bar.

Counsel contend that the bankrupt did all she was required to do when she filed her petition, and that it was the fault of the clerk of the court that an earlier hearing thereon was not had. They base this position on the forms in bankruptcy prescribed for the application and for the order of notice for the hearing and a statement in Loveland on Bankruptcy that as soon as the petition is properly filed the court passes the order of notice. But the bankrupt was the actor in this proceeding for her discharge, and, in the absence of any refusal or delay of the court or judge to grant a proper application on her behalf for an order of notice of a hearing upon her application, she cannot escape the consequences of her laches. It is not the duty of judges or clerks to fix the times and places of hearings of controversies, petitions, or bills in equity

and to give notice thereof without the application or suggestion of any of the interested parties.

[1, 2] The third reason urged in support of the denial of the motion to dismiss the petition for the discharge is that the order denying that motion was discretionary with the court below, and hence is not reviewable here, save for a gross abuse of that discretion. Every order and decree of a court of equity rests in some degree in the discretion of the chancellor who makes it because every appeal to him for relief is addressed to his conscience. They do not rest, however, in his mere arbitrary or whimsical will, but in his sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence, and the question whether or not in the exercise of his discretion he has fallen into any error in the interpretation or application of these principles and rules is always a question of law reviewable in a proper case by an appellate tribunal. There is necessarily a wide difference in the degrees in which decrees and orders are intrusted to the discretion or judgment of the chancellor because there is a wide difference in the degrees by which they are governed by fixed principles and rules. Interlocutory administrative orders which determine methods of procedure and times and places of acts and hearings are more largely discretionary than final orders and decrees that determine substantial rights, because they depend more upon special facts, less upon fixed principles, and are less decisive of vested rights than final orders and decrees. Thus a decree of specific performance of a contract, *Shubert v. Woodward*, 167 Fed. 47, 54, 92 C. C. A. 509, 516, and an order postponing a hearing of a case for a few days rest alike in the discretion of the chancellor; but the former is governed by fixed and familiar rules and principles and is at once seen to be reviewable, while the varying facts and circumstances which condition the latter generally exempt it from established rules and leave it to the judgment of the court which will be reviewed only for a gross abuse of discretion. The order in this case is of the former class. The motion of the creditors was in reality an application to the court below to refuse the bankrupt a discharge on account of her lack of prosecution of her application for it. If that court had granted the motion, it would thereby have finally denied her application for her discharge, and she could have invoked a review by this court of that decision by an appeal under section 25a of the Bankruptcy Law. In *re Kuffer*, 127 Fed. 125, 61 C. C. A. 259; *Matter of Semons*, 72 C. C. A. 683, 140 Fed. 989, 15 Am. Bankr. Rep. 822. But its refusal to grant the motion was not more discretionary than its grant of it would have been. The controlling facts presented at the hearing of the motion were undisputed. They either gave the creditors the right under the principles and rules of equity jurisprudence to a dismissal of the application for the discharge, or they gave the bankrupt the right to a hearing upon them. The question to be decided was a question of law, reviewable by appeal under section 25a of the Bankruptcy Law if decided against the bankrupt

and by petition to revise under section 24b of that law if decided against the creditors. Returning therefore to the question at issue, did the court fall into an error in its interpretation or application of the principles and rules of equity jurisprudence to the facts of this case?

A proceeding in bankruptcy is a proceeding in equity. The bankrupt, after a neglect to file her petition for a discharge until more than 16 months after she was adjudged a bankrupt, and after a delay of more than 4 years and 4 months after she filed her application for a discharge, was for the first time praying the court to hear and grant it. It is an immemorial principle of equity jurisprudence that nothing but conscience, good faith, and reasonable diligence can call a court of equity into action. *Smith v. Clay*, 3 Brown's Chancery, 639; *State of Iowa v. Carr*, 191 Fed. 257, 270, 112 C. C. A. 477. "It has been frequently held," says the Supreme Court, "that the mere institution of a suit does not of itself relieve a person from the charge of laches, and that, if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun." *Johnston v. Standard Mining Co.*, 148 U. S. 360, 370, 13 Sup. Ct. 585, 589 (37 L. Ed. 480); *Willard v. Wood*, 164 U. S. 502, 505, 17 Sup. Ct. 176, 41 L. Ed. 531. Undoubtedly it was not the intention of the Supreme Court by this statement to hold or intimate that a complainant who had commenced a suit or proceeding would be guilty of the same degree of laches as one who had not done so. But it clearly was its purpose to declare that the institution of a legal proceeding would not relieve the actor from laches before or after its commencement.

Let us try the question in this case by these rules. Had the defendant in the autumn of 1911 exercised such reasonable diligence to obtain a hearing and decision upon her application for a discharge as ought to call a court of equity into activity on her behalf? She neglected to file her petition within the year limited by the bankruptcy law for its filing. That law provides that it may be filed within the next six months after the year only when "it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it" within the year, section 14a. What was made to appear to the judge according to the record in hand, on which this court must decide this case, was that the petition was signed and in the hands of the bankrupt's attorney in June, 1906, that he was busy and at times absent from his office in the fall of 1906, and from January 1, 1907, until April 26, 1907, when he applied to the court to file it. There was, however, no showing that he was prevented by business or absence, or by any means whatever, from filing it in June, July, or August, 1906, or that either he or the bankrupt had been "unavoidably prevented" from filing it within the year. It was filed on April 26, 1907, and then for more than four years and four months the bankrupt and her attorney neglected to apply to the court or clerk to bring the application to a hearing, while witnesses who knew facts and circumstances that might have been material to issues that might be

raised by objections to the discharge forgot and scattered. The provisions of section 14 of the Bankruptcy Law that the application for a discharge shall be filed within one year after the adjudication, that if the bankrupt is unavoidably prevented from doing so it may be filed within the next six months, and that the judge shall hear the petition and the proofs in opposition to it at such time and place as will give parties in interest a reasonable opportunity to be heard, plainly indicate the purpose of Congress to secure an early hearing and disposition of the issues springing from such petitions. It is obvious that a wise and just administration of this law requires that such issues shall be framed and tried before the memory of the witnesses familiar with the transactions of the bankrupt at and shortly before the time of his adjudication has been dimmed by long delay and before they and the documentary evidence surrounding these transactions have been scattered or lost. The record in this case is so clear and compelling that the court is unable to resist the conclusion that the bankrupt failed to exercise that reasonable diligence in the prosecution of her claim for a discharge which is requisite to call a court of equity into action in her behalf.

The prayer of the petition to revise must therefore be granted, the order denying the motion of the petitioners to dismiss for want of prosecution the application of the bankrupt for her discharge must be set aside, and the court below must be directed to enter an order granting that motion, and it is so ordered.

PEOPLE'S TELEPHONE CO. et al. v. CONANT.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,825.

MASTER AND SERVANT (§ 217*)—DEATH OF SERVANT—ASSUMED RISK—ELECTRIC WIRES.

Decedent, a man of mature age and fairly well educated, having previously worked about electric plants and being familiar with the dangers attending telephone and electric light wires, was employed as a "trouble man" by defendant telephone company. He was sent to repair a broken wire strung on a cross-arm above electric light wires, knowing that the light wires were not insulated, except to protect them against the weather, and that if the telephone wire came in contact therewith it would be dangerous. While working on the wire, it came in contact with the electric light wire, and decedent was slightly shocked, but not injured. Thereafter he attempted to draw the telephone wire taut, when it again came in contact with the electric light wire, and he received a shock which resulted in his death. *Held*, that the danger was not latent, but that decedent proceeded with knowledge thereof and assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & REPT INDEXES

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

Action by Mary A. Conant, as administratrix of the estate of Carroll E. Conant, deceased, against the People's Telephone Company and the Superior Water, Light & Power Company. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Defendant in error, hereinafter called plaintiff, recovered judgment against plaintiffs in error, hereinafter termed, respectively, the Telephone Company and the Light and Power Company, for \$5,130.11, on March 13, 1911, in a suit brought to recover damages sustained by reason of the death of plaintiff's intestate, caused by an electric shock, alleged to have been the result of the joint negligence of both plaintiffs in error, at the corner of Logan avenue and an alley in the city of Superior, state of Wisconsin, on or about August 25, 1909. Plaintiff's decedent was, at the time of the accident, about 26 years of age. He had received a fair education. He had theretofore worked in a general store at Minneapolis for two years, and had been employed as "trouble man," and as such had repaired breaks on telephone wires, for more than two years for the Tri-State Telephone & Telegraph Company in said city of Minneapolis. During this period he had a number of trouble cases each day growing out of wire crossings and other causes, and was experienced in making crossings of the kind here involved. This work he sometimes attended to alone, and sometimes in company with another man. On or about July 27, 1909, he was employed as trouble man and inspector of the lines and instruments of the Telephone Company—a combination man. As such, he was called upon to install telephones, repair instruments, wires, and cables, and any other work that one man can accomplish. The Telephone Company and the Light and Power Company had some 400 crossings in the city of Superior. At the place where the accident occurred, the telephone lines extended east and west along the alley at a height of about 1½ feet above the light and power lines, and rested on arms built upon the telephone poles. The lowest line was about 20 feet from the ground, and carried between 75 and 175 volts. The electric light wires carried a voltage of about 2,300. There was little or no insulation of the latter wires—only just enough to protect them from the elements. It was the custom on receipt of complaint to give a trouble slip to the trouble man, stating what and where the trouble was. On or about August 21, 1909, at about 9:30 a. m., decedent was given three trouble slips, among which was one pertaining to the location here involved. He had then been in the Telephone Company's employ about 25 days. He proceeded to Logan avenue and the alley crossing, and began the task of remounting the telephone wire upon the cross-arm where it belonged. He was warned several times by the Telephone Company's wire chief, Skuse, about the danger of the light and power wires—not to place telephone wires over light and power wires alone, and not to run any chances and to report before he did it (as was done with every man doing that work, as an extra precaution, so Skuse testifies).

About 1 o'clock, at the office, the decedent asked for a hand line, saying he wanted to put up a wire. Not being able to get one, he said he would take a marline; that is, a small piece of cord—a nonconductor. On the day before the accident, a Mr. Tift, an employé of the Light and Power Company, had gone out to the place of trouble, and had found one of the telephone company's wires broken from the first pole east of Logan avenue. A piece 3 or 4 feet long was hanging from the cross-arms. The other broken end was hanging over the Light and Power Company's wires and lying across Logan avenue on the sidewalk, depending from the pole on the west side of Logan avenue. He cut the wire and drew it off the Light and Power wires. He then rolled it up and laid it next to the foot of the pole. When the decedent arrived at the place of the trouble, he proceeded to replace the wire alone. He was seen by the persons living near, working west of Logan avenue, and then going east. He spliced a piece of wire onto the broken line, which was then not charged. This he carried up the telephone

pole east of Logan avenue attached to the marline. The neighbors heard him exclaim, and one of them went to him with a tender of help. Decedent said he had received a little shock, but was then all right, and proceeded to descend. He then began walking backward, pulling the wire which he had drawn over the Light and Power wires and over the cross-arm of the first pole east of Logan avenue, where it belonged. He seemed to be dragging the wire beyond the cross-arm, so as to wrap it about an adjacent pole for the purpose of holding it off the Light and Power wires, in order that he might be able to keep it dead for the purpose of completing the splicing of it. He was seen to fall while walking backwards and pulling the wire. When the neighbors came to him, he was lying on his back dead, with his head toward the north and having a flame coming up from his hands. The wire, which had been attached to the marline 3 or 4 feet from its end, was lying upon his right wrist, extending down near his right hip and between his legs and spur. There were fragments of wire lying about upon the irregular surface of the alley.

Complaint was filed on August 19, 1910. The acts of negligence charged are: First, that plaintiffs in error located their several wires in such close proximity to each other as to expose persons working thereon to great and imminent danger; second, that they, respectively, so negligently located the said several wires that they were liable to sag and destroy insulation, and to be and were dangerous to persons working on the telephone wires; third, that the wires were permitted to remain without insulation; fourth, that it was negligent not to place the wires under ground; fifth, that the wires were permitted to remain without proper guard wires; sixth, that the Light and Power Company did not comply with its charter and franchise as to insulation; seventh, that decedent was exposed to great danger, of which he did not know, and of which he was not warned.

The plaintiffs in error filed their respective answers, denying each and all of the said alleged charges of negligence. On the trial, evidence was adduced in substance as aforesaid, so far as material here. At the conclusion of plaintiff's evidence and all of the evidence, they severally moved the court for an instructed verdict, which was denied. They then asked the court to submit certain questions to the jury to answer as part of their verdict, under the state court practice, which motion was denied. They then moved the court to give certain other instructions to the jury, which the court refused to do. After verdict they moved the court for judgment notwithstanding verdict, and for new trials, both of which were denied, and exceptions entered. The jury having found for the plaintiff below, judgment on the verdict was entered as above stated, whereupon the writ of error herein was sued out. For errors, plaintiffs in error assign the following among others, viz.: (1) That the court allowed evidence as to the custom of placing electric wires over telephone wires and the purpose of doing so; (2) that the court denied the motion of defendants below to instruct the jury to render a verdict in their favor respectively, at the close of the plaintiff's evidence, and at the close of all the evidence, respectively; (3) that the court denied the motions of the several defendants below for judgment notwithstanding verdict.

Further facts deemed material are stated in the opinion.

L. K. Luse, for plaintiff in error People's Telephone Co.

Joseph B. Doe, for plaintiff in error Superior Water, Light & Power Co.

H. W. Dietrich and John Jenswold, Jr., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). This case is practically on all fours with *Bell Telephone Company v. Detharding*, 148 Fed. 371, 78 C. C. A. 185. It appears from the undisputed evidence that plaintiff's decedent was of mature age and

fairly well educated. He was possessed of ordinary native and business intelligence. He had, prior to the accident, been engaged in and about electrical plants, and was familiar with and versed in the dangers attending telephone and light wires. He had been engaged as a "trouble man" in that service, wherein he was obliged to deal with situations of like risk with that here involved, and was also notified that the task was dangerous. There was no hidden danger at the place of the broken wire. He saw that the telephone wire was strung above the light wire, as was the case in *Telephone Company v. Detharding*, above cited. He knew that the former wire would take the current from the light wire, were it allowed to rest upon it. He knew that neither of them was insulated for other than weather protection purposes, and that the situation was a dangerous one. This is plainly shown by the care and precaution he took in getting the nonconducting marline for the purpose of dragging the broken wire across the light wire. Even had he been unable to see these dangers, the shock he received when upon the cross-arm, to which he sought to fasten the telephone wire, or where he sought to splice it to the west end of the break, was indubitable notification that the telephone wire took the light current from the latter wires when resting thereon. Indeed, his main effort was to draw the former taut, so as to lift it from the latter. The circumstances seem to indicate that, while pulling on the marline as he walked backward to the pole, to which he might attach the marline and hold the telephone wire free of the light wire, his person in some way came in contact with the latter before it was clear of the light wire, and when it was taking the light current from the light wires, and was shocked to death.

As was said in *Telephone Co. v. Detharding*, supra, he was seeking to remedy the very trouble which killed him. The present case is even stronger for the defendants than that just cited. There he could not see the disarrangement of the wires which carried death. Here he knew that, if the thing happened which did happen, his life would be in jeopardy. He was advised that he could have a man to help him, if he desired. Whether or not some other manner of stringing the two sets of wires would have been generally safer or more usual is not established from the evidence. Even had it been, it would not have been of moment here, because the danger was not only apparent, but clearly demonstrated, to decedent. The evidence entirely fails to disclose any negligence on the part of the defendants, or either of them. Nor does it show negligence on the part of plaintiff's decedent. So far as can be gathered from the evidence, the death resulted from one of those accidents for which no one was responsible. Whatever the cause, it was, so far as disclosed in this record, one assumed by the decedent, for which his administrator may not recover. The motion to take the cause from the jury should have been granted.

The judgment of the Circuit Court is therefore reversed, and the cause remanded for a new trial.

HARDING v. CORN PRODUCTS MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. May 16, 1912.)

No. 1,842.

COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—APPEAL—ORDERS APPEALABLE.

An appeal does not lie to the Circuit Court of Appeals from an order denying complainant's motion to remand a cause to the Circuit Court, awarding costs incurred on the motion against him, to be taxed, and directing execution to issue therefor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1103; Dec. Dig. § 405.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by George F. Harding against the Corn Products Manufacturing Company. From an order denying plaintiff's motion to remand a cause to the state court, awarding costs against him, and directing that execution issue therefor, he appeals. Dismissed.

See, also, 168 Fed. 658, 94 C. C. A. 144.

The appellant, Harding, is complainant in an equity suit against the appellee, pending in the court below, on removal from a state court, and this appeal is from an order or decree therein denying the appellant's motion to remand the cause to the state court, and awarding against the appellant costs incurred upon such motion by the appellee, to be taxed, "and that execution issue therefor." The appellee moves for dismissal of the appeal, "on the ground that the order appealed from is not an appealable order." See *Ex parte Harding*, petitioner. 219 U. S. 363, 366, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, for recital of the proceedings involved herein.

William J. Ammen (George F. Harding, of counsel), for appellant.

Levy Mayer, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. The appellant's contention that this appeal from an interlocutory order in equity is entertainable rests alone on the provision thereof awarding costs to the appellee defendant, to be enforced by execution. It is both unquestionable and undisputed that no appeal is authorized from its denial of the motion to remand the cause, as proceedings thereupon are not reviewable pending final disposition of the issues. Thus, without other appealable subject-matter, the question is distinctly presented whether an appeal lies from such award of costs between the parties to this suit in equity.

The Supreme Court, commencing with *Canter v. American Insurance Co.*, 3 Pet. 307, 316 (7 L. Ed. 688), has invariably pronounced the rule to be that "no appeal lies from a mere decree respecting costs" against a party in suit, in equity or admiralty. See 3 Notes U. S. Rep. 70; *Gunckel on Costs in Federal Courts*, c. 35, § 80. In *City Bank of Ft. Worth v. Hunter*, 152 U. S. 512, 516, 14 Sup. Ct. 675, 676 (38 L. Ed. 534), the appeal involved allowances

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of interest amounting to about \$4,000, alleged to be unauthorized under a mandate of the Supreme Court, together with an award of costs; and the opinion states the rule that "no appeal lies from a mere decree for costs," and that "the appeal in respect to costs must also be dismissed," as the appeal "in respect to interest must be dismissed for want of jurisdiction." So, in the recent case of *Wingert v. First National Bank of Hagerstown*, 223 U. S. 670, 32 Sup. Ct. 391, 56 L. Ed. 605 (decided March 11, 1912), the appeal was from a decree dismissing a bill filed to enjoin the pulling down of a bank building and erection of a new building in its place. It appearing that "pending the litigation the new structure has been built," and that "the only ground for further prosecution of the case is costs," the ruling was that the appeal must be dismissed, citing *Union Paper Bag Machine Co. v. Nixon*, 105 U. S. 766, 26 L. Ed. 959. In *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, the general rule as above stated is recognized and defined, as applicable to "costs as between party and party, confined to the taxed costs allowed by the fee bill," but held inapplicable to costs and expenses directed to be paid out of a fund in court, and not by parties to the suit, where "the inquiry was a collateral one, having a distinct and independent character, and received a final decision."

The doctrine of these decisions, therefore, must be accepted as settled, that awards of costs in equity between the parties, within the allowances of the fee bill, which "are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court" (*Canter v. American Insurance Co.*, supra), are not appealable subject-matters within the purpose of the appellate jurisdiction of the Supreme Court; and the instant appeal therefrom cannot be entertained, if such doctrine is alike applicable to the appellate jurisdiction conferred upon this court. Whatever may be the view under which these rulings were adopted, we are impressed with no distinction between the respective jurisdictions which would authorize rejection of such rule as inapplicable to like appeals before this court; and we are of opinion that this incidental allowance of costs, in the interlocutory order not otherwise appealable, presents no appealable subject-matter. *Wright v. Gorman-Wright Co.*, 152 Fed. 408, 81 C. C. A. 534; *Foster v. Elk Fork Oil & Gas Co.*, 99 Fed. 617, 40 C. C. A. 21; *Gamewell Fire Alarm Telegraph Co. v. Municipal Signal Co.*, 77 Fed. 490, 23 C. C. A. 250. See *Western Coal & Mining Co. v. Petty*, 132 Fed. 603, 65 C. C. A. 667, wherein uniform application of the rule in equity cases as above defined is well recognized (under authorities cited), but held to be inapplicable to the denial of costs "as a matter of positive right" in favor of a prevailing party in a suit at law.

The appellant contends, however, that the rule referred to is without force in the Circuit Court of Appeals, and that sanction for departure therefrom appears in authorities cited from several circuits, namely: *The City of Augusta*, 80 Fed. 297, 25 C. C. A. 430; *In re Michigan Central R. Co.*, 124 Fed. 727, 59 C. C. A. 643; *McIntosh v. Ward*, 159 Fed. 66, 86 C. C. A. 256. Each of these cases is plainly distinguishable from the case at bar in the question involved, and

we believe that neither of their rulings tends to uphold this appeal. In *The City of Augusta*, the appeal was from a decree in admiralty in a collision case, involving review and decision upon the merits. The opinion, after ruling upon the merits, states that error is further assigned for an item of costs, alleged to be unauthorized, and proceeds to the consideration of such allowance. Citing the authorities stating the general rule to be "that there is no appeal on a mere matter of costs," it further refers to another line wherein cost allowances are reviewed, where the appeal involves the merits as well, and adopts as the rule applicable to the case that such review is authorized "when the force of a statute or some positive rule of law is involved, although it concerns only costs." As no analogous question arises under the present appeal, the exception there stated is not involved herein.

The case in the Sixth Circuit, *In re Michigan Cent. R. Co.*, supra, involved alone the appealability of the final order of the Circuit Court, under a foreclosure decree, which required payment to the clerk of the court (as fees claimed by him under subintervention in the proceedings) of a commission for alleged services in "receiving, keeping, and paying out" moneys arising from the foreclosure sale, predicated on section 828, R. S. U. S. (U. S. Comp. St. 1901, p. 635). As appeal therefrom was denied by the Circuit Court, an application for a writ of mandamus to compel its allowance was granted by the Circuit Court of Appeals. The opinion presents an instructive review of the authorities in reference to appeals from decrees for costs, marks the distinction of the allowance complained of from other allowances of costs in equity and admiralty, as between the parties, wherefrom appeals will not lie under the general doctrine as stated, and upholds the right of appeal from such allowance in favor of the clerk, as not within the rule applicable to discretionary costs between the parties. In support of the ruling that an appeal lies, under the distinction referred to, the opinion points out that it may rest (a) either on the doctrine of *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, and other cases cited as to allowances to officers of the court, or (b) as involving "the construction and application of a positive statute" for the allowance.

So, in *McIntosh v. Ward*, supra, decided by this court, error was assigned for extraordinary allowances, designated as "costs of administration" and "costs of litigation," not within the fee bill act, charged in the decree as taxable costs required to be paid by "one party (and the sureties on his cost bond)," and review thereof was entertained, overruling an objection that such allowances, as matter of costs, were not appealable. As stated in the opinion, the assertion as costs "quite evidently begs the question"—the allowances challenged not being within the fee bill, and therefore not "costs as between party and party," in the sense of the rule referred to (as defined in *Trustees v. Greenough*, supra)—and merely naming and charging them as costs cannot bar appeal therefrom. Clearly, neither of these cases sanctions departure from the rule applicable to the present cost decree.

We are of opinion, therefore, that the order appealed from presents no reviewable subject-matter; that neither the denial of motion to remand the cause—wherein error is assigned in various forms—nor the incidental award of costs thereupon furnishes standing for the appeal, which must be dismissed accordingly.

It is so ordered.

FWLER STATE BANK, OF FWLER. KAN., v. WHITE.

RIDENOUR-BAKER GROCERY CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1912.)

Nos. 3,763, 3,764.

1. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—REASONABLE CAUSE TO BELIEVE INSOLVENCY.

A bank, which held a demand note of a retail grocer, who was in fact insolvent, demanded payment, and a few days later took a new note, secured by a chattel mortgage on the debtor's stock. Seven days afterward it made a contract with another merchant to take enough goods from the stock to satisfy its claim, and this was done, with the debtor's consent. The price paid was 80 per cent. of the invoice price of the goods, which sum the bank received. It had also within a few days protested small checks drawn on it by the debtor, and returned drafts sent to it for collection as uncollectible. On the day after the goods were taken, an involuntary petition was filed against the debtor, and he was adjudicated a bankrupt. *Held*, that the bank had reasonable cause to believe that the bankrupt was insolvent when it received the payment, and that the sum was recoverable by his trustee as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—REASONABLE CAUSE TO BELIEVE INSOLVENCY.

A creditor of an insolvent merchant, which took a chattel mortgage on his stock three days before his bankruptcy, and two days later took possession and sold and removed goods sufficient to pay its claim, had reasonable cause to believe that the debtor was insolvent, and the amount it received was recoverable by his trustee as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

Appeals from the District Court of the United States for the District of Kansas.

Suits in equity by Warren White, trustee in bankruptcy of C. E. Lockwood, against the Fowler State Bank, of Fowler, Kan., and against the Ridenour-Baker Grocery Company. Decrees for complainant, and defendants appeal. Affirmed.

Alexander New, Edwin A. Krauthoff, E. J. Geittman, Harry J. Bone and Chas. S. Briggs, for appellants.

W. G. Fairchild and H. S. Lewis, for appellee.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WILLARD, District Judge. These appeals are prosecuted from judgments rendered in the District Court of the United States for the District of Kansas, in favor of Warren White, trustee in bankruptcy of C. E. Lockwood, and against the Ridenour-Baker Grocery Company for \$389.93, and against the Fowler State Bank, of Fowler, Kan., in favor of the same plaintiff, for \$927.83. The judgments are predicated upon a finding by the trial court that the appellants above named received a preference under section 60, cls. "a," "b," of the Bankruptcy Act, to the extent of the respective amounts above named. The issues in both cases being practically the same, the suits were, upon stipulation of the parties, consolidated for trial, and, likewise by stipulation of parties, consolidated on appeal.

In the month of April, 1909, C. E. Lockwood opened a grocery store in the city of Fowler, Kan., and continued to conduct said store until an involuntary petition in bankruptcy was filed against him on the 14th day of January, 1910. He opened an account with the Fowler State Bank about the time he began to do business, making a deposit in the bank which was subject to his check. During the latter part of November, 1909, Lockwood borrowed from the Fowler State Bank, on his demand note, \$874.46. On January 1, 1910, the bank made demand on Lockwood that the note be paid, or at least be reduced. Apparently Lockwood was unable to take up the note, so on January 6, 1910, he gave the bank a new note for \$1,045, which was to cover the old note of November 24, 1909, for \$874.46, and an overdraft of \$170.54, making a total of \$1,045. This note for \$1,045, dated January 6, 1910, was secured by chattel mortgage on Lockwood's stock of goods.

A few days after F. D. Morrison, cashier of the Fowler State Bank, requested that Lockwood make some arrangement to take care of the account, and said that they would have to foreclose their mortgage unless some of the goods could be sold to a merchant in town. A little later Morrison made a contract with Linn Frazier, who was in the grocery business, by which Frazier agreed to take from Lockwood's stock enough goods to satisfy the bank's claim; Frazier paying for the goods 80 per cent. of their cost price. Lockwood was notified of this arrangement and assented to it. About the 13th day of January, one day before the petition in bankruptcy was filed, Frazier took from Lockwood's stock goods which were invoiced at \$1,197, and on January 15th he paid 80 per cent. of this, as follows: \$957.60 to the Fowler State Bank, and \$29.60 to Lockwood. The bank's debt having thus been paid in full, it thereupon surrendered to Lockwood his note and mortgage.

[1] The claims of the bank are: (1) That there was no evidence of insolvency at the time the alleged preference was given; and (2) that the bank did not have reasonable cause to believe that Lockwood was insolvent.

Lockwood testified that his assets at all times in January were about \$4,000, and his liabilities about \$6,000. An analysis of all the testimony in the case sufficiently shows that his testimony was substan-

tially accurate. It would serve no useful purpose to relate such evidence.

Upon the other question, as to the bank's knowledge of Lockwood's condition, it appears that Morrison, the cashier, when he went to Frazier to get him to take the property, told Frazier that Lockwood was in hard circumstances. A check of Lockwood, drawn on the Fowler State Bank for \$25 on December 29, 1909, in favor of the Standard Oil Company was protested by Morrison himself as notary public on January 5, 1910. On the same day he protested another check of Lockwood for \$11.77, drawn in favor of the Loose-Wiles Biscuit Company. That company afterwards, on January 11th, made a draft to the order of the Fowler State Bank on Lockwood for the amount of the check. This was returned uncollected, with the following notation thereon: "No show to collect. F. D. M." Other checks and drafts were returned by the bank about that time. In addition to all this, the transaction was very unusual, and was sufficient to put Morrison upon inquiry as to the financial condition of Lockwood.

[2] So far as the question of insolvency is concerned, the case of the Ridenour-Baker Grocery Company is the same as that of the Fowler State Bank. Hudson, the agent of this company, was at Fowler on January 11, 1910. He then took a chattel mortgage on all of Lockwood's stock. He knew at that time of the prior mortgage to the Fowler Bank. He returned to Fowler on January 13th, and on Thursday 14th took possession of the store and sold goods therefrom Thursday afternoon, Friday, and Saturday forenoon. In addition to selling goods over the counter, he loaded two wagons out of the stock and sent these out of town by night.* At that time only \$100 of the company's claim was due. On January 12, 1910, a letter was sent from Fowler to the Grocery Company at Kansas City, notifying it that Lockwood's written consent to bankruptcy had been secured. The facts above recited are sufficient to show that the Grocery Company had reasonable cause to believe that Lockwood was insolvent.

Some claim is made in the brief to the effect that the judgment against the company for \$389.93 is erroneous, because there is no evidence of the amount of goods which Hudson took away, nor of the amount of money which he received while he was selling in the store. The testimony upon this point, however, is ample to justify the finding of the court below to the effect that the Grocery Company had received enough to pay its claim in full, and the judgment against it was for the amount of the claim.

The decree of the court below in each case is affirmed, with costs.

HECOX v. TELLER COUNTY et al.

In re ECONOMIC GOLD EXTRACTION CO.

(Circuit Court of Appeals, Eighth Circuit. August 3, 1912.)

No. 3,475.

BANKRUPTCY (§ 346*)—CLAIMS—PRIORITIES—TAXES—"DUE AND OWING."

Within the meaning of Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), which provides that a trustee shall pay "all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors," taxes on property of a bankrupt are "due and owing" by the bankrupt, although, as in Colorado, an action cannot be maintained for their collection, but resort must be had to the property. Nor does the fact that the property has been struck off to the county for the taxes for want of bidders, as provided by Rev. St. Colo. 1908, § 5713, or that it was surrendered by the trustee to a mortgagee, deprive the county of the right to their preferred payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2213-2220; vol. 8, p. 7643.]

Appeal from the District Court of the United States for the District of Colorado.

In the matter of the Economic Gold Extraction Company, bankrupt. From an order requiring him to pay taxes to Teller County, Colo., Roy C. Hecox, trustee, appeals. Affirmed.

Ernest Morris (William W. Grant, Jr., on the brief), for appellant.

Tully Scott (Thomas, Bryant, Nye & Malburn, on the brief), for appellees.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. March 18, 1907, the Economic Gold Extraction Company was adjudged an involuntary bankrupt by the District Court of the United States for the District of Colorado, and on April 26, 1907, Harry Hendrie, treasurer of Teller county, Colo., made application for an order to pay the sum of \$3,207.43, being taxes alleged due from the bankrupt before the adjudication of bankruptcy. The trustee made objection to the order, first, because the property upon which they were levied had been offered for sale and struck off to Teller county, and it still held the certificate of purchase therefor; second, because the trustee had under an order of the District Court released the real estate upon which the taxes were levied to the holder of an incumbrance thereon and the taxes followed the land. The referee allowed the claim and his action was confirmed by the District Court, and the trustee appeals.

The case involves a consideration of section 64a of the bankruptcy law:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Taxes are not debts in the ordinary sense of that word. *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101. They are imposts levied for the support of government, or for some special purpose authorized by it. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *New Jersey v. Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284. It is the duty of every person subject to taxes in Colorado to attend at the county treasurer's office and pay his taxes. Section 5675, R. S. Colo. 1908.

"If there shall be no bid for any tract offered the treasurer shall pass it over for the time and shall reoffer it at the beginning of the sale next day until all the tracts are sold or until the treasurer shall become satisfied that no more sales can be effected when it shall become his duty to strike off to the county the lands and town lots remaining unsold for the amount of such taxes, interest and costs thereon." Section 5713, R. S. Colo. 1908.

By section 5726, R. S. Colo. 1908, the county treasurer is authorized to sell, assign, and deliver the certificate to any person upon payment to the treasurer of the amount for which the property was bid in by the county, with interest and penalties accrued thereon and \$1 for making the assignment. But the law does not contemplate any deed to the county.

In *Montezuma Valley Co. v. Bell*, 20 Colo. 175, 36 Pac. 1102, it was held that the remedies prescribed by the statute for the collection of taxes are exclusive, and a suit cannot be maintained to recover them. In *Mitchell v. Mennequa Town Co.*, 41 Colo. 367, 92 Pac. 678, it was held that the rule of caveat emptor applies to a tax sale, and if it be void no action will lie against the county. That was the sole question in that case, but the court reviews the prior authorities, and refers at length to the case of *Montezuma Valley Co. v. Bell*.

It does not follow that taxes are not due and owing from the citizen because they are not debts upon the one hand, or because the state has prescribed some method exclusive in its character for their collection.

"It is, however, the individual and not his property which pays the tax, although the property is resorted to for the purpose of ascertaining the amount of the tax and for the purpose of enforcing its payment where the owner makes default." 37 Cyc. 710.

It will be conceded that when the property is thus resorted to, and the property is sold to a third person, the public have been paid, and they have no right to ask payment again, and the person who has bid the property in is not the United States, state, county, district, or municipality, and there is no provision for payment to him, and he is not entitled to preference upon the ground of subrogation, or for any other reason. The question is not whether the county could sue the Economic Gold Extraction Company before or after sale.

This case arises under the bankruptcy law, which provides that taxes shall be ordered paid, if legally due and owing by the bankrupt, and the right, if any, arises under the federal statute.

Some states hold that taxes are debts, and these and perhaps others hold that a suit will lie for their collection against the owner; while others, like Colorado, hold the statutory means for their collection is exclusive of a suit. If upon this question turned the right to the

order prescribed in section 64a of the bankruptcy law, then no taxes could be collected at all of a trustee in Colorado and similar states, while they could all be collected in such states as permit of a suit against the taxpayer. The truth is that the question of the right to sue has nothing whatever to do with the question of whether the taxes are legally due and owing. In Colorado, as a suit will not lie for taxes before sale, of course, none will lie after sale; but there is no case in Colorado holding there is anything in a tax sale, either to third parties or the county, which would change, much less abolish, the liability for the taxes. If the sale is to a third person, there is a change in the party entitled to the taxes. It has been held that a sale to the public does not change the liability, where the taxpayer is personally liable. In *re Stalker* (D. C.) 123 Fed. 961; In *re Elsner*, 86 App. Div. 207, 83 N. Y. Supp. 670. In the Circuit Court of Appeals of the Fifth Circuit, it was held in *City of Waco v. Bryan*, 127 Fed. 79, 62 C. C. A. 79, that the taxes must be paid from bankrupt estates, although they are a lien upon real estate which did not come into the hands of the trustee; and the Circuit Court of Appeals of the Sixth Circuit in *Chattanooga v. Hill*, 139 Fed. 600, 71 C. C. A. 584, 3 Ann. Cas. 237, held that taxes must be ordered paid independently of whether they were secured by lien or not. In that case, as in this, the most of the property taxed was mortgaged so heavily that it had been relinquished by the trustee to the mortgagee. The court said:

"The bankrupt might have paid all taxes immediately prior to the filing of a petition by or against him. This would not have been a preference. The law means that the trustee shall do what the bankrupt might have done, and what good citizenship required him to do."

In *Re Tilden* (D. C.) 91 Fed. 500, it was held the trustee must pay taxes upon the homestead, which was exempt and never passed to the trustee.

Under the statutes of Colorado the county was not a volunteer; but, as soon as the treasurer became satisfied that no one would bid on this property, he was required to, and did, strike it off to Teller county. The only effect of this provision was to enable the county to sell the certificate if it could find a purchaser. It in no wise paid the taxes. They were still due by the same party and to the same party, and that party was one of those entitled to preference under the bankrupt law; nor could the trustee, by relinquishing the property to the mortgagee, with or without consent of court, in a proceeding to which the county was not a party, destroy the county's right to preferential payment.

The decree of the District Court was correct, and is affirmed.

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,800.

1. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—LOW DRAWBARS.

Under Safety Appliance Act March 2, 1893, c. 196, § 5, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3175), providing that no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard provided for, it was no defense, to an action to enforce a penalty for the use of a car in interstate commerce with a drawbar less than the standard height above the rails, that the lowering of the bar was caused, not from any defect therein, or in its attachment to the frame of the car, but from the breaking of a king pin, whereby the frame to which the drawbar was secured was lowered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 764-772; Dec. Dig. § 254.*]

2. RAILROADS (§ 229*)—INTERSTATE COMMERCE—REGULATION—SAFETY APPLIANCE ACT—"TRAIN."

Safety Appliance Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), provides that, after January 1, 1898, it should be unlawful for any interstate carrier, by rail, to use any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic, after that date, that had not a sufficient number of cars in it so equipped with power or train brakes that the engineer of the locomotive drawing such train could control its speed without requiring the brakeman to use the common hand brake for that purpose; and Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1315), required that 50 per cent. of the cars should be equipped with air brakes. *Held*, that such section was not limited to road trains, but applied to interstate trains, destined to a particular railroad yard, which, before reaching their destination, were operated by a switching crew.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7056, 7057.

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States of America against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert Dunlap, Lee F. English, and James L. Coleman, for plaintiff in error.

James H. Wilkerson, U. S. Atty., Harry A. Parkin, Asst. U. S. Atty., and Philip J. Doherty, Sp. Asst. U. S. Atty.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Penalties were assessed against plaintiff in error for violations of the Safety Appliance Act. Points respecting constitutionality have been abandoned. Two matters concerning the application of the statute are pressed as grounds for reversal.

[1] In a train used in interstate traffic plaintiff in error had a car

*For other cases see same topic & § NUMBER in Dec. & Am.Digs. 1907 to date, & Rep'r Indexes

whose drawbar was less than the standard height above the rails. This condition was observed by the government inspector 15 minutes before the train left the yard. Violation of the statute is questioned on the ground that the condition resulted, not from any defect in the drawbar itself, or in its attachment to the frame of the car, but from the breaking of a king pin, whereby the frame to which the drawbar remained securely attached was lowered. But the statute (section 5) provides that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for." So it is immaterial whether the lowering was caused by the sagging of the drawbar from the frame or the sagging of the entire frame; and the resulting condition of noncompliance with the standard height would be as observable in the one case as in the other.

[2] Less than the required number of cars in the train had air brakes under the control of the engineer. Corwith is an outer Chicago yard, where incoming trains used in interstate traffic are stopped and the cars are distributed upon various tracks. Cars that are destined to plaintiff in error's inner yard at Eighteenth street are assembled at Corwith into a train and moved about eight miles to Eighteenth street over switch tracks, leads, and main tracks of plaintiff in error, across a drawbridge and three railroads, at the rate of six to eight miles per hour. Beyond Corwith the trains are under the jurisdiction of the train dispatcher; between Corwith and the Eighteenth Street yard, of the yardmaster. At Corwith the regular "road" crews give up the trains, and from there to Eighteenth street trains are handled by "switching" crews. From Corwith to Eighteenth street the railroad is wholly within Cook county, Ill.

Section 1 of the act of March 2, 1893, provides:

"That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes, that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section 2 of the amendment of March 2, 1903, required that 50 per cent. of the cars should be equipped with air brakes and placed under the control of the engineer; and authorized the Interstate Commerce Commission by order to increase the percentage. On the occasion complained of the required percentage was 75.

From the use of the words "run," "speed," and "brakemen" in the original act plaintiff in error argues that this provision for the engineer's control of the train by means of air brakes applies only to "road" trains. But, in our opinion, Congress, in requiring a train to be "so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose," employed the word "brakemen" generically as including any and all

men, whether specifically known as "conductors" or "brakemen" or "yard foremen" or "switchmen," whose duties in connection with the train would oblige them to use the common hand brakes in the absence of air brakes, and intended that the engineer should be able to "control the speed" and bring quickly to a standstill a train moving slowly through a congested region of drawbridges and railroad crossings, as well as a train moving rapidly on a single clear track in the country. Interstate cars destined to Eighteenth street did not complete their interstate journey until they reached that point; and the dangers to the men engaged in moving those cars and to the interstate traffic itself were at least as imminent as the dangers on the "road."

These considerations, expressed more at large in *Belt Ry. Co. v. United States*, 168 Fed. 542, 93 C. C. A. 666, 22 L. R. A. (N. S.) 582, and *Wabash Ry. Co. v. United States*, 168 Fed. 1, 93 C. C. A. 393, require that the judgment be affirmed.

McKIBBON, DRISCOLL & DORSEY et al. v. HASKELL

In re HASKELL

(Circuit Court of Appeals, Eighth Circuit. September 2, 1912.)

No. 3,709.

(Syllabus by the Court.)

BANKRUPTCY (§ 409*)—GROUNDS OF REFUSAL TO DISCHARGE—FAILURE TO KEEP BOOKS OF ACCOUNT.

Every one is presumed, in the absence of countervailing proof, to intend the natural and inevitable consequences of his acts.

Where a merchant, who had conducted his business in a small town for many years, where he had kept books of account of some kind, moved with a stock of merchandise, worth about \$2,000 and a debt of about the same amount, to a city, kept no books of account after his removal, but within four months bought more than \$8,000 worth of new merchandise, sold more than \$1,300 worth thereof in bulk at 25 per cent. less than cost, and more than \$462 worth thereof in bulk at 10 per cent. less than cost, and paid with the proceeds thereof relatives and friends, from whom he had borrowed more than \$1,700, and went into bankruptcy with a stock scheduled at \$2,415.13 and debts to the amount of more than \$8,000; held, the legal presumption that the bankrupt intended, by failing to keep books, the natural effect thereof, the concealment of his financial condition, was so strongly supported by these facts as to overcome the persuasive presumption of the contrary finding of the chancellor below, and his discharge must be denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.*]

Appeal from the District Court of the United States for the Southern District of Iowa.

In the matter of the bankruptcy of Samuel Haskell. From an order granting a discharge to the bankrupt, McKibbon, Driscoll & Dorsey and others appeal. Reversed and remanded.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles F. Maxwell (N. T. Guernsey, on the brief), for appellants.
Jerry B. Sullivan (Sullivan & Sullivan, on the brief), for appellee.
Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal of creditors from an order granting a discharge to the bankrupt, Samuel Haskell. There are several specifications of error, but in our view of the case it will be necessary to consider but one, and that is that the court below found from the record that the bankrupt did not, with intent to conceal his financial condition, fail to keep books of account or records from which his financial condition might be ascertained. Haskell was a merchant engaged in retail trade in shoes, clothing, and gents' furnishing goods from 1895 until about December 14, 1906, when he was adjudged a bankrupt. He embarked in his business in Woodward, a small town in the state of Iowa, about 1895, with a capital of \$400, with which he purchased a stock of goods of the value of about \$600, and he continued in business in that town until August, 1906, when he moved to Des Moines, Iowa. In January, 1905, he took an inventory of his stock, and found that he had merchandise worth about \$5,000 and that he owed his bank \$2,000 to \$3,000. He never took an inventory thereafter. When he moved to Des Moines he paid the bank, but owed for merchandise about \$1,200, and to relatives and friends, from whom he had borrowed money, about \$1,796, in all about \$3,000, and he had a stock of merchandise worth from \$1,300 to \$3,000, and some book accounts and fixtures. In the four months between his removal to Des Moines in August, 1906, and his adjudication in bankruptcy in December of that year, he purchased new goods of the value of \$8,192.39, \$3,000 of the purchase price of which was not due when he was adjudged a bankrupt. During these four months he sold in bulk out of this merchandise, at a discount of 25 per cent. from the cost price thereof, a lot selected by the purchaser, for which the bankrupt received \$979.90, and a second lot at a discount of 10 per cent. from the cost price, from which he received \$421, he paid all the friends and relatives from whom he had borrowed money with the proceeds of these and other sales, and went into bankruptcy with a stock of merchandise which he scheduled at \$2,415.43 and debts to the amount of more than \$8,000. He kept no books of account whatever during these four months. At one time he testified that he kept none in Woodward. At another time he testified as follows;

"Q. At the time you came down here, you owed more than you were worth? You brought down here about \$3,000 worth of odds and ends? A. I had book accounts, you know; fixtures. I think I had more than I owed. Q. How much book account did you have? A. I could not tell for sure how much it was, for in moving they lost my book account. You see the way it was, when I had everything packed and put in the car, I sold my safe there and had to pack everything in a little box in the safe, and I left it with the drayman to pack. I left the books in the store, and gave the key to the drayman to pack this along with the other stuff in the store Monday morning. This was Saturday night that I sold the safe. The agent at the depot claims that he opened up the car and saw it off, but I never got the book. I was

over there looking for it twice, but I never found it. There were notes in it, and book accounts, and a few such things that belonged to me in the cash register, and book accounts we had from the old register there, that I never got. Q. What kind of books did you keep? A. It was a kind of file of bills, payment, and cash register, and there were cards inside of the leather, and the initial and the little cards I mentioned. Some had no credit. They had the charge upon it, and the party's name, and that was torn up and put on the credit, the amount, and how much the number of the ticket was, and it was put in between that card. It was put in the files and lost. Q. It was what the grocery man would call a short account system? A. Yes; and some small accounts had been running on my ledger. Q. Have you that ledger? A. My new ledger I have, but not the old one. That was one thing I had the safe for, was the ledger."

The rational, if not the unavoidable, deduction from this testimony, is that the bankrupt had and kept a ledger while he was at Woodward; that in this ledger he entered the state of many, if not all, of his accounts, for, if he had not done so, the ledger would not have been so valuable to him; that one of his reasons for owning a safe would have been to preserve this ledger; that he also had another account book, in which he kept upon cards, or upon the book itself, or upon both, statements of some if not all of his accounts. Whether or not the account books and files of accounts which he kept at Woodward correctly portrayed his financial situation may be questionable; but this evidence is conclusive to the effect that he kept at least two books of account, a ledger and an account book, before he moved to Des Moines, that he lost both of them when he left Woodward, that he never kept any books of account whatever thereafter, never entered on any account book or record any account or memorandum concerning any of his purchases of any of the \$8,-192.39 worth of new merchandise which he bought, of his sale of more than \$1,300 worth of these new goods in one lot at 25 per cent. less than their cost, of his sale of more than \$460 worth of them at 10 per cent. less than their cost, of any of his other transactions whereby he disposed of more than \$6,000 worth of goods in four months, of his payment of any of his debts to the amount of more than \$1,700 to the relatives and friends from whom he had borrowed money, or of any of his other financial transactions after he went to Des Moines.

The bankruptcy act, as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. Stat. Supp. 1907, § 1026]), directs the discharge of a bankrupt unless he has—

"(2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records, from which such condition might be ascertained."

The bankrupt failed to keep such books of account, or records, or any books of account, after he moved to Des Moines. Prior to that time he had kept books of account, a ledger and an account book. With what intent did he fail to keep books of account at Des Moines? That failure concealed his extraordinary purchase of new merchandise on credit, concealed his sales of this merchandise in bulk at less than cost and the use of its proceeds to pay his relatives and friends, concealed his financial condition even from himself, for

he testified that he did not and does not know what his condition actually was.

The act of Congress proclaims the presumption and expectation of the law that honest merchants will keep account books which will disclose their true financial condition. In the absence of prevailing evidence to the contrary, every man is presumed to intend the natural and inevitable consequence of his acts, and the evidence which has been recited so strongly supports this legal presumption that it has overcome the persuasive presumption of the finding of the court below to the contrary, and has convinced that the bankrupt in this case failed to keep account books at Des Moines with intent to conceal his financial condition. In re Hanna, 168 Fed. 238, 93 C. C. A. 452; In re Schachter (D. C.) 170 Fed. 683; In re Koelle (D. C.) 171 Fed. 257; 2 Loveland on Bankruptcy (4th Ed.) 1317, 1320.

The order granting the discharge must accordingly be reversed, and the case must be remanded to the court below, with instructions to deny the application for the discharge; and it is so ordered.

PAPER et al. v. STERN.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1912.)

No. 3,668.

(Syllabus by the Court.)

1. BANKRUPTCY (§ 159*)—PREFERENCES—STATUTORY PROVISION—"CREDITOR."

A guarantor, an indorser, an accommodation maker, or a surety, on the obligation of a bankrupt, is a creditor within the meaning of section 60b of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

The fact that the guarantor or indorser did not pay or induce the payment of the debt, but the payment was made by the bankrupt, does not except the case from the operation of the rule.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247-281; Dec. Dig. § 159.*

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

2. BANKRUPTCY (§ 176*)—PREFERENCES—"INSOLVENT."

A transfer by a bankrupt within four months of the filing of the petition does not create a voidable preference unless he is "insolvent"; that is to say, unless his property at a fair valuation is insufficient to pay his debts at the time of the transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 249; Dec. Dig. § 176.*

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

3. BANKRUPTCY (§ 166*)—PREFERENCES—CREDITORS—REASONABLE CAUSE TO BELIEVE—SUSPICION—FEAR.

Proof of knowledge or notice of facts which give a creditor, or a person to be benefited by a preference, reasonable cause to believe at the time of the transfer that it is intended to give a preference thereby, is indispensable to the establishment of a voidable preference.

Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor, or the party to be benefited, but give no reasonable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ground for him to believe that a preference is intended by the transfer, do not make such a preference voidable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the District of North Dakota.

Action by Max Stern, as trustee in bankruptcy of the estate of Dave Naftalin, against Sam Paper and another, copartners under the firm name and style of Fargo Iron & Metal Company. From a decree (183 Fed. 228) for plaintiff, defendants appeal. Affirmed.

Ball, Watson, Young & Lawrence, for appellants.

Sam T. Swansen and T. C. Richmond (Ralph W. Jackman, of counsel), for appellee.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

SANBORN, Circuit Judge. Sam Paper and Abraham Yoffey have appealed from a decree that a transfer of some of the property of the bankrupt, Dave Naftalin, to them on February 13, 1908, constituted a voidable preference under section 60b of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. Stat. 1901, p. 3445), and that the trustee recover of them the value of this property. Naftalin was adjudged a bankrupt on March 24, 1908. He had been engaged in the business of a retail merchant of clothing, gents furnishing goods, boots, and shoes at Fargo, N. D., for about four years. He had a stock of goods worth somewhere from \$5,000 to \$10,000. In March, 1907, he gave his promissory note for \$3,000, payment of which was guaranteed by the appellants to the First National Bank of Fargo, the note and guaranty were renewed for 90-day periods, and one or two small payments were made upon the debt until, on February 13, 1908, the bank held the note of Naftalin and the guaranty of the appellants for \$2,948.35, principal and interest, dated December 16, 1907, due March 16, 1908. Naftalin was, and for some months had been, unable to pay his debts as they matured, the bank had received several drafts on him which it had been compelled to return unpaid, the appellants were engaged in business in Fargo and had exchanged checks with and loaned small amounts to Naftalin from time to time, which he had repaid. The bank had notified Naftalin that its discount committee insisted that his note should be paid, and the appellant Paper knew this fact. Thereupon Naftalin sold a portion of his stock of merchandise that cost him \$4,400 to the appellants for \$3,140, the appellants borrowed of the bank on their note on February 13, 1908, \$2,950, and gave Naftalin their check for that amount in part payment for this merchandise because he told them he wanted this amount of money then to pay the bank, and Naftalin on the same day gave the bank his check

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for \$2,948.35 in payment of his note. A few days later the appellants paid Naftalin the remainder of the purchase price of the goods they bought.

The appellants specify three errors: That the court ruled that the appellants were creditors of the bankrupt at the time of the transfer; that it found that Naftalin was insolvent at that time; and that it found that the appellants had reasonable ground to believe that it was intended to give a preference by the transfer. The first specification presents a question of law; the second and third questions of fact.

[1] In 1908, section 60b provided that if a bankrupt shall have given a preference within four months preceding the filing of the petition in bankruptcy, "and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee." If Naftalin was insolvent at the time of the transfer here in issue so that he could not pay his creditors in full, it is evident that the appellants, who were guarantors of the payment of his note to the bank and who must have paid it if he did not, were the parties to be benefited by this transaction whether they were creditors or not, so that the objection here urged would not be fatal to the decree if the appellants were not creditors. The rule, however, is too well settled, and the reasons for it have been too often and too clearly stated, to warrant further discussion, that a guarantor, an indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor within the meaning of section 60b of the Bankruptcy Act. *Swarts v. Siegel*, 117 Fed. 13, 18, 54 C. C. A. 399, 404; *Kobusch v. Hand*, 156 Fed. 660, 84 C. C. A. 372; *Huttig Mfg. Co. v. Edwards*, 160 Fed. 619, 87 C. C. A. 521; 1 *Loveland on Bankruptcy*, p. 989. The argument, which has been presented with much force and acumen, that this case should be excepted from this rule because the guarantors did not pay, or induce the payment of the debt, and the bankrupt himself paid it, has been deliberately and thoughtfully considered; but it presents to our minds no sound reason for an exception to the rule, and there was, in our judgment, no error in determining the rights of the parties upon the theory that the appellants were creditors of the bankrupt and parties to be benefited by the transfer. *Goldberg v. Harlan*, 33 Ind. App. 465, 67 N. E. 707, 710.

[2, 3] The second and third specifications of error present questions of fact, the questions whether the evidence sustains the findings below that the bankrupt was insolvent, and that the appellants had reasonable cause to believe at the time the transfer was made that it was intended thereby to give a preference. The rules of law which condition these issues are: A transfer does not create a voidable preference unless the bankrupt is insolvent, that is to say, unless his property at a fair valuation is insufficient to pay his debts at the time of his transfer. Proof of knowledge of facts which give a creditor, or a person benefited by a preference,

reasonable cause to believe at the time of the transfer that it is intended to give a preference thereby, is indispensable to the establishment of a voidable preference. Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor, or party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer, do not make such a preference voidable. *Powell v. Gate City Bank*, 178 Fed. 609, 617, 102 C. C. A. 55, 63; *Grant v. National Bank*, 97 U. S. 80, 81, 24 L. Ed. 971; *In re Eggert* (D. C.) 98 Fed. 843; *Id.*, 43 C. C. A. 1, 102 Fed. 735; *In re Goodhile* (D. C.) 130 Fed. 471, 475; *Turner v. Fisher* (D. C.) 133 Fed. 594, 595; *Off v. Hakes*, 142 Fed. 364, 365, 73 C. C. A. 464, 465; *In re Pfaffinger* (D. C.) 154 Fed. 523, 525. This court has applied these rules of law to this case. With them in mind the evidence in the record before us has been carefully examined, and it has convinced that the court below made no mistake in the findings of fact which are here challenged. That evidence covers more than 190 pages of the printed record, the court below reviewed it and set forth some of the salient facts it proved, in a clear opinion, which has been published in the *Federal Reporter*, *Stern v. Paper* (D. C.) 183 Fed. 228, and a second recitation and review of this evidence would be worse than useless labor.

Suffice it to say that the decree below was right, and it must be affirmed.

UNITED STATES v. LA ROQUE.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1912.)

No. 3,698.

1. INDIANS (§ 18*)—LANDS—DEATH OF INDIAN BEFORE ALLOTMENT.

Where an Indian, whose name appeared on the rolls of the Chippewas residing on the White Earth reservation in Minnesota, made under Nelson Act Jan. 14, 1889, c. 24, 25 Stat. 642, died, not having received his allotment, there was no right to an allotment in his name, and a trust patent issued for such an allotment on an application made after his death is void.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.*]

2. INDIANS (§ 13*)—LANDS—CANCELLATION OF PATENT—SUIT BY UNITED STATES.

The United States may maintain a suit for the cancellation of a trust patent to an Indian allotment issued without authority of law.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

3. INDIANS (§ 13*)—SUIT FOR CANCELLATION OF TRUST PATENTS—LIMITATION.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), which limits the time within which the United States may bring suits to annul land patents to six years from the date of issuance, does not apply to so-called trust patents for Indian allotments, under Act Feb. 8, 1887, c. 119, 24 Stat. 388.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

4. INDIANS (§ 13*)—SUIT FOR CANCELLATION OF TRUST PATENT—RIGHT OF UNITED STATES TO MAINTAIN.

Act April 23, 1904, c. 1489, 33 Stat. 297, which authorizes the Secretary of the Interior to correct errors in or cancel Indian trust patents in certain cases at any time during the trust period, does not affect the jurisdiction of the courts to entertain a suit by the United States to cancel such a patent on any well-recognized ground.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.*]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit in equity by the United States against Henry La Roque. Decree for defendant, and complainant appeals. Reversed.

Charles C. Houpt, U. S. Atty.

R. J. Powell (J. T. Van Metre, on the brief), for appellee.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. The bill in this case was filed by the United States to set aside an Indian trust patent issued in the name of Vincent La Roque.

[1] The case was tried upon an agreed statement of facts, from which it appears that the defendant, Henry La Roque, is the father of Vincent La Roque; that his mother is dead; that both father and mother were Chippewa Indians, residing on the White Earth reservation in Minnesota; that Vincent La Roque's name appeared on the census made under the provisions of the act of January 14, 1839, known as the "Nelson Act" (25 Stat. 642, c. 24); that an application for an allotment under this act was made in his name; that he was not then alive; that after his death an allotment was made in his name, and on July 21, 1902, a trust patent was issued in his name under the provisions of section 5 of the act of February 8, 1887 (24 Stat. 388, c. 119), for the land allotted, which is a part of the White Earth reservation; and that the defendant, the father, claims to own the land described in the trust patent as the sole heir of his son Vincent. Upon final hearing a decree was entered dismissing the bill.

There is nothing in the Nelson Act to indicate that lands should be allotted to Indians who died before the allotment was made. The act of 1887 and the act of February 28, 1891 (26 Stat. 794, c. 383), provide for an allotment to each Indian "located" on the reservation. The Supreme Court in *Fairbanks v. United States*, 223 U. S. 215, 32 Sup. Ct. 292, 56 L. Ed. 409, affirming the judgment of this court in *United States v. Fairbanks*, 171 Fed. 337, 96 C. C. A. 229, held that Indians born after the Nelson Act was passed were entitled to its benefits. Speaking of the word "located" it said:

"By such amendment the classification found in the act of February 8, 1887, is entirely omitted, and the language is: 'To each Indian located thereon one-eighth of a section of land.' The conclusion that plaintiffs in error draw from that provision is that being on the reservation at the instant of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time the act was passed is a necessary condition. But such conclusion misses the meaning of the word 'located.' Of itself it has no reference to time. It has reference entirely to place and is used to designate upon what Indians the powers given by the act, when exercised, should operate—that is, 'to each Indian located' on the reservation. The act was a part of a scheme of legislation to have existence and continuity of action until its purpose should be completely fulfilled. See *Oakes v. United States*, 172 Fed. 305 [97 C. C. A. 139]."

When the powers given by this act "were exercised" with reference to Vincent La Roque he was not alive. In *Woodbury v. United States*, 170 Fed. 302, 95 C. C. A. 498, it appeared that after the passage of the act of April 28, 1904 (33 Stat. 539, c. 1786), known as the "Steenerson Act," Woodbury made an application for an allotment thereunder, but died soon after. That act declared that the President was authorized to make an allotment to each Indian *now* legally residing on the reservation. This court held that the heirs of Woodbury were not entitled to an allotment. It said:

"Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestors, in addition to their personal rights, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction."

Neither at the time the allotment was made nor at the time the trust patent was issued did Vincent La Roque or his heirs have any right to the land described therein.

This trust patent, having been issued to a person not in being, is void. *Moffat v. United States*, 112 U. S. 24, 31, 5 Sup. Ct. 10, 14 (28 L. Ed. 623). The court in that case said:

"The patents, being issued to fictitious parties, could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one."

[2] The government can maintain the suit. *Heckman v. United States* (April 1, 1912) 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, affirming the decision of this court in *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1.

[3] The defendant, however, relies on the statute of limitations contained in Act March 3, 1891, c. 561, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1521). The trust patent was issued on July 21, 1902. The bill in this case was filed on May 1, 1909. Section 8 of the act of March 3, 1891, is as follows:

"Section 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The act itself treated of a variety of subjects connected with the public lands. It repealed the timber culture and the pre-emption acts, amended the homestead law, and amended the law relating to

the sale of desert lands. There was no reference in it to Indian lands, except in section 10, which is as follows:

"That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section 5 of this act."

It is not necessary to consider the effect of this section, any further than to say that it cannot strengthen the claim of the defendant.

Does the word "patent," as used in section 8, cover such a document as was issued by the government in this case? In *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, the court, speaking of trust patents issued under the allotment act of 1887, said:

"The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of 25 years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust, and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a 'patent,' showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee."

The court referred to the enabling act of South Dakota, which, after providing that its Constitution should contain certain declarations relating to the Indians, declared that nothing therein provided should preclude the state from taxing lands held and owned by an Indian who had obtained from the United States title thereto by patent or other grant. It then said:

"The patent or grant here referred to is the final patent or grant which invests the patentee or grantee with the title in fee; that is, with absolute ownership. No such patent or grant has been issued to these Indians."

In the case of a true land patent the negotiations and dealings between the government and the patentee are at an end when the patent is issued. But in cases like the one here in question the relations between the government and the Indian are not terminated when the trust patent is issued. The United States still holds the legal title, and it does not lose its interest in the land until the expiration of the trust period. So long as this relation continues there seems to be no reason why any limitations should be placed upon its power to enforce in the courts any rights which it may have.

It should also be considered that, in the case of an ordinary land patent, no one but the government and the patentee are interested. If the patent is set aside, the government becomes again the real owner of the property. In the case of Indian lands, this is not true. Although the legal title is in the government, yet the Indians are in a way the beneficial owners of the property. It is the duty of the gov-

ernment to distribute the land among the Indians entitled thereto. If the patent in this case is set aside, the government will not become the actual owner of the land; but it will be its duty to allot it to some other Indian. Its power to perform its duty in this respect should not be limited, at least during the trust period.

It is also to be observed that by the act of April 23, 1904 (33 Stat. 297, c. 1489), presently to be mentioned, the Secretary of the Interior is given power during the whole of the trust period to cancel the trust patent under certain conditions. It would seem strange, indeed, to limit the power of the courts with reference to such patents to six years, when a similar power is given to an administrative officer for 25 years. The defense based upon this statute of limitations cannot prevail.

[4] The defendant relies also upon the act of April 23, 1904 (33 Stat. 297). That act provides as follows:

"That the act of Congress approved January twenty-sixth, eighteen hundred and ninety-five (Twenty-Eighth Statutes, six hundred and forty-one), entitled 'An act authorizing the Secretary of the Interior to correct errors where double allotments of land have erroneously been made to an Indian, to correct errors in patents, and for other purposes,' be, and the same is hereby, amended to read as follows:

"That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: And provided, that such lands shall not be open to settlement for sixty days after such cancellation: And further provided, that no conditional patent that shall have heretofore or that may hereafter be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress."

The act which it amended (Act Jan. 26, 1895, c. 50, 28 Stat. 641), is as follows:

"That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been erroneously and wrongfully issued, whenever in his opinion the same ought to be canceled for error in the issue thereof, or for the best interests of the Indian, and, if possession of the original patent cannot be obtained, such cancellation shall be effective if made upon the records of the General Land Office and no proclamation shall be necessary to open the lands so allotted to settlement."

A comparison of these laws shows that the former was intended to limit the power of the Secretary to cases specifically mentioned therein, and not to allow him to cancel any trust patent whenever he thought it ought to be canceled for the best interests of the Indian, a power which perhaps was given to him by the act of 1895.

Neither act deals in any way with the power of the courts. It cannot be assumed that Congress intended to give to the Secretary power to cancel a trust patent for certain reasons at any time within 25 years, and at the same time to take away from the courts the power to entertain a suit by the government to cancel a patent on any of the grounds then well recognized as being sufficient to move the courts to action. If the contention of the defendant be sustained then the government cannot maintain an action to set aside a trust patent for fraud. Under the act of 1904 the Secretary has no power to set aside such patent. The only remedy in such a case therefore would be an appeal to Congress. This result never could have been intended.

The decree of the court below is reversed, and the case remanded, with instructions to enter a decree as prayed for in the bill, with the exception, however, that the decree shall provide that the government holds the land in the same way in which it held it before the patent was issued.

SMITH, Circuit Judge, concurs in the result.

FIREBALL GAS TANK & ILLUMINATING CO. et al. v. COMMERCIAL ACETYLENE CO. et al.†

(Circuit Court of Appeals, Eighth Circuit. September 2, 1912.)

No. 3,745.

(Syllabus by the Court.)

- 1. INJUNCTION (§ 135*)—APPEAL AND ERROR (§ 954*)—INTERLOCUTORY INJUNCTIONS—DISCRETION OF TRIAL COURT—CLEAR PROOF OF ABUSE OF DISCRETION REQUISITE TO DISSOLVE.**

Granting or refusing a temporary injunction is intrusted to the discretion of the court of original jurisdiction, not to the discretion of the appellate court.

In the absence of a violation of the rules and principles of equity established for the guidance of the court of original jurisdiction, the action of that court in granting or refusing such an injunction must be sustained, unless there is clear proof of abuse of its discretion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135;* Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 954.*]

- 2. PATENTS (§ 297*)—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.**

When there has been a prior adjudication sustaining a patent and the infringement thereof, in the same or in another circuit, where its validity was contested on full proofs, a Circuit Court should, on motion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 19, 1912.

for preliminary injunction, sustain the patent and leave the determination of its validity until after the final hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

3. PATENTS (§ 324*)—APPEAL AND ERROR—PRELIMINARY INJUNCTION—DISPUTED ISSUES OF FACT RESERVED UNTIL FINAL HEARING.

Where questions of fact and of mixed law and fact are presented to the appellate court on an appeal from the court below which has issued an injunction upon a prior adjudication of the validity and infringement of the patent, this court will not consider and determine these questions, but will reserve their decision until after the final hearing upon the issues they present below. The facts recited upon which this ruling is founded.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

Appeal from the District Court of the United States for the Eastern District of Missouri.

Bill by the Commercial Acetylene Company and others against the Fireball Gas Tank & Illuminating Company and others. Decree for complainants, and defendants appeal. Affirmed.

Hugh K. Wagner, of St. Louis, Mo., for appellants.

Keyes Winter and John P. Bartlett (Clarence Winter and John H. Holliday, on the brief), for appellees.

Before SANBORN and HOOK, Circuit Judges, and WIL-LARD, District Judge.

SANBORN, Circuit Judge. This is an appeal from an order which granted an interlocutory injunction against the infringement by the defendant below of claims 1, 2, and 5 of letters patent No. 664,383, issued to Claude & Hess on December 25, 1900, for a combination of elements which constituted an apparatus for storing and distributing acetylene gas. The thing sought by the inventors was an apparatus by means of which acetylene gas, which in its normal state is inflammable and explosive, could be safely inclosed, stored, and, if desired, transported in a reservoir or tank to the place where it was to be used and there slowly discharged through many hours, to produce light and heat. To attain this end, Claude & Hess placed in a steel tank or closed reservoir, provided with an inlet through which it could be charged and an outlet through which it could be discharged, and with suitable valves in these openings to open and close them, a liquid solvent, such as acetone or alcohol and acetylene gas forced into this liquid in the reservoir and confined there under a pressure of about 12 atmospheres. Under these circumstances, acetone absorbed 300 times its volume of acetylene gas, and while acetone and acetylene gas were both normally inflammable and explosive, the supersaturated solution produced and stored in the way described in the specification of this patent was neither inflammable nor explosive and could be safely and conveniently stored, transported in, and used from the reservoirs. The apparatus immediately went into general use.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suitable tanks containing such a supersaturated solution for the purpose of furnishing light for automobiles were manufactured and used, and when the gas was exhausted from them they were charged and used again and again as often as desired. The complainants are corporations which have succeeded to the rights of Claude & Hess. Under their patent they have been manufacturing and selling an apparatus of this character for the purpose of furnishing light for automobiles, which is called the "Prest-o-lite" tank. The defendants were manufacturing and selling such an apparatus called the "Fireball" tank, which is claimed to be an infringement of the patent in suit.

In their specification for this patent Claude & Hess wrote:

"The apparatus is to be charged or prepared at a central station or distributing point and shipped or transported to the intended place of use as a complete article or package adapted to be placed in communication with the burners or pipes of a building, room or space to be lighted. * * * Contained within the reservoir is a fluid, such as alcohol or acetone, capable of dissolving acetylene gas. * * * In order that the gas delivered from the receptacle may pass into the pipes to the burner under a substantially uniform pressure (the pressure of the gas within the reservoir of course decreasing as the gas passes out therefrom), a reducing valve *d*, of any suitable or usual construction, is interposed between the interior of the receptacle and the outlet *e* therefrom. * * * It is not intended to limit the invention to the specific construction herein shown, since modifications may obviously be made."

The first claim of the patent is:

"1. A closed vessel containing a supersaturated solution of acetylene produced by forcing acetylene into a solvent under pressure, said vessel having an outlet for the acetylene gas, which escapes from the solvent when the pressure is released or reduced, and means for controlling said outlet, whereby gas may escape therethrough at substantially uniform pressure, substantially as described."

The second claim secures "a prepared package consisting of * * * a reducing valve" and the other elements of the apparatus, and the fifth claim secures, "as a new article of manufacture, a gas package comprising" acetone as the liquid solvent, the reducing valve, and the other elements of the combination.

An order to show cause why the preliminary injunction should not issue was made on October 16, 1911. It was followed by an answer, affidavits, counter affidavits, patents, and publications, which fill more than 500 printed pages of the record before us. The application for the injunction was argued and submitted to the court on these voluminous proofs upon November 15, 1911, and on January 22, 1912, the order for the injunction was made.

[1] The granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the equitable rules and principles established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it has abused its discretion. An appeal from such an order does not invoke the judicial discretion of the appellate court. The question is not whether or not the appellate court would

have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the granting or refusing of such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? *Massie v. Buck*, 128 Fed. 27, 31, 62 C. C. A. 535, 539; *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 330, 107 C. C. A. 403; *High on Injunctions* (4th Ed.) § 1696; *Higginson v. Chicago, B. & Q. R. R. Co.*, 102 Fed. 197, 199, 42 C. C. A. 254, 256; *Interurban Ry. & Terminal Co. v. Westinghouse E. & Mfg. Co.*, 186 Fed. 166, 170, 108 C. C. A. 298, 302; *Kerr v. City of New Orleans*, 61 C. C. A. 450, 454, 126 Fed. 920, 924; *Thompson v. Nelson*, 18 C. C. A. 137, 138, 71 Fed. 339, 340; *Société Anonyme Du Filtre Chamberland Sys. Pasteur v. Allen*, 33 C. C. A. 282, 285, 90 Fed. 815, 818; *Murray v. Bender*, 48 C. C. A. 555, 559, 109 Fed. 585, 589; *U. S. Gramophone Co. v. Seaman*, 51 C. C. A. 419, 423, 113 Fed. 745, 749.

At the close of his brief in this case counsel for the defendants below summarizes his contentions into seven reasons why this question should be answered in the affirmative. Four of them are that the prior state of the art discloses the fact that the patent is void for lack of novelty and that it expired with the expiration of certain foreign patents which he claims were for the same apparatus as that secured by the domestic patent, and three of them are that the defendants escape infringement, although their apparatus is literally described by the first claim of the patent to Claude & Hess, because they use a needle valve in the outlet of their tank in place of the specific reducing valve described in the specification of Claude & Hess, because they use terpineol as the liquid solvent instead of the acetone used by the complainants, and because the outlet of their tank is not located above the level of the liquid solvent where the specification of Claude & Hess places theirs.

[2] It is an incontrovertible rule of equity jurisprudence that where there has been a prior adjudication sustaining a patent and an infringement thereof in the same or another circuit, where the validity of the patent has been contested on full proofs, the Circuit Court should, upon a motion for a preliminary injunction, sustain the patent and leave the question of its validity to be determined upon the final hearing. *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 312, 29 Sup. Ct. 495, 53 L. Ed. 805; *Interurban Ry. & Terminal Co. v. Westinghouse E. & Mfg. Co.*, 186 Fed. 166, 170, 108 C. C. A. 298.

On January 22, 1912, when the court below made the order for the injunction, the validity of this patent had been contested on full proofs, had been sustained on final hearing and its infringement by the use of a tank in which a needle valve had been substituted for the reducing valve described in the specification of Claude & Hess had been adjudged on January 13, 1909. *Commercial Acetylene Co. v. Avery Portable L. Co.* (C. C.) 166 Fed. 907, 910-912, 913-915. Counsel argues that the fact which appears in

this case, but was not proved in that case, that Claude & Hess knew in June, 1897, that Berthelot & Vielle had discovered "that the dissolution of acetylene in acetone under a pressure which is not very much over 10 atmospheres cannot explode, that only is explosive the space above the liquid which is filled with acetylene gas" takes this case out of this rule. It is, however, claimed by the complainants that the discovery here mentioned was not the invention secured by this patent, but that that invention was the combination of the tank, the liquid solvent in the tank, the acetylene forced into and secured in the tank, and the inlet and outlet so made and provided with valves that the tank could be conveniently charged, that the charged package could be safely and conveniently transported, and that the acetylene therein could be discharged with a low and uniform pressure wherever desired. Counsel made other less important claims of new evidence of the prior art. But in view of the prior adjudication it cannot be held that it was any abuse of discretion in the court below to reserve the final decision of these claims until the hearing of the case upon the merits.

The claim of counsel for the defendants that the patent had expired was based on the British patent to Claude & Hess No. 29,750, issued June 30, 1896, which expired June 30, 1910, and upon the German patent to Claude & Hess, issued August 27, 1896, which expired August 27, 1911, and upon the provision of section 4887 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 3382, that every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time as the foreign patent. The defendants claimed, as other defendants had claimed before, that these foreign patents were for the apparatus secured by the domestic patent in suit, and hence that they limited its life, while the complainants insisted that they were patents for the process used by Claude & Hess and not for their combination or apparatus and that they did not affect the domestic patent for the latter. The Supreme Court had decided that:

"A process and an apparatus by which it is performed, are distinct things. They may be found in one patent; they may be made the subject of different patents. So may other dependent and related inventions. If patented separately, a foreign patent for either would not affect the other." *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 318, 29 Sup. Ct. 495, 53 L. Ed. 805.

The Circuit Court of Appeals of the Sixth Circuit had cited and followed that decision in *Acme Acetylene Appliance Co. v. Commercial Acetylene Co.*, 192 Fed. 321, 326, 112 C. C. A. 573, 578, and in *Century Electric Co. v. Westinghouse Electric & Mfg. Co.*, 191 Fed. 350, 359, 360, 112 C. C. A. 8, 17, 18, this court had held that a patent for a process which described the machine and a patent for the only known machine by which the process could be practiced, which described the process, were patents for separate inventions and neither was affected by the other. The terms of the British patent lent themselves more strongly than those of

the German patent to the argument that it was for an apparatus, and on April 25, 1911, Circuit Judge Kohlsaas, on an application for a preliminary injunction, so held, a conclusion to which he has adhered on the final decision of that case in an opinion handed down on June 26, 1912, six months after the court below made its order. *Commercial Acetylene Co. v. Searchlight Gas Co.* (C. C.) 188 Fed. 85. But Judge Denison, on April 26, 1911, had filed an opinion in which he had reached the opposite conclusion and upon a motion for a rehearing, upon which Judge Kohlsaas's opinion was urged upon his attention, he considered it and declared that notwithstanding he was satisfied that his own opinion was correct. *Commercial Acetylene Co. v. Acme Acetylene Appliance Co.* (C. C.) 188 Fed. 89, 91. An appeal had been taken from the order of Judge Denison to the Circuit Court of Appeals of the Sixth Circuit. The opinions of Judge Kohlsaas and Judge Denison had been urged in support of the respective contentions of the parties in that court, and on December 5, 1911, it had delivered a considered and unanimous opinion that the British patent was for a process and not for an apparatus, that it was not for the same invention as the patent in suit, and that it did not limit its terms. *Acme Acetylene Appliance Co. v. Commercial Acetylene Co.*, 192 Fed. 321, 326, 112 C. C. A. 573, 578. Such was the state of the adjudications upon this subject when the court below was required to determine whether or not it would refuse an injunction because the domestic patent had expired. There had been, it is true, no adjudication of the character of the German patent; but its terms are much less favorable to the contention that it is a patent for an apparatus than are those of the British patent. The specification mentions the "present process" five times, describes it, describes two apparatus, gives figures of them, and closes with these words:

"Indeed, the apparatus described above and shown in figures 1 and 2, are only given by way of example for explaining the process and the latter is independent of the described constructional forms."

The German patent has but one claim, and that reads in this way:

"The employment of liquids charged with acetylene under pressure for the purpose of utilizing acetylene for illumination, motive power, heating and the like, characterized by the acetylene being absorbed under pressure by a suitable liquid saturated with acetylene being preserved or contained in suitable vessels from which the acetylene gas can be supplied for use, a pressure regulator being preferably interposed."

It is the claims of a patent, not the narratives or descriptions in the specifications, that portray, define, and limit the invention that is patented. *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 315, 29 Sup. Ct. 495, 53 L. Ed. 805; *Railroad Company v. Mellon*, 104 U. S. 112, 118, 26 L. Ed. 639; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 279, 24 L. Ed. 344. The court below was favored with the affidavits of experts and the arguments of counsel relative to the nature of the invention patented by the German patent, relative to the state of the prior art,

relative to the validity and expiration of the patent in suit and relative to its infringement by the defendants. In *Victor Talking Machine Co. v. Talk-O-Phone Co.* (C. C.) 146 Fed. 534, claims 5 and 35, of Berliner patent, No. 534,543, had been sustained and adjudged infringed in 140 Fed. 860. In that subsequent suit against another defendant an application for a preliminary injunction was made, and over 500 pages of affidavits and briefs were presented to the Circuit Court upon the hearing of the application. Twelve defenses, claimed to consist of new matter not before the court on the former hearing, or to relate to matters which were not then discussed or considered, were presented. Some of these defenses consisted of new matter discovered in the prior art, some were that the patent had expired because prior foreign patents for the same invention had expired, some were that the defendant had not infringed and that the complainant was guilty of laches. The Circuit Court considered some of these defenses, deferred consideration of laches, noninfringement, and some others, expressed the opinion that no new matter had been introduced which would in his judgment have led the court which made the prior adjudication to reach a different conclusion from that which it had announced, and added:

"But, even if I am mistaken in this view, and if the expiration of the Sues Canadian patent is a complete defense, or if a decision of the questions raised as to the character and scope of the various patents, now introduced for the first time, should be postponed until final hearing, yet I am constrained to grant the injunction in order to permit an appeal and a determination of the questions at the earliest possible moment."

Thereupon the court ordered the issue of the interlocutory injunction. An appeal from this order was taken, and it was affirmed by the Circuit Court of Appeals of the Second Circuit in open court without an opinion. *Victor Talking Machine Co. v. Leeds & Catlin Co.*, 148 Fed. 1022, 79 C. C. A. 536. The case was then taken to the Supreme Court by writ of certiorari. In its opinion that court noticed the fact that the Circuit Court had not passed upon the question of infringement, set forth the quotation from its opinion made above, recited that the lower courts had also reserved, until the hearing on the merits, the consideration of the defense that the claims in suit were void because they were for functions of machines and not for the machines themselves, and then said:

"In passing on the foreign patents the Circuit Court considered that the prior adjudications fortified the presumption of the validity of the patent in suit, and established its scope, and that the new matter introduced did not repel the presumption, or limit the extent of the patent. That the lower courts properly regarded the prior adjudication as a ground of preliminary injunction is established by the cases cited in *Walker on Patents*, § 655 et seq. See, also, *Robinson on Patents*, § 177 et seq. And in that aspect the question must be considered, and so considering it we may pass the defenses of anticipation, whether complete or partial, and the defense of infringement." *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 311, 312, 29 Sup. Ct. 495, 53 L. Ed. 805.

Passing then the defenses of anticipation and infringement in the case in hand, as we well may under the decisions of the Su-

preme Court and the Circuit Court of Appeals of the Sixth Circuit in the Leeds & Catlin Case, and under the other decisions which have been cited to the same effect, and bearing in mind the facts that on January 22, 1912, the validity of the patent and its scope, that it was not anticipated in the prior art and that the use of a needle valve in place of the specific reducing valve described in the patent did not avoid infringement, had been adjudicated in the year 1909, after full and final hearing, that two chancellors had reached opposite conclusions on the question whether or not the apparatus secured by the domestic patent had been patented by the British patent, that the Circuit Court of Appeals of the Sixth Circuit, after a consideration of the opinions of both these judges, had delivered an unanimous opinion that it was not so patented, that the terms and claim of the German patent were more favorable to a like decision regarding that patent than were those of the British patent, there is no rational or logical escape from the conclusion that the evidence in this record falls far short of clearly or preponderantly showing that the court below was guilty of an abuse of discretion in its issue of the interlocutory injunction.

The claim of the defendants in this case that they do not infringe because they use terpineol instead of acetone, which claim is conditioned by conflicting testimony and by the counterclaim that the patent is not limited to the use of acetone or alcohol, and that they do not infringe because they place the outlet of their tank below the level of the liquid solvent, a claim that is conditioned by explanatory evidence, the claim that the patent is void because an amendment to the specification was not accompanied with the oath required by rule 48 of the Patent Office when the theory of an invention and the mode of applying it is first introduced by the amendment (*Steward v. American Lava Co.*, 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139), which is met by the claim that the amendment in question had no such effect, the claim that some of the affidavits were not competent, and the other claims of the defendants in this case, have been considered before reaching this conclusion, although some of them have not been discussed in this opinion. But what has been already said is equally applicable to each of these, and there is nothing in this case to sustain the theory that the court below abused its discretion in the issue of the injunction.

[3] Counsel for the defendants invites the court to consider and determine the equities of this entire case and to dismiss the bill, as did the Supreme Court in *Mast Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 495, 20 Sup. Ct. 708, 44 L. Ed. 856. But the suit in hand is more analogous to the Leeds & Catlin Case, 213 U. S. 311, 29 Sup. Ct. 495, 53 L. Ed. 805, in which the Supreme Court denied a like prayer with the remark:

"If we should yield to this invocation and attempt a final decision, it would be difficult to say whether it would be more unjust to petitioner or to respondent."

The decisions of many of the questions the defendants present must be determined by the consideration of conflicting testimony, many of the questions they raise are questions of mixed law and fact, the just determination of which may be much aided by the testimony of witnesses, the interests involved here are large, and, in the condition of the litigation concerning this patent, the ends of justice would be better and more certainly attained by reserving, and we do hereby reserve, our opinion upon all the questions it presents, except the question of the abuse by the court below of its discretion in the issue of the injunction, until the affidavit stage of this proceeding shall have been passed, until the rights of these parties shall have been tested by the production, hearing and cross-examination of their witnesses according to the salutary and searching practice of the common law, and until the court below, at the final hearing, has investigated and decided the issues these parties raise in the light of that testimony and of the argument of counsel. The order for the injunction must accordingly be affirmed, and it is so ordered.

HOOK, Circuit Judge. This case is exceptionally circumstanced. I concur in the result for the reasons mentioned in the last paragraph of the opinion.

BEIFELD v. DODGE PUB. CO.

(Circuit Court, S. D. New York. December 28, 1911.)

1. COPYRIGHTS (§ 67*)—INFRINGEMENT—COPY FROM SKETCH.

An artist contracted to paint and copyright a picture for complainant, and having done so defendant without complainant's permission printed substantial copies of the painting claimed to be from copies of a sketch made by the artist before completing the painting and given to defendant's vendor. The only differences between the sketch and the finished painting were in the treatment of certain minor details. *Held*, that since any one, by making slight alterations in the copyrighted painting, could not obtain another copyright or publish it free of the original copyright, and the artist could not publish the sketch free of the copyright of the painting for the same reason, defendant's publication constituted an infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 64; Dec. Dig. § 67.*]

2. WITNESSES (§ 295*)—COMMUNICATIONS BETWEEN THIRD PERSONS.

In a suit for infringement of a copyright on a painting sold to complainant and copyrighted in his name, correspondence between the artist and the C. Co. as to the publication of a sketch of the picture from which defendant's copies were printed, produced under a subpoena duces tecum, was inadmissible as relating to transactions between third persons which might expose the publisher to penalties.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1018-1020; Dec. Dig. § 295.*]

In Equity. Suit by Joseph Beifeld against the Dodge Publishing Company. On motion for preliminary injunction. Granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prior to November, 1910, Maxfield Parrish made a contract with complainant to paint for complainant a picture entitled, "Sing a Song of Sixpence," to be placed in the barroom of the Hotel Sherman in Chicago. The contract provided that Parrish should make the picture, and sell the picture and the copyright to the complainant. This was done, and in November, 1910, copyright of the picture was procured by Parrish in the name of complainant. Subsequently defendant published, without permission from complainant, pictures which were substantial copies of the complainant's painting, and a suit for infringement of copyright was brought, and on motion for preliminary injunction the defendant asserted that the pictures published by it were not copies of the painting, but were copies of a sketch for the painting, completed by Parrish before the completion of the painting.

Fixman, Lewis & Seligberg (Walter N. Seligsberg, of counsel), for the motion

Jacob B. Burnet (Norman B. Beecher, of counsel), opposed.

WARD, Circuit Judge. [1] This is a motion for a preliminary injunction enjoining the defendant from infringing the complainant's copyright taken out November 17, 1910, for a painting called "Sing a Song of Sixpence" purchased by him from the artist, Maxfield Parrish, with all rights to copyright the same. The defendant is publishing a sketch or study of the painting which it purchased March 11, 1911, of one Purves, to whom the artist had given it after the copyright of the painting. It is contended that the sketch and the painting are different and independent productions, but I do not think so. The subject is the same, the number, position, and sex of the figures are the same, and the differences are only as to the treatment of certain minor details. Ordinary inspection would give the distinct impression that both pictures were the same.

Assuming, as the defendant contends, that the sketch was made before the painting, still it is in my opinion covered by the copyright of the painting. It will hardly be pretended that any one by making slight alterations in the copyrighted painting could get another copyright or publish it free of the original copyright. Neither could the artist copyright or publish the sketch free of the copyright of the painting for the same reason, namely, that both pictures are the same.

[2] The correspondence between the artist and the Century Company as to the publication of the sketch in the Century Magazine of February, 1911, produced under a subpoena duces tecum, the admissibility of which was to be determined by the judge calling the motion calendar, is excluded, and returned to the Century Company. It relates to transactions between third parties, may expose the publisher to penalties, and as admissions of the artist is not competent against the defendant.

Motion granted.

MCALLISTER v. CHESAPEAKE & O. RY. CO. et al.

(District Court, E. D. Kentucky. May 27, 1912.)

1. REMOVAL OF CAUSES (§ 36*)—JOINDER OF RESIDENT DEFENDANT—PLEADING.

In an action in a state court by a citizen of the state against a nonresident lessee railroad company and its resident lessor to recover for the death of plaintiff's intestate who was struck and killed by a train operated by the lessee, if the petition does not state a cause of action against the lessee, it cannot against the lessor, which will prevent the removal of the cause by its codefendant, since the lessor's liability can only follow the primary liability of the lessee.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

2. REMOVAL OF CAUSES (49*)—JOINT LIABILITY OF DEFENDANTS—LAW GOVERNING.

When a suit is brought in a state court by a resident against two defendants, one a nonresident and the other a resident, in determining whether there is a joint liability on the part of the defendants which will prevent a removal by the nonresident defendant, the law of the state where the suit is brought governs.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49.*]

3. RAILROADS (§ 259*)—LEASES—LIABILITIES OF LESSOR FOR TORTS.

Under the law of Kentucky as settled by decision, the owner of a railroad operated by another company under a valid lease is liable for an injury to a third person if the cause of injury was the omission of a duty owed to the public generally and imposed by its charter, but not if it was the omission of a duty owed the person injured by the lessee growing out of the particular relations between them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 414, 415, 802-816; Dec. Dig. § 259.*]

4. RAILROADS (§ 259*)—LEASES—LIABILITY OF LESSOR FOR TORTS.

Under the law of Kentucky, a lessor railroad company is not liable for the injury of a trespasser on the track through the negligence of employes of its lessee in operating a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 414, 415, 802-816; Dec. Dig. § 259.*]

5. REMOVAL OF CAUSES (§ 36*)—JOINT ACTION FOR TORT—REMOVAL BY ONE DEFENDANT.

Under the decisions of the Court of Appeals of Kentucky, as well as the federal decisions, an action for tort brought in a state court by a citizen of the state against two defendants, one a citizen of the state and the other a nonresident, is removable by the nonresident defendant where the petition fails to state a cause of action against the resident defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

At Law. Action by Miriam McAllister, administratrix of A. J. McAllister, deceased, against the Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company. On motion to set aside order overruling motion to remand to state court. Overruled.

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

Allen D. Cole, of Maysville, Ky., and Wm. T. Cole, of Greenup, Ky., for plaintiff.

Worthington, Cochran & Browning, of Maysville, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on motion to reconsider motion to remand, heretofore overruled. The grounds of my action, in overruling motion to remand, may be found in the opinion delivered by me on application for a preliminary injunction in a suit in equity between the parties hereto, in which the defendant Chesapeake & Ohio Railway Company, the nonresident and removing defendant, sought an injunction against the further prosecution of this suit in the state court after the filing therein of its petition and bond for removal, which application I sustained; my action in so doing being affirmed by the Court of Appeals for this circuit. The opinion is reported in connection with that of the appellate court. *McAlister v. Chesapeake & Ohio Ry. Co.*, 157 Fed. 740, 85 C. C. A. 316, 13 Ann. Cas. 1068.

The affirmance can hardly be said to have gone further than to approve my action in granting the preliminary injunction. The question whether the cause was removable was not necessarily involved, and the appellate court withheld any expression of opinion on that subject.

The basis of the motion to reconsider is certain decisions of the Supreme Court of the United States and of the Sixth Circuit Court of Appeals, rendered since the order overruling the motion to remand, which, it is claimed on behalf of plaintiff, established that I erred in so doing. The decisions relied on are as follows; to wit: *I. C. R. R. Co. v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208; *C., B. & O. R. R. Co. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521; *Enos v. Ky. D. & W. Co.*, 189 Fed. 342, 111 C. C. A. 74.

[1] I am led, by the earnestness with which it is claimed that the case should be remanded, to consider the matter afresh. And, at the outset, the case as presented by plaintiff's pleadings should be well understood. Her intestate was killed by being struck by a train on defendants' railroad. The resident and nonremoving defendant, Maysville & Big Sandy Railroad Company, was the owner of the railroad and the nonresident and removing defendant, Chesapeake & Ohio Railway Company, was in possession thereof and operating it under a lease from its codefendant. The lease was made pursuant to legislative authority and was valid. *McCabe's Adm'r v. M. & B. S. R. R. Co.*, 112 Ky. 861, 66 S. W. 1054. The allegation as to the place where decedent was, when struck, is that he was "at or near a public crossing." It is the same as if it had been alleged that he was not on the crossing, and was therefore a trespasser. This has been so decided by the Court of Appeals of Kentucky. In the case of *Davis, Adm'r, v. Chesapeake & Ohio Ry. Co.*, 116 Ky. 144, 75 S. W. 275, Judge Paynter said:

"The averment that she was killed 'at or near' the private crossing should be construed that she was killed at a place on the track other than the

crossing, because pleadings are to be construed most strongly against the pleader."

And again:

"But, under the rule that a pleading must be construed most strongly against the pleader, the averment that she was killed 'at or near' the crossing is equivalent to the averment that she was not killed on it, but near the crossing; hence she was a trespasser."

This being so, there was no duty on the part of the nonresident and removing defendant, the lessee, to be on the lookout for him so as to be able to give him any warning of its train's approach or to exercise any care as to him until his presence was discovered. *Chesapeake & Ohio Ry. Co. v. See* (Ky.) 79 S. W. 252; *Chesapeake & Ohio Ry. Co. v. Nipp*, 125 Ky. 49, 100 S. W. 246. The negligence charged is failure to discover his presence and to give him suitable warning of the train's approach, and excessive speed. The allegation is that the "employés saw, or by the exercise of reasonable diligence could have seen," the decedent. This was the same as if it had been alleged that decedent was not seen in time to avoid striking him. In the case of *King v. Creekmore*, 117 Ky. 172, 77 S. W. 689, Judge Paynter said:

"The amended petition supplements the original petition with the averment that the defendant knew of the defective and dangerous condition of the boiler, or by the exercise of ordinary care could have known of it at the time it was leased. It will be observed that it is not averred that defendant knew (without the alternative statement that by the exercise of ordinary care he could have known) of the defective and dangerous condition of the boiler when leased to Warren; therefore, there is no charge that he was guilty of acting in bad faith. Taking the alternative averment, in the light of the rule that a pleading must be construed strongly against the pleader, the only charge is that defendant was guilty of negligence in failing to exercise ordinary care to discover the defect in the boiler."

It follows, therefore, that plaintiff fails to state a cause of action against the nonresident and removing defendant, the lessee. And none being stated against it, none was stated against the resident and nonremoving defendant, the lessor. For if the former was not liable for the death of plaintiff's intestate, the latter certainly was not. It is only through and because of the lessee's liability that it is possible for the lessor to be liable in such a case.

[2] But for the time being, I pass this phase of the case and proceed to determine the removability of the case on the assumption that a cause of action is stated against the nonresident and removing defendant, the lessee, e. g., that it is alleged that decedent's presence was discovered in time to avoid striking him and it wantonly ran him down. In that case would the cause have been removable? This depends on two subordinate questions. One is whether it results therefrom, i. e., from such a cause of action being stated against the nonresident and removing defendant, the lessee, that one is stated against the resident and nonremoving defendant, the lessor. The other is whether if it does not so result, and there is therefore no cause of action stated against the latter, this circumstance, in and of itself, is sufficient to render the cause removable.

The determination of the first of these two questions must be in accordance with the law as laid down by the Court of Appeals of Kentucky. For it is now well settled by the Supreme Court of the United States that, when a suit is brought in a state court by a nonresident against two defendants, one a nonresident and the other a resident, between the latter of whom and the plaintiff, therefore, there is no diversity of citizenship, in determining whether there is liability on the part of the resident and nonremoving defendant and that jointly with the other defendant, which, if so, will render the cause nonremovable, the law of the state where the suit is brought governs. This was so recognized and held in the Sheegog and Willard Cases, *supra*, in each of which there was a suit against the lessee and lessor of a railroad to recover damages for a personal injury caused by the negligence of the lessee.

What we are concerned with, then, is the law of this state, as so laid down, as to the liability of a lessor of a railroad for an injury caused by the negligence of the lessee where there is a valid lease. For, as heretofore stated, such is the case we have here. Three cases have arisen and been decided by the Court of Appeals of Kentucky involving this question. They are the cases of McCabe v. M. & B. S. R. R. Co., *supra*; Swice v. M. & B. S. R. R. Co., 116 Ky. 253, 75 S. W. 278; Illinois Central R. R. Co. v. Sheegog, 126 Ky. 252, 103 S. W. 323. The first two were suits against the two defendants here. It is certain from these decisions that the lessor is not liable from the mere fact that the lessee is liable. This is so, because, though in two of these three cases, to wit, the McCabe and Sheegog Cases, it was held that the lessor was liable, in the other, to wit, the Swice Case, it was held that he was not. The thing to be ascertained from them is the line of demarcation between cases where the lessor is liable and those where he is not. In the McCabe Case plaintiff's intestate was a highway traveler and was struck by a passenger train operated by the lessee. The ground of the decision was that the duty of caring for highway travelers was imposed on the lessor by its charter, and the grant of power to lease should not be construed as including a grant of absolution from that duty in case of a lease. Judge Hobson said:

"The obligation to fence the track for the protection of stock or to receive passengers or freight or carry them safely is no more a duty of the lessor imposed upon it by its charter than its duty to avoid injury to the traveling public in the discharge of its functions, as in this case. By its acceptance of the franchises conferred by the state, the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease the property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents."

In the Swice Case the plaintiff's intestate was a servant of the lessee, in its employ at one of its coal docks, and he lost his life by its negligence in relation to an elevated platform on which he had to walk in the performance of his duties. The ground of the decision that the lessor was not liable was the absence of any such duty to-

wards the servants of the lessee as existed in the case of highway travelers.

In the McCabe Case, in referring to cases where it had been held that the lessor was not liable for injuries to the servants of the lessee by reason of the lessee's negligence, Judge Hobson said:

"Those cases rest on the idea that the duty owed to the servant by his employer grows out of the contract of service which is voluntarily entered into by the servant, and that he does not stand to it like the public."

In the Swice Case, in referring to the decision in the McCabe Case, Judge Hobson, said:

"It was there held that the lessor company continued liable to the public for the discharge of the obligation imposed on it by law."

In support of the decision reached in the Swice Case he quoted from a note to *Lee v. Southern Pacific R. R. Co.*, 58 Am. St. Rep. 140, these words:

"The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public."

The Sheegog Case was like the Swice Case in that plaintiff's intestate was a servant of the lessee and lost his life by the negligence of the latter. The negligence there, however, was a failure to provide a safe roadbed as to which a duty was owed by the lessor to the public. It was on this ground that it was held that the lessor was liable. Judge Nunn said:

"But it is said that this responsibility of the lessor does not apply to the employes of the lessee of the road; that the lessor owed no duty to them; and that they are not members of the public in the sense used in decisions on that subject. It is true that the courts in part have made this distinction, but have only extended the rule and exempted the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, but hold the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses," etc.

And again:

"It was alleged and proven that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed."

In brief, the point of decision in the Sheegog Case was that the death of plaintiff's intestate was caused by the lessor's own wrongful act, and the lessor was not held liable for the wrongful act of the lessee.

[3] It is to be gathered from these three cases that the distinction between those cases where the lessor is liable and those where it is not is this: If the cause of the injury was the omission of a public duty, i. e., of a duty owed the public generally, then the lessor

is liable; but, if not, and it was the omission simply of a duty owed the person injured growing out of the particular relation between him and the lessee, then the lessor is not liable notwithstanding he may be said to be a member of the public. In the case of *Hukill v. M. & B. S. R. R. Co.* (C. C.) 72 Fed. 745-752, Judge Taft said:

"The only cases where liability in tort is enforced against the lessor company are those where the person injured is a member of the public, with the right to rely upon the discharge of the public duties assumed by the lessor company in the operation of the road. Such persons are shippers, who have a common-law right to demand of the common carrier that he shall carry their goods safely, passengers, who have a common-law right to demand of the common carrier that they shall be carried safely to their destination, and travelers upon the highway, who have a statutory and common-law right to such a reasonable and careful operation of the road as shall not unduly injure them in their lawful rights."

These words are applicable here with this qualification, owing to the *Sheegog Case*, that, though the person injured may not be a shipper, passenger, or highway traveler, but a servant of the lessee, yet if the negligence which caused the injury was the omission of a duty owed the public generally and of which a shipper or a passenger or a highway traveler could complain, if his property or he is injured, the lessor is liable.

[4] This places us in a position to decide whether the resident and nonremoving defendant in this case, the lessor, is liable for the death of plaintiff's intestate had it been caused by the negligence of the nonresident and removing defendant, the lessee, in the operation of its freight train. He was neither a shipper, passenger, nor highway traveler. He was a trespasser. He was not where he had the right to be, as was the servant in the *Sheegog Case*. His death was not caused by the omission on such defendant's part of a public duty, i. e., of a duty owed the public generally. It was caused by the omission of a duty owed to him alone, i. e., of not wantonly running him down, after his presence on the track was discovered, which, for the sake of the argument, we are assuming to have been alleged. In this particular the case is exactly like the *Swice Case*, where the death of plaintiff's intestate was caused by the omission of a duty owed him alone by reason of his being in the lessee's employ. In each the death was caused by the omission of a duty owed the decedent alone. They differ only in the basis of such duty. In the *Swice Case* the basis was the contract relation between decedent and the lessee. Here it is the knowledge by the lessee of the decedent's peril, assumed to be alleged. In the *Sheegog Case* and cases cited therein, in support of the conclusion there reached, it was emphasized that the employé, who was injured by the defective roadbed, had a right to be where he was when injured. As for instance, in the case of *Nugent v. Boston R. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, cited in the *Sheegog Case*, it is said:

"The only materiality which attaches to the contract between the companies is to make certain that the plaintiff was lawfully and not a trespasser on the defendant's road."

In the case of *Lee v. Southern Pacific R. R. Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140, also cited therein, the court says:

"Plaintiff has pleaded and shown to the satisfaction of the jury that he was not a trespasser upon the railroad at the time and place where he met his injury, but that he was there under a lawful employment; that in pursuance of his vocation he met with an injury occasioned by defendant's defective construction of its roadbed for which injury the defendant is in law responsible."

Plaintiff's intestate when injured was not a shipper or a passenger or a highway traveler. He was not where he had any right to be, as was the servant injured in the *Sheegog Case*, and in the *Nugent Case* and in the *See Case*. It must be held, therefore, that the plaintiff's pleadings do not state a cause of action against the resident and nonremoving defendant, the lessor, even though it be assumed that it states one against the nonresident and removing defendant, the lessee. This is so because there is no liability on the former's part for the alleged negligence of the latter, and it has not itself been guilty of any negligence. In the *McCabe* and *Sheegog Cases* the lessor itself had been guilty of negligence, and this was the real ground upon which it was held liable; not that it was responsible for the lessee's negligence.

Is then this circumstance sufficient in itself to make the cause removable? In support of the position that it is may be cited the following federal decisions, to wit: *Nelson v. Hennessey* (C. C.) 33 Fed. 113; *Rivers v. Bradley* (C. C.) 53 Fed. 305; *Hukill v. M. & B. S. R. R. Co.* (C. C.) 72 Fed. 745; *Kelly v. Chicago R. R. Co.* (C. C.) 122 Fed. 290; *Bryce v. Southern Ry. Co.* (C. C.) 122 Fed. 709; *Williard v. Spartansburg R. R. Co.* (C. C.) 124 Fed. 796; *Axline v. Toledo R. R. Co.* (C. C.) 138 Fed. 169; *Chicago R. R. Co. v. Stepp* (C. C.) 151 Fed. 908; *Lockard v. St. Louis R. R. Co.* (C. C.) 167 Fed. 675; *Marach v. Columbia Box Co.* (C. C.) 179 Fed. 412; *Floyd v. Shenango Furnace Co.* (C. C.) 186 Fed. 539.

These cases are all personal injury cases. In the first, the *Nelson Case*, the two defendants sued were, respectively, the owner and the tenant of a building, which had fallen and caused the injury. Plaintiff's claim that each defendant owed the duty of caring for the safety of the building, and hence sued them together. In the last two, the *Marach* and *Floyd Cases*, the two defendants sued bore towards each other the relation of master and servant. The person injured was a servant also. The master in the one case was the operator of a box factory, the injury being caused by a defective platform; and, in the other, he was the operator of a coal mine, the injury being caused by a defective ladder. Plaintiff's claim in the *Marach Case* was that each defendant owed the duty of caring for the safety of the platform, and in the *Floyd Case* of caring for the safety of the ladder. The duty of the master relied on in each case was its nondelegable duty to provide a reasonably safe place in which to work, and that of the servant, to whom it had intrusted the performance of such duty, to inspect and to discover and report the

defect. Hence the plaintiff in each instance sued the master and servant together.

In the cases intervening between the first and last two cases, i. e., in the Rivers, Hukill, Kelly, Bryce, Williard, Axline, Stepp, and Lockard Cases, the injury was received in connection with the operation of a railroad train. In the Rivers, Kelly, Bryce, Stepp, and Lockard Cases, the two defendants sued, as in the Marach and Floytt Cases, bore towards each other the relation of master and servant, and in the Rivers Case, as in those cases also, the person injured was a servant also. He was a brakeman, and the servant sued was the engineer of the train. The injury was caused by the deafness and defective vision of the latter, i. e., by a defective engineer, and a defective car. The duties of the master whose breach was relied on were its nondelegable duties of providing competent servants and reasonably safe appliances. It is not apparent what duty on the part of the engineer, it was claimed, had been breached, unless it was not to act as such in his defective condition. But under a claim of liability on the part of both for the injury plaintiff sued both. In the Kelly and Bryce Cases the person injured was a passenger. In the Kelly Case he was injured by the explosion of the locomotive, and in the Bryce Case by the derailment of the train. The servant sued in the one case was the yardmaster, and in the other the engineer of the train. The duty of the master whose breach was relied on in each case was its duty as a common carrier to exercise the highest degree of care for the safety of its passengers. That of the yardmaster in the Kelly Case was to inspect and to discover and report the defect in the locomotive which caused the explosion, and that of the engineer in the Bryce Case to operate the train with due care for the safety of the passengers, to each of whom the performance of its duty had been intrusted by the master. There was no allegation in the Bryce Case of any specific negligence on the engineer's part; the allegation being general, i. e., that the derailment was caused by his negligence. In the Stepp and Lockard Cases the person injured was run into by the train whilst on the track, presumably in each instance a trespasser, as here. The servant sued in each instance was the engineer of the train. The duty of the master whose breach was relied on in each case was to be on the lookout for persons on the track, whether trespassers or not, prescribed by statute in the particular jurisdiction where it arose. The performance of this duty had been intrusted by the master to the engineer, but the statute prescribed no duty on the engineer personally to be on the lookout. The claim was, however, that he so owed such duty, and hence he was sued along with the master.

In the Hukill, Williard, and Axline Cases the two defendants bore towards each other the relation of lessee and lessor, the same as here; in the Hukill Case the two defendants being the two defendants here. In each case the person injured was a servant of the lessee, the same as the Swice Case, decided by the Kentucky Court of Appeals, and heretofore cited; the Hukill and Swice Cases being alike in all particulars. The duty on the part of lessee, whose breach

was relied on, was a certain one of the nondelegable duties owed by the master to the servant. Seemingly there was no claim that the lessor had breached any duty owed by it to the person injured; the claim going no farther than that the lessor was liable because the lessee was liable.

In the owner and tenant case, i. e., the Nelson Case, the owner was the nonresident and the tenant the resident defendant; in the master and servant cases, i. e., the Rivers, Kelly, Bryce, Stepp, Lockard, Marach, and Floyt Cases, the master was the nonresident and the servant the resident defendant; and in the lessee and lessor cases, i. e., the Hukill, Williard, and Axline Cases, the lessee was the nonresident and the lessor the resident defendant. In each of the entire eleven cases the removal was at the instance of the nonresident defendant; and the question which each presented was whether the presence of the resident defendant as a party affected the removability of the cause.

In the owner and tenant case, i. e., the Nelson Case; in the first of the master and servant cases, i. e., the Rivers Case; and in each of the lessee cases, i. e., the Hukill, Williard, and Axline Cases—the resident and nonremoving defendant had no connection whatever with the negligence charged against the nonresident and removing defendant and upon which the claim of liability on its part was based. It was through no act or omission of the one that the other can be said to have been negligent and hence liable. In the lessee and lessor cases, i. e., the Hukill, Williard, and Axline Cases, it was the other way. The resident and nonremoving defendant, the lessor, was claimed to be liable because of the negligence of the nonresident and removing defendant, the lessee. In the owner and tenant case, i. e., the Nelson Case, and in the first of the master and servant cases, i. e., the Rivers Case, neither defendant was chargeable or claimed to be chargeable with the other's negligence.

In all of the master and servant cases, except the Rivers Case, i. e., in the Kelly, Bryce, Stepp, Lockard, Marach, and Floyt Cases, the master, the nonresident and removing defendant, had intrusted to the servant, the resident and nonremoving defendant, the performance of the duty which it owed the person injured, i. e., the passengers in the Kelly and Bryce Cases, the trespassers in the Stepp and Lockard Cases, and the coservants in the Marach and Floyt Cases, and whose breach was relied on as making it liable, and it was through his failure to perform same that the claim of its breach arose. The servant sued, however, in thus bringing about liability on the part of the master, was, as held therein, himself guilty of no breach of duty owed by him to the person injured. This possibly was an error in the Bryce Case. In all of these six master and servant cases, except that case, the duty of the servant sued was that of discovery, and this duty, it was held, he owed, not to the person injured, but to the master. In the Bryce Case it would seem that the servant sued owed the person injured, to wit, the passenger, the duty of operating the train with due regard to his safety.

In none of these eleven cases, then, had the resident and nonre-

moving defendant, except, possibly, in the Bryce Case, been guilty of a breach of any duty owed by him to the person injured. In the master and servant cases, except the Rivers Case, however, he was guilty of a breach of duty; but, except, possibly, in the Bryce Case, it was a duty owed to the nonresident and removing defendant, the master, and not to the person injured. In no one of these cases, therefore, was a cause of action stated against such defendant, except, possibly, in the Bryce Case; the only ground for holding that none was stated therein being that no particular negligence was specified. And this circumstance that no cause of action was so stated was in and of itself held to be sufficient to render the cause removable.

It has likewise been so held by the Court of Appeals of Kentucky in a number of decisions, to wit: *C. & T. P. Ry. Co. v. Robertson*, 115 Ky. 858, 74 S. W. 1061; *Davis v. C. & O. R. R. Co.*, *supra*; *Swice v. M. & B. S. R. R. Co.*, *supra*; *Slaughter v. Nashville R. R. Co. (Ky.)* 91 S. W. 744. And it is the well-settled practice in this state, as sanctioned by numerous decisions of that court, that, though a cause of action may be stated against the resident and nonremoving defendant, yet if on the trial before the jury the plaintiff fails to present sufficient evidence to justify submitting the question to the jury, the trial should cease at once and the case be removed to the federal court. The earliest case where this practice was approved is that of *Illinois Central R. Co. v. Coley*, 121 Ky. 385, 89 S. W. 234, 1 L. R. A. (N. S.) 370. To the same effect are the cases of *Dudley v. Illinois Central R. R. Co.*, 127 Ky. 221, 96 S. W. 835, 13 L. R. A. (N. S.) 1186, 128 Am. St. Rep. 335; *Underwood, Adm'r, v. Ill. Cent. R. R. Co. (Ky.)* 103 S. W. 322; *Haynes' Adm'r v. C. & T. P. R. R. Co.*, 145 Ky. 209, 140 S. W. 176.

[5] I will not analyze any of these Kentucky decisions, as I have done with regard to the federal decisions cited; but there can be no question that the law as settled by the Court of Appeals of Kentucky is that the fact that the plaintiff's petition fails to state a cause of action against the resident and nonremoving defendant, in and of itself, without more, renders the cause removable.

The why of this position has not been much discussed. No reference thereto whatever is made in the decisions of the Kentucky Court of Appeals. They simply take it for granted that this is so. In the *Nelson Case* the position is placed on the ground that the resident and nonremoving defendant is a merely nominal party. Judge Brewer said:

"It is claimed that this is an action for a joint tort, and therefore, unless both defendants have a right of removal, this court cannot take jurisdiction, and the case must be remanded. This is undoubtedly true if the complaint discloses a joint tort. But it is also true that, where there has been a tort committed by one party, the plaintiff cannot join another and merely nominal party as defendant so as to prevent a removal to which the real defendant is entitled."

Then, as to the tenant's liability and the result of his nonliability, he said:

"Clearly so far as disclosed he was under no responsibility for the injury. He was therefore improperly joined. The only real party is the owner of

the building, and, as he is a citizen of another state, he is entitled to a removal to this court."

This idea was accepted in the Rivers, Bryce, Williard, and Axline Cases.

In the Bryce Case Judge Simonton said:

"It appears from these authorities that no actionable charge of negligence has been made against these two defendants, the conductor and engineer. No cause of action has been stated against them. This being so, the only controversy in the complaint is that of the railway company, and the insertion of the names of these two defendants in the complaint cannot prevent the removal of the cause into this court."

And in the Williard Case the same learned judge said:

"It is clear from all that has been said that the Spartanburg Union & Columbia Railroad Company has no interest whatever in the issue in this case, that it is neither a necessary nor a proper party. This being so, the Southern Railway Company, the only other defendant, being the only party against whom a cause of action is stated and a citizen of the state of Virginia, had the right to remove the cause into this court. * * * It is unnecessary to consider whether the Spartanburg Union & Columbia Railroad Company is a sham party, or that its name was inserted to defeat the jurisdiction of this court—a proposition the court will not willingly entertain and would be loath to believe."

In the Lockard Case Judge Rogers placed it on the ground of separable controversy. He said:

"It follows that there is no cause of action stated against the engineer in any aspect of the complaint. The real cause of action in this suit is one against the railroad company only, in which Daniels is made a party without any semblance of liability, joint or otherwise. It matters not, therefore, whether the intent of the pleader was to make Daniels a party to defeat the jurisdiction of the court or not, since in any event, without reference to the purpose, the complaint states no cause of action, as stated, against him, and, no cause of action being stated against him, the railroad company had the right to remove the cause against it to this court. In other words, the cause of action is made separable because there is no cause of action stated against Daniels."

In *Floyd v. Shenango Furnace Co.*, Judge Amidon placed it on the ground that the joinder of the resident and nonremoving defendant was fraudulent. After referring to the point decided in the case of *Wecker v. National Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757, a case of fraudulent joinder, due to the allegation of a fact known to be untrue, for the purpose of stating a cause of action against the resident and nonremoving defendant on the face of the petition and thus preventing a removal, he said:

"If a showing by affidavit that the plaintiff has no cause of action as against the employé will sustain a removal by the other defendant, surely that result ought to follow when the complaint on its face makes the same disclosure. There can be no higher evidence that the joinder is fraudulent than the fact that on the face of the complaint, under well-established principles of law, no cause of action is stated against the employé."

According to this the basis of the position in question is that there has been a fraudulent joinder, and seemingly every case of a failure to allege a cause of action against such defendant is a

case of fraudulent joinder. This is hardly consistent with the earlier decision of the same court held by a different judge in the case of *Jacobson v. Chicago R. R. Co.* (C. C.) 176 Fed. 1004. That was a personal injury case also. The two defendants sued bore towards each other the relation of master and servant, and the person injured was a servant also. The master was the operator of a railroad, and the injured servant a coal shoveler at a certain station on the line. The injury was caused by a defective platform on which he was at work. The duty of the master, whose breach was relied on, was its nondelegable duty of providing a reasonably safe place in which to work and that of the servant, to whom it had intrusted the performance of this duty, was to inspect and to discover and report, or possibly to repair. Hence plaintiff sued both together. The master was the nonresident and removing defendant, and the servant the resident and nonremoving defendant. The cause was removed at the instance of the former. It claimed that the duty of the resident and nonremoving defendant, the servant, was a duty owed the master and not the injured servant, that in consequence of this no cause of action was stated against such defendant, and that therefore the cause was removable. It is thus seen that the case is exactly like the later *Floyd Case*. It was held that the cause was not removable, and it was remanded to the state court. Judge Willard said:

"But it is said by the defendants that, even if the defendant Hutton was charged with the duty of inspecting this platform, the complainant states no cause of action against him, for it alleges only a duty imposed upon him in favor of his employer, the railroad company, and for a breach of that duty by a failure to inspect no cause of action arises in favor of the plaintiff. In other words, for nonfeasance an action lies only in favor of the master, and not in favor of a third person; the theory being that an employé in such cases owes no duty to such third person. This contention presents a question of law, and it must be determined, where that question should be decided, which court has the right to say whether the complaint states a cause of action or not?"

Referring to the case of *Alabama Southern Ry. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, which was a case where a cause of action was stated against the resident and nonremoving defendant, as well as the nonresident and removing defendant, and the sole question was whether the two were jointly liable and hence could be sued together, and it was held that the claim of the plaintiff that they were jointly liable rendered the cause not removable, he said:

"The case of *Alabama Southern Ry. Co. v. Thompson* was decided on the principle that the cause of action was what the plaintiff in good faith said it was."

From this he argued:

"If that is true when the question is whether the liability is joint or several, it must be true also when the question is whether the facts alleged show any liability at all on the part of the defendant employé. If the plaintiff in good faith says that they did, the case cannot be removed. So upon

this branch of the case, as upon the other, the point to be determined is whether the plaintiff has acted in good faith in asserting that Hutton is liable to him for failure to inspect. An examination of the authorities will show that this is a doubtful question. * * * A plaintiff, who claims under such circumstances as appear in this case mere nonfeasance creates a liability in his favor, cannot be said to make such claim in bad faith, even though the court should be of the opinion that the complaint would be held bad on demurrer presented by the employé."

I doubt whether a case of fraudulent joinder is ever presented in the absence of fraud in the matter of allegation of facts on which liability on the part of the resident and nonremoving defendant is based, i. e., except where on the facts alleged a cause of action against such defendant is stated and they have been alleged with the knowledge that they were untrue or without reasonable ground for believing that they were true and with the animus to affect the removability of the cause by such fraud. If this is so, then in such cases the question of good faith relates solely to the allegation of fact and not to the claim in law, for everybody is conclusively presumed to know what the law is. It is certain that no question of good faith or fraudulent joinder arises when the sole basis for the claim that the one is lacking and the other exists lies in the motive of the plaintiff in joining the resident and nonremoving defendant. Judge Taft made this clear in the *Hukill Case*, *supra*. And it may be that no such question arises when the sole basis for such claim is to be found in plaintiff's claim as to matter of law. I find it difficult to gather from the case of *Alabama Southern Ry. Co. v. Thompson* that, where the plaintiff's pleading alleges facts showing liability on part of both defendants and it is not claimed that such facts, in so far as they show liability on part of the resident and nonremoving defendant, have been fraudulently alleged, a case of fraudulent joinder can grow out of the mere claim that there is joint liability so as to justify suing the two defendants together. The impression which the case makes on me is that in such a case the claim of joint liability by plaintiff is conclusive in all cases, except, perhaps, where the highest court of the state where the suit is brought has previously decided that there is no joint liability, and, in such a case, the idea of fraudulent joinder is, perhaps, not needed to make the cause removable. But it seems to me that in determining whether or not the eleven federal decisions and those of the Kentucky Court of Appeals heretofore cited are on principle sound, i. e., whether or not the mere fact that no cause of action is stated against the resident and nonremoving defendant is sufficient, in and of itself, to render the cause removable, the language of that portion of the Removal Act which is relevant must be reckoned with, and that its true meaning is all that is relevant. There is nothing in it about fraudulent joinder, separable controversy, or nominal parties. It is in these words:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be

fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

This presupposes that there may be in a suit "a controversy which is wholly between citizens of different states and which can be fully determined as between them" which does not cover all that is therein. Where such is the case, it is provided that "one or more of the defendants actually interested in such controversy" may remove the suit. Where, then, the plaintiff fails to allege facts which present a cause of action against the resident and nonremoving defendant, is it or not to be said that there is a controversy in the suit to which such defendant is no party and which is wholly between the plaintiff and the nonresident and removing defendant and which can be fully determined as to them? It is true that in such a case the plaintiff is claiming that the former as well as the latter is liable for the injury complained of; but, as no facts are alleged showing liability on his part, does it not follow that the controversy as to the liability of the latter, under the facts alleged, is one that is wholly between plaintiff and the latter and one that can be fully determined as between them within the meaning of the provision?

I find it somewhat difficult to answer these questions satisfactorily to myself, and the relevant decisions do not yield much help in answering them, because, so far as my reading has gone, I do not find that any court has come to close quarters with the exact meaning of this provision of the Removal Act and attempted to point out exactly what is covered by it and what not. It is well settled by the Supreme Court of the United States that in determining whether a particular case is covered thereby the view must be limited to the allegations of the plaintiff's pleading. But it has laid down no clear line between those cases which are covered by it and those which are not. It has never had occasion to deal with the question now under consideration. It would seem that according to its view but few cases can arise coming within its purview. This appears from Judge Lowell's citation and characterization of the decisions of the Supreme Court dealing with the removability of a suit because of the presence in it of what is called a separable controversy in the case of *Regis v. United Drug Co.* (C. C.) 180 Fed. 201. Yet, if the necessities of this case were such as to require my taking position on the question as to whether the fact that no cause of action is stated against the resident and nonremoving defendant renders the cause removable, I would feel compelled to give the numerous decisions of the Supreme Court thereby referred to a very careful consideration. Each separately would have to be subjected to a very close and keen criticism, and, after so doing, they would have to be viewed together; this in order to extract their essence. Otherwise, I would not feel properly equipped to deal with the question. And this is a work that should be done by some one.

This possible view of the matter, however, occurs to me in this connection. In the case of *Powers v. C. & O. R. R. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, Mr. Justice Gray said:

"The cause of action is the subject-matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff discloses it to be in his pleadings."

If, then, there is no cause of action stated against the resident and nonremoving defendant, i. e., if the cause of action stated against the nonresident and removing defendant is not a cause of action against him or it, also, can it be said that he or it is a party to the controversy between the plaintiff and the nonresident and removing defendant as to the cause of action stated against it, and, if not, is not that controversy one that is wholly between such defendant and plaintiff, and that can be fully determined as between them within the meaning of the provision? But the necessities of this case do not require that I should take such position.

It is apparent, from the recent decisions of the Supreme Court, that, in such cases as we have here, it shows much respect to the position of the highest court of the state where the case arises, if, indeed, it does not regard it as conclusive. Now, it is as well settled in Kentucky, as it is possible for it to be, that, where the plaintiff's pleading states no cause of action against the resident and nonremoving defendant, the cause is removable. This can only be because it is considered that in such a case the plaintiff's pleading presents a controversy which is wholly between him and the nonresident and removing defendant and which can be fully determined as between them. And, if that is really so, there can be no question that the case is covered by that provision of the Removal Act. But, if for such a suit to be removable, it is essential that fraud be made out in the claim that as a matter of law on the facts alleged there is liability on the part of the resident and nonremoving defendant, this case presents such fraud, in that there was no reasonable basis for the claim that the resident and nonremoving defendant here, the lessor, was liable for the injury complained of. It is true that the Kentucky Court of Appeals has never held that the lessor of a railroad is not liable for an injury to a trespasser thereon caused by the lessee in the operation of one of its trains. But the principles upon which it held that the lessor was liable in the *McCabe* and *Shegog* Cases, and was not liable in the *Swice* Case require that it should so hold, whenever such question shall be presented to it. And there seems to be no room for reasonable doubt as to this. These considerations lead me to the conclusion, on the assumption upon which I have been proceeding, that this cause was removable. That assumption is that the plaintiff's pleadings here state a good cause of action against the nonresident and removing defendant.

Does, then, the fact that they do not so state, in that the negligence charged is failure to discover the presence of plaintiff's intestate on the track in time to have warned him of the approach of the train and thus to have avoided the injury, make any

difference? I do not see why it should. The resident and nonremoving defendant is still no party to the controversy to which the nonresident and removing defendant is a party, and that controversy is wholly between it and plaintiff and can be fully determined as between them; and the same ground exists for saying that the joinder of the resident and nonremoving defendant was fraudulent.

It remains to say a word or two as to the cases cited and relied on by plaintiff. The Sheegog Case was carried to the Supreme Court of the United States from the Kentucky Court of Appeals, whose decision therein has been heretofore referred to, and that court affirmed the decision of the lower court. If, as we have found, that decision is not against the removability of this cause, its affirmance by the Supreme Court is not. The Supreme Court held that it was bound to accept the decision of the lower court that the resident and nonremoving defendant, the lessor, was liable for the death of plaintiff's intestate, a servant of the nonresident and removing defendant, the lessee, caused by the negligent performance of the duty owed the public to provide a safe roadbed, and that such liability was joint with that of the removing defendant the lessee, as sound, and that, such joint liability existing, the cause was not removable even though the joinder had been made for the express purpose of preventing a removal. In such a case there can be no such thing as a fraudulent joinder.

The decision in the Willard Case was substantially the same, though the liability of the resident and nonremoving defendant, the lessor, was placed on a different ground. The cause originated in one of the courts of original jurisdiction in the state of Illinois, from whence it was removed to the federal court. That court having taken jurisdiction, its judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit for want of jurisdiction, and its judgment was affirmed by the Supreme Court on certiorari. The law of the state of Illinois as determined by its Supreme Court is that the lessee of a railroad is the mere servant or agent of the lessor.

In the case of *Chicago R. R. Co. v. Hart*, 209 Ill. 414, 70 N. E. 654, '66 L. R. A. 75, cited in the Willard Case, it is said:

"Though a railroad company may, by lease or otherwise, intrust the execution of its charter powers and duties to a lessee company, this court has expressed the view that the lessee company, while exercising such chartered privilege or chartered powers of the railroad company, is to be regarded as the servant or agent of the lessor company."

Of course, in jurisdictions where this is the law, it must be held that the lessor, in all cases, is liable for the lessee's negligence. So in the Willard Case, Mr. Justice Harlan said:

"It results that, upon the face of the record, the action throughout was proceeded on as a joint action, and that there was no separable controversy in such an action entitling the Iowa corporation as a matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a co-defendant with the Iowa corporation when such a charge is negated, as a matter of law, by the fact that the plaintiff was, as we have seen, entitled

under the laws of Illinois, where the cause of action originated and within which the road was located, to bring a joint action against the Illinois and Iowa companies."

It must be accepted, therefore, that there is nothing in this decision of the Supreme Court, as there was nothing in the Sheegog Case, requiring a remand of this action to the state court.

The Enos Case decided by the appellate court of this circuit, was not a suit against a lessee and lessor of a railroad to recover of both for the lessee's negligence. It was a suit against a master and servant to recover of both. The servant was the resident and non-removing and the master the nonresident and removing defendant. The injured person was a servant also. It arose in this state and was brought in the circuit court for Jefferson county, from whence it was removed to the Circuit Court of the United States for the Western District. Motion to remand having been overruled, and the suit having resulted in judgment for defendant, the case was carried to the appellate court. It was there held that the suit was not removable, and the judgment of the lower court was reversed with directions to remand to the state court. The plaintiff's petition stated a good cause of action against both defendants; that against the resident and nonremoving defendant, the servant, being his personal negligence, alleged to have caused the injury, and that of the nonresident and removing defendant, the master, the negligence of the servant. Not otherwise was a case stated against the latter. That being so, the cause was not removable in the absence of a fraudulent joinder. This had been recognized by the lower court, and the sole ground of removal was that there had been a fraudulent joinder. This was attempted to be made out by showing that the injury was due to the negligent performance by the person injured of the work he was doing when injured, and not to any negligence of the resident and nonremoving defendant, and that there was no reasonable basis for claiming otherwise. If the claim as to the cause of the injury was correct, then the plaintiff had no cause of action against either defendant, for the nonresident and removing defendant was not liable except through the negligent act of the resident and nonremoving defendant. It was held that a fraudulent joinder in such a case could not be made out by showing that plaintiff had no reasonable basis for claiming that he had a cause of action against either defendant. Judge Knappen said:

"The Circuit Court in denying the motion to remand practically found that plaintiff was affirmatively shown to have no cause of action against any of the defendants. The assertion of fraudulent joinder of O'Hearn and Bittner necessarily involves the proposition that the cause of action against even the resident defendant was fraudulently asserted. But the rule which permits a removal to the federal court in case of a fraudulent joinder of defendants whose presence destroys diversity of citizenship cannot be carried to the extent of permitting such fraudulent joinder to be inferred from the fact only that no cause of action is found to exist against any defendant, resident or nonresident, or of permitting a removal in a case where the negligence of the corporate defendant can be made out only by proof of negligence of the servant alleged to be fraudulently joined but against whom a cause of action is stated."

I see nothing in this decision that militates against the position here taken. In view of these considerations, therefore, I am constrained to overrule the motion to set aside the order overruling the motion to remand.

UNITED STATES v. O'NEILL et al.

(District Court, D. Colorado. August 19, 1912.)

No. 5,859.

1. EMINENT DOMAIN (§ 29*)—LANDS TAKEN FOR PUBLIC USE—GOVERNMENT IRRIGATION PROJECT.

Lands condemned by the United States under Reclamation Act June 17, 1902, c. 1093, § 7, 32 Stat. 389 (U. S. Comp. St. Supp. 1911, p. 666), for right of way for a canal or ditch required in the carrying out of an irrigation project, are taken for a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 76; Dec. Dig. § 29.*]

2. EMINENT DOMAIN (§ 5*)—CONDEMNATION UNDER RECLAMATION ACT—PROCEDURE.

The power conferred on the Secretary of the Interior by Reclamation Act June 17, 1902, c. 1093, § 7, 32 Stat. 389 (U. S. Comp. St. Supp. 1911, p. 666), to condemn lands necessary for use in constructing irrigation works, is not subject to limitation by state statutes relating to the exercise of the power of eminent domain of the state, nor is its exercise governed by a state procedure requiring the necessity of the taking in each particular case to be determined by a local commission, but such necessity is a matter to be determined by the Secretary, whose decision is not reviewable by the courts.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 19-23; Dec. Dig. § 5.*]

3. EMINENT DOMAIN (§ 74*)—PROCEEDINGS UNDER RECLAMATION ACT—RIGHT TO TAKE POSSESSION.

In proceedings by the United States to condemn right of way for a ditch under Reclamation Act June 17, 1902, c. 1093, § 7, 32 Stat. 389 (U. S. Comp. St. Supp. 1911, p. 666), which provides a fund from which the damages assessed shall be paid, it is not necessary that the damages shall be assessed and paid before the government may be allowed to take possession.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 188-197; Dec. Dig. § 74.*]

Condemnation proceedings by the United States against Jesse O'Neill and James O'Neill. On motion by plaintiff for an order for possession. Motion sustained.

Ethelbert Ward, of Denver, Colo., for petitioners.

Catlin & Blake, of Montrose, Colo., for defendants.

LEWIS, District Judge. This is a proceeding in condemnation. From the petition, answer and reply these facts appear: The plaintiffs have been engaged for the past several years in the construction of an irrigation system in the Uncompahgre Valley, in Montrose and Delta counties. It is in charge of the Secretary of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Interior under authority vested in him by the reclamation Act, approved June 17, 1902 (32 Stat. 388), and is known as the Uncompahgre Valley project. Up to this time about five million dollars has been expended in its construction, but it is not completed. It diverts a large body of water from the Gunnison River through a long tunnel into the Valley, whence it is taken in large canals, from which it is received into smaller canals and from them carried in distributing ditches to the arid acres to be reclaimed. At some places water is turned into small creeks, or other natural drainage ways, and taken therefrom lower down in canals or ditches for carriage and ultimate distribution. It is expected by those in charge for the Government that the system when brought to completion will reclaim about 140,000 acres of dry lands and render them highly productive. The particular part of the system with which we are here concerned is known as ditch D, or the Spring Creek lateral, by which it is intended to take out of Spring Creek, a part of the waters turned into said creek from a canal higher up, and conduct the same for about five miles for the reclamation of some eight hundred acres. Starting at the head of this ditch, about three-quarters of a mile of its course, as projected, is across improved and occupied lands of defendants. That part of it has been surveyed, but no construction work has been done thereon, for the reason that petitioners have been unable to come to terms with the defendants therefor, and consequently this proceeding is for the purpose of acquiring the right thereto by condemnation. Construction work on the remainder of the line of this ditch has been finished.

The defendants resist the attempt of plaintiffs to thus acquire a right of way across their lands. They admit that they were unable to agree on a consideration therefor. They plead two matters in defense, the sufficiency of which must be determined now,—both raising the question of necessity. The first is stated in the answer thus (p. 10):

"Plaintiffs have laterals from their own irrigation system, surveyed, platted and constructed from which they can carry and distribute water upon every acre of land that is covered by said Spring Creek canal (ditch D), and from which distribution and delivery will be and is, wholly feasible and practicable, and that the said proposed Spring Creek canal is wholly unnecessary;"

and in support of this defense they rely upon a state statute, being section 2420, R. S. Colo., 1908, found in the chapter on Eminent Domain, which, in part, is as follows:

"The court or judge * * * shall appoint a board of commissioners of not less than three freeholders to ascertain and determine the necessity for taking such lands. * * *"

Their said second defense is stated in their answer thus (p. 3):

"That many years prior to the filing of the petition herein, to wit, ever since on or about February 24, 1891, there has been constructed and in operation across the lands of defendants sought to be subjected to the burden of a right of way by plaintiffs herein a ditch for the conveying of water from Spring Creek to lands lying beyond the lands of defendants, and ever since

said time said ditch has been in operation and has carried the waste, seepage and spring water across the lands of defendants to lands lying beyond for irrigation purposes. That the irrigation of all of the lands adjoining and lying beyond the lands owned by defendants and across which plaintiffs desire to secure a right of way can practicably and feasibly be attained by enlarging the ditch now constructed and in operation across the lands of defendants, and known as the Blye & Hall ditch. That all of the water that is necessary to irrigate the lands sought to be irrigated by plaintiffs can be carried through said Blye & Hall ditch by enlarging the same by the plaintiffs herein. That defendants herein have offered the said plaintiffs the right to enlarge said Blye & Hall ditch, as now constructed, to carry the water necessary to irrigate the lands lying beyond defendants' lands sought to be irrigated and reclaimed by plaintiffs free of any charge, except the retaining by defendants of the water to which they are entitled under their filings and appropriations under the Blye & Hall ditch, and defendants stand ready and willing at this time to deed to plaintiffs a right of way across defendants' lands from Spring Creek along the line of the Blye & Hall ditch, as constructed and filed, free of any charge for such right of way except that defendants' water rights as now existing and enjoyed by them be recognized and the water to which they are entitled (11.32 second feet) to run through such Blye & Hall ditch and delivered to them;"

—and in support of this defense defendants rely on section 2420, supra, and also on section 3170, R. S., Colo., 1908, being a part of the state act on Irrigation, as follows:

"That no tract or parcel of improved or occupied land in this state, shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

There are other facts set up in the answer as a claimed defense against the right to condemn, but, as I am of the opinion that they are material only on the measure of damages, they cannot be considered now, but must stand over for that inquiry.

The petitioners move for immediate possession. The motion is resisted. On the hearing of the motion petitioners presented the affidavits of four persons, from which it appears that they are fully informed of the situation, and they depose that the selected line of ditch D, of which the segments here sought in condemnation are a part, is a necessary route and that no other is practicable to serve the contemplated purposes. One of them deposes that he has known the Blye & Hall ditch for the past eight years and that it has not been maintained or operated or carried any water whatever during that time; that along portions of its claimed route there are no traces of it on the ground; that there is nothing on the ground to indicate that it was ever constructed between points marked "Intake 1" and "Intake 2" on exhibits attached, and that it has no headgates or intakes.

The defendants presented the affidavit of one person. He deposes that the Blye & Hall ditch with enlargements will be feasible for the same purpose in contemplation by the petitioners for their ditch and that it would carry water to the lands intended to be served by ditch D, except the strip between the two.

Neither side presented affidavits touching the first defense above noted, but arguments were made thereon based on exhibits that were presented and filed.

The lands sought consist of two disconnected segments, as shown by the maps, along the line of the proposed ditch, fifty feet in width and less than one mile in total length, and a small rectangular tract at the proposed headgate, one hundred feet long by seventy-five feet wide, covering both banks of Spring Creek.

[1] 1. Express authority for this proceeding is given by section 7 of the reclamation Act (32 Stat. 388). That Act and the facts here amply disclose that the purpose for which petitioners seek to condemn and take these lands is a public purpose. *Burley v. United States*, 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807. The State constitution, statutes and Colorado decisions also declare it to be a public purpose. Colo. Const. art. 16, § 7; *R. S. Colo.* 1908, § 3169. This is not denied by the defendants.

[2] 2. Defendants do not question the necessity of a way to convey the waters from Spring Creek to the lands to be reclaimed; nor do they claim that more land is sought to be taken than is necessary for the construction and maintenance of the ditch if it is to be put through; nor that the proposed ditch is impracticable for the purpose in view; nor that it should be constructed on some other route. I understand them to concede that under the local rule these matters, in so far as they involve the element of necessity for the taking, are not open to judicial inquiry and determination. *Gibson v. Cann*, 28 Colo. 499, 66 Pac. 879; *Railroad Co. v. Telegraph Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Warner v. Town of Gunnison*, 2 Colo. App. 431, 31 Pac. 238.

Their position in this regard is two-fold: first, a canal or ditch has already been constructed as a part of the project, from a point on the creek upstream, traversing in its course higher lands, but through which and the lower end of ditch D the same waters can be conducted to the lands; and, second, there is now a private ditch across defendants' lands through which the waters may be taken and applied as proposed, therefore there is no necessity for the upper end of this ditch, and consequently their lands cannot be condemned and taken. Both contentions are based on section 2420 of the State statute, and the construction placed thereon by the courts. *Sand Creek Co. v. Davis*, 17 Colo. 326, 29 Pac. 742; *Kern v. Minekine*, 45 Colo. 378, 101 Pac. 341; *Broadmoor Co. v. Curr*, 142 Fed. 421, 73 C. C. A. 537.

As an additional basis for the second contention defendants invoke section 3170 of the State statute, quoted above, and the construction placed thereon. *Tripp v. Overocker*, 7 Colo. 72, 1 Pac. 695; *Downing v. More*, 12 Colo. 316, 20 Pac. 766; *San Luis Co. v. Canal Co.*, 3 Colo. App. 244, 32 Pac. 860.

It is obvious that to enforce defendants' contention would necessarily result not only in stripping the Secretary of the Interior of all power, discretion and responsibility bestowed upon him by the reclamation Act as to the planning of such projects, but would

also operate to transfer that power and discretion to local boards of commissioners; and if such boards were not of like mind as to the necessity for different sections of the same waterway, or as to separate waterways for the one project, the plan as a whole and also as to its different parts is thus thwarted and the legislative purpose is at once set at naught. The largeness of the project under consideration demonstrates that many canals and carrying and distributing ditches are necessary. How many and where they shall be put requires technical ability, as to which even those who are competent to decide may not agree with exactness. It does not appear just how far upstream the headgate of the canal, which defendants say has been constructed by petitioners and will serve (in conjunction with the lower end of ditch D) the same purpose as the proposed ditch, is above the headgate of the proposed ditch, but it does appear from the exhibits that that distance must be several miles, and it also appears from the exhibits that the line of that canal is more than one mile westerly from the headgate of the proposed ditch and that they are on different levels,—that difference being stated by counsel to be about one hundred and fifty feet. It also appears that the proposed ditch reaches, some three and a half miles below its headgate, the line of said canal; but at that point the ditch and the canal are on greatly different elevations. The waters in the canal are syphoned across the lower ground through steel pipes and continue on the higher level. Defendants' proposition is that enough water to supply ditch D should be dropped into it from the canal at this point, thus avoiding the construction of ditch D across their lands at its upper end.

As to the Blye & Hall ditch, it clearly appears that it never reached Spring Creek, that it has never been constructed between a point at the creek marked "Intake No. 1" and point marked "Intake No. 2," being a distance of about a half mile, the upper part of which is not on defendants' lands. That part of said ditch which it is claimed has heretofore been constructed on defendants' lands is below the point marked "Intake No. 2" and is about 600 feet in length. The proof conclusively shows that the lower part of said ditch was constructed many years ago, it was a small affair, has not been maintained, has not been used for many years, is now scarcely visible at places where it had been constructed, and that the only purpose it ever served was to gather some seepage and spring waters. It is not believed that the facts bring it within the intendment of said section 3170.

The apparent impossibility of carrying into execution the reclamation Act under the local restrictions contended for ought to be sufficient reason for their rejection.

But the necessity contemplated under the State statute does not mean an absolute one, but only a reasonable necessity. It is sufficient if it appear, "That the property sought to be condemned would conduce to some extent to the accomplishment of the public object to which it was to be devoted. With the degree of necessity, or the extent to which the property will advance the public purpose, the courts have nothing to do." "A large discretion is necessarily vested in those

who are vested with the power in determining what property and how much is necessary. To warrant a denial of the application, it should appear that what is sought is clearly an abuse of power on the part of the petitioner." *Lewis, Em. Dom. 3rd Ed. 2 Vol. Sec. 601; 15 Cyc. p. 632.*

Further, it must be borne in mind that the petitioners here are not exercising in this proceeding the State's power, and therefore are not bound by the limitations and restrictions placed on that power; but they are exerting their own sovereign right, and the only restriction on the exercise of that right is, that just compensation shall be made for private property taken for public use. 5th Amendment to the U. S. Constitution.

Kohl v. U. S., 91 U. S. 367, 374 (23 L. Ed. 449):

"If the United States have the power (Eminent Domain), it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment." *Railroad Co. v. Lowe, 114 U. S. 525, 531, 5 Sup. Ct. 995, 29 L. Ed. 264.*

The question of necessity is political and must be determined by congress. "When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." *Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. Ed. 206; U. S. v. Jones, 109 U. S. 513, 518, 519, 3 Sup. Ct. 346, 27 L. Ed. 1015.*

"The question of necessity is not one of a judicial character, but rather one for determination by the law-making branch of the government." *Backus v. Depot Co., 169 U. S. 557, 568, 18 Sup. Ct. 445, 450 (42 L. Ed. 853).*

The legislative branch may delegate the determination of the question of necessity. The reclamation Act imposes that duty on the Secretary of the Interior, and it appears here that he has selected the route for ditch D claimed in the petition. *Chappell v. U. S., 160 U. S. 499, 510, 16 Sup. Ct. 397, 40 L. Ed. 510; Burley v. U. S., 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807; U. S. v. Certain Lands (C. C.) 145 Fed. 654, 657; Barrett v. Kemp, 91 Iowa, 296, 59 N. W. 76; Warner v. Town of Gunnison, 2 Colo. App. 431, 31 Pac. 238; Joplin Co. v. Joplin, 124 Mo. 129, 27 S. W. 406; Smith v. Gould, 59 Wis. 631, 18 N. W. 457; Farneman v. Cemetery Ass'n, 135 Ind. 344, 35 N. E. 271; Philadelphia v. Ward, 174 Pa. 45, 34 Atl. 458; Kirkwood v. School District, 45 Colo. 368, 101 Pac. 343.*

This question of necessity obviously goes to petitioners' fundamental right, and the provisions of the State statute in that respect cannot be imposed on the petitioners without their consent. Neither section 2 of the Act of August 1st, 1888 (25 Stat. 357), nor the general conformity Act are effective for that purpose. They relate only "to practice, pleadings, forms and modes of proceeding." *Hills & Co. v. Hoover, 220 U. S. 329, 336, 31 Sup. Ct. 402, 55 L. Ed. 485.*

On the facts here presented, the conclusion is reached that the only inquiry for determination in limine is whether the contemplated purpose to which the lands sought to be condemned are to be devoted is

a public use. *Shoemaker v. U. S.*, 147 U. S. 282, 298, 13 Sup. Ct. 361, 390 (37 L. Ed. 170):

"The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted."

[3] 3. Section 15 found in the Bill of Rights in the Colorado Constitution, is this:

"That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested."

The Colorado statute (Section 2420, R. S. Colo. 1908) makes provision for the manner of executing this constitutional requirement. It provides that pending the proceeding in condemnation the judge or the court may determine the amount that petitioner shall pay or deposit pending the ascertainment of damages, and that on payment of said sum into court, to be there held until the damages are ascertained, the court may, by an order, let the condemnor into possession. The defendants insist that they are also entitled to have this done before the petitioners can be let into possession. *McClain v. People*, 9 Colo. 190, 11 Pac. 85.

Here again it is noted that there are no such restrictions in the Federal Constitution or Acts of Congress on the petitioners' rights. The reclamation Act provides a fund from which to pay the damages to which defendants may be entitled.

Cooley's Constitutional Limitations, p. 694:

"When the property is taken directly by the State, or by any municipal corporation by State authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain, that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it. * * * It is essential, however, that the remedy be one to which the party can resort on his own motion; if the provision be such that only the public authorities appropriating the land are authorized to take proceedings for the assessment, it must be held to be void." *Lewis, Em. Dom.* Vol. 2, 3rd Ed. Sec. 963 et seq.

If it be conceivable that petitioners could dismiss this proceeding after being let in, or that they would withdraw on the assessment of damages, still an impartial tribunal is open to the defendants in which, by initiation on their part, the damages could be assessed. They are thus protected. *Act March 4, 1911* (33 Stat. p. 1136, § 145); *U. S. v. Manufacturing Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; *Cherokee Nation v. Railway Co.*, 135 U. S. 641, 658, 10 Sup. Ct. 965, 34 L. Ed. 295; *Sweet v. Rechel*, 159 U. S. 380, 16 Sup. Ct. 43, 10 L. Ed. 188; *Crozier v. Krupp*, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771; *Adirondack Co. v. State*, 176 U. S. 335, 349, 20 Sup. Ct.

460, 44 L. Ed. 492; *Great Falls Mfg. Co. v. Garland* (C. C.) 25 Fed. 521.

The only question now open is one of damages which must be assessed by a jury in the usual way. *Chappell v. U. S.*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510.

The motion will be sustained and an order entered letting the petitioners in.

It is so ordered.

THE FAYETTE BROWN.

(District Court, N. D. Ohio, E. D. March 27, 1912.)

No. 2,043.

COLLISION (§ 98*)—STEAM VESSELS MEETING—VIOLATION OF RULES.

A steamer, which passed down through the American Soo locks at night and proceeded on her way at full speed and without giving any signals to other vessels in the river, as required by rule 24 of the Rules for the Great Lakes (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649 [U. S. Comp. St. 1901, p. 2891]), *held* solely in fault for a collision with a barge passing up in tow on her proper course, and a second collision with another barge resulting from the first.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 208-210; Dec. Dig. § 98.*

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

In Admiralty. Suit for collision by the Saginaw Bay Transportation Company, as owner of the barge *Bottsford*, against the steamer *Fayette Brown* and Pittsburgh Steamship Company, brought in by the claimant of the *Brown*. Decree against the *Brown*.

George B. Marty, for Saginaw Bay Transportation Co.

Goulder, Day, White, Garry & Duncan (O. D. Duncan, of counsel), for Northwestern Tr. Co.

Hoyt, Dustin, Kelley, McKeehan & Andrews (George W. Cottrell, of counsel), for Pittsburgh Steamship Co.

DAY, District Judge. This action arose out of a collision between the steamer *Fayette Brown* and the barge *Bottsford* about 10 o'clock on October 29, 1906, a short distance below the locks of the Soo. Both vessels were down bound; the *Bottsford* laden with lumber, and the *Brown* with ore. The *Bottsford* and her towing steamer, the *Leuty*, also owned by the libellant, locked through ahead of the *Brown*, and on coming out of the lock the *Leuty* took the *Bottsford* alongside on her starboard side and endeavored to dock at the coal dock known as Kemp's Dock on the American side of the river. The *Brown* passed down through the lock a little later, and in proceeding down the river collided with the *Bottsford*, as the *Bottsford* and the *Leuty* were trying to reach Kemp's Dock. In the original action the libellant proceeded against the *Brown* alone. Later the owner of the *Brown* brought in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Pittsburg Steamship Company, owner of the barge Nasmyth and the steamer Houghton, to answer to the libellant's claim, on the ground that the fault of the Houghton and Nasmyth had caused the Brown to collide with the Nasmyth and throw the Brown in collision with the Bottsford. A number of boats were in the immediate vicinity at the time of these disasters.

It appears from the record that the steamer Fayette Brown locked through the American Soo with the steamer Wawatam. The Wawatam proceeded out of the lock and then stopped to take on supplies. The Brown passed her on the Wawatam's starboard side, and the Houghton, with the Nasmyth in tow, was somewhat below and bound up for the locks, and below the Houghton was the Leuty, with the Bottsford lashed to her starboard side, attempting to make a landing at Kemp's Dock, having come down from the American Soo. The boats being located in this manner, there were two collisions, one between the Nasmyth and the Brown, and the second between the Bottsford and the Brown, and, as I have indicated, both the Brown and the Bottsford claim damages; the Bottsford having first filed a libel against the Brown, and the Brown filing a petition under the fifty-ninth admiralty rule (29 Sup. Ct. xlv), bringing in the Pittsburg Steamship Company owner of the Houghton and Nasmyth. It appears from the record that the Leuty is a wooden steamer of 178 feet length and 33 feet beam, the Bottsford is 164 feet long and 32 feet beam, the Brown 320 feet long and 42 feet beam, and the Nasmyth is 365 feet long. The steamer Houghton is over 400 feet long.

It appears, from a fair consideration of the testimony, that after the Bottsford and Leuty were lashed together they slowly proceeded down the river, seeing the Houghton and Nasmyth coming up on the range known as the Bayfield Rock Range, the ordinary range used by steamers using the St. Mary's river entering the locks. The Leuty and Bottsford passed 75 feet or 100 closer to the shore than the Nasmyth, and about this time the Leuty and the Bottsford started to turn into the dock. They were about abreast of Kemp's Dock. The captain of the Leuty was on the pilot house in charge of the vessel; that while heading toward the dock going up the stream, and at perhaps 400 or 500 feet from the dock, the Brown struck the Bottsford. There is some dispute as to whether or not the Leuty and Bottsford were moving forward at the time of this collision; but I do not consider this of much importance, in view of the other facts in the case, because from the entire record it is quite apparent to me that, if the Brown had not collided with the Nasmyth, there would have been no collision with the Bottsford. The Brown came down the river at full speed, not having blown any signals, and when about a quarter of a mile away the Leuty blew her two-blast signal, indicating that the Leuty was going to port.

Now rule 24 of the Rules Governing Navigation on the Great Lakes provides:

"That in all narrow channels where there is a current, that is the river St. Mary, St. Clair, Detroit, Niagara, and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall,

before the vessels shall have arrived within a distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."

So, under this rule the Brown had the right of way, and also had the duty imposed upon her of giving a signal within half a mile of the other vessel. This was admittedly not done. On the other hand, it is claimed that the Leuty blew a two-blast signal, which was not answered. And it is claimed by the Brown that the Leuty was at fault, because she did not blow an alarm whistle or signal. I do not think this was necessary. There seemed to have been no misunderstanding between the Brown and Leuty as to the navigation of the respective vessels. The Leuty supposed the Brown would pass under her stern, and the Brown expected to pass in this manner.

The application of rule 27 is urged by counsel for libellant. This rule provides as follows:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary, in order to avoid immediate danger."

I have given considerable consideration to the testimony of the officers of the various boats as to what was done on their own vessels. This testimony is entitled to great weight. The *Alexander Folson*, 52 Fed. 403, 3 C. C. A. 165; The *Captain Sam* (D. C.) 115 Fed. 1000.

As to how the Brown was navigated in coming down the river, I will take the captain's own testimony. He testified that he saw the *Bottsford* and the *Leuty* and observed their maneuvers, and that he saw the *Nasmyth*, and that she was in tow of the *Houghton*; that he opened his engine wide open ahead and headed down the river; that when he got close to the *Nasmyth* he observed she was drifting down upon him, and he also discovered that the *Bottsford* was drifting into his course; that he hailed the *Nasmyth* to hold up and the *Bottsford* to go ahead, and whistled when he got within a short distance of the *Nasmyth*. He did not check during this time until he was very close to the *Nasmyth*, when he collided with the *Nasmyth*, and this collision caused the Brown to sheer in such a manner that the collision with the *Bottsford* occurred. His wheelsman testified in open court that he called the captain's attention to the danger and the *Nasmyth* when the Brown had gotten down to within 200 feet of the *Nasmyth*.

Now, the Brown came down this river giving no signals and going at full speed. The captain of the vessel observed what they were doing. He did not answer the Leuty's two-blast signal. He evidently expected that certain things would happen. These things did not happen, and the injuries occurred.

It is apparent from reading the record that this Brown was navigated with great recklessness. This would make applicable the rule laid down in the case of *The New York*, 147 U. S. 84, 85, 13 Sup. Ct. 211, 216 (37 L. Ed. 84), where the court says:

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence

on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

Now, the Brown being in fault, what was the conduct of the Houghton and the barge Nasmyth? In so far as the Houghton is concerned, I think it is shown by the record that, when the Nasmyth was abreast of the power house, the Houghton dropped the tow line, and the tug General had made fast to the barge Nasmyth and taken charge of her. The Houghton had then proceeded up the river and was in the lock at the time of the collision. So no fault can attach to the Houghton.

Now, what was the Nasmyth doing at the time of this collision? It appears that there was a wind blowing toward the American shore; that it was a bright moonlight night; that the Nasmyth was light, and projecting far out of the water; that she was proceeding, lashed to the tug General, heading on the extreme outer end of the north pier of the Poe Lock, and her course was to the starboard of the Bayfield Range line; that, at the time of the collision between the Brown and the Nasmyth, the Nasmyth was north of the Bayfield Range; that at all events the Nasmyth was observed by the wheelsman of the Brown some 200 feet before the vessels met. The wheelsman testified that he called the captain's attention to the fact that the Nasmyth was drifting. It is also testified to by two other witnesses, who were coal heavers, on the shore, that the Nasmyth was drifting toward the American shore. These witnesses, however, were abreast of the boat, and would have some difficulty in judging of the fact to which they testified. On the other hand, those on board of the Nasmyth and the Wawatam testified that the Nasmyth was not drifting. In any event, the Nasmyth was proceeding on a proper course, and there was plenty of navigable water to permit of the safe navigation of the Brown, had the Brown been properly navigated. Even though the Nasmyth were drifting, she was taking a course which was customary, and which permitted of ample space in which the Brown might pass. *Mitchell Transp. Co. v. Green*, 120 Fed. 49, 56 C. C. A. 455.

The Brown claims that the Nasmyth, had not a proper lookout, and did not give proper signals. The testimony shows that the Nasmyth was in tow of a tug, and that in any event the proximate cause of the collision was the reckless navigation of the Brown. As I have indicated, I could see no fault in the manner in which the Leuty and Bottsford were navigated, and it is plain that the responsibility for these disasters must rest upon the Brown, and that the two collisions were approximately caused by the fault of the Brown. This is plain, when we stop to consider that the Brown left the lock, passed the Wawatam, then headed down the river at full speed ahead, without giving any signals until the Brown was almost immediately upon the Nasmyth. The captain evidently assumed too many things and paid too little attention to careful navigation in this crowded river. Proceeding down the river with an

utter disregard of signals and at full speed, the captain of the Brown admits that the proper way was to move slowly, and the Brown's fault is clear.

The burden rests upon the cross-petitioner to prove contributory fault on the part of the Nasmyth and the Houghton, and having failed so to do, and the Brown being at fault in reference to the collision with the Bottsford and the Leuty, the Brown must bear the responsibility of these two collisions.

In re ALVERTO.

(District Court, E. D. Pennsylvania. September 24, 1912.)

No. 7233.

1. ALIENS (§ 61*)—NATURALIZATION—STATUTES—REPEAL.

Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), providing that the naturalization law shall apply to aliens who are free white persons and aliens of African nativity or descent, was not repealed by Naturalization Act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 528]).

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

2. ALIENS (§ 61*)—NATURALIZATION—MILITARY SERVICE.

Service in and honorable discharge from military service of the United States does not extend the right of naturalization to those persons who are neither free white persons nor persons of African nativity or descent, and therefore not entitled to naturalization under Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333).

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

3. ALIENS (§ 61*)—NATURALIZATION—PHILIPPINES.

Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), limiting naturalization to aliens who are free white persons and aliens of African nativity or descent, was applicable to Naturalization Act (Act June 29, 1906, c. 3592, 34 Stat. 606 [U. S. Comp. St. Supp. 1911, p. 544]), § 30, providing that the naturalization laws shall apply to authorize the admission to citizenship of all persons not citizens who owe allegiance to the United States, and who may become residents of any state or organized territory of the United States on certain conditions; and hence a citizen of the Philippine Islands who ethnologically was one-fourth white and three-fourths brown or Malay could not be naturalized.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

Petition for naturalization by Eugenio Alverto. Denied.

Jerome C. Shear, Special Naturalization Examiner, for the United States.

THOMPSON, District Judge. The facts adduced at the hearing are as follows:

The petitioner is a native of the Philippine Islands. His paternal grandfather was a Spaniard, who settled in the Philippines while those islands were under the dominion of Spain, and married a na-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tive Philippino woman. The petitioner's father, who was born in the Philippines, also married a native Philippino woman, and was a Spanish subject prior to the cession of the Philippine Islands to the United States by the treaty of Paris. Act July 1, 1902 (32 Stat. at L. 691, c. 1369), providing for the administration of the Philippine Islands, declared that:

"All inhabitants of the Philippine Islands continuing to reside therein, who were Spanish subjects on the 11th day of April, 1899, and then resided in said islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain, signed at Paris December 10th, 1898."

The applicant on April 11, 1899, was a Spanish subject residing in the Philippine Islands, and under the terms of the act became a citizen of the Philippine Islands. At the time of the hearing he had served continuously for seven years as an enlisted man in the United States navy, had been honorably discharged under his first enlistment, and was serving under a second.

Section 30 of the Naturalization Act of June 29, 1906 (34 Stat. 606, c. 3592 [U. S. Comp. St. 1911, p. 544]), provides as follows:

"All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law."

The applicant claims under the above section and under Act July 26, 1894 (28 Stat. 124, c. 165 [U. S. Comp. St. 1901, p. 1332]), as a provision of the naturalization laws applicable thereto. The latter act provides that:

"Any alien of the age of twenty-one years and upwards who has enlisted or may enlist in the United States navy or marine corps, and has served or may hereafter serve five consecutive years in the United States navy or one enlistment in the United States marine corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States navy, or marine corps."

The question is whether the applicant is debarred by section 2169, Revised Statutes, as amended in 1875 (U. S. Comp. St. 1901, p. 1333), which provides:

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

[1] Section 2169 was not repealed by the Naturalization Act of June 29, 1906. *United States v. Balsara*, 180 Fed. 694, 103 C. C. A. 660.

[2] The applicant's service in the navy does not affect his status under section 2169. It has been repeatedly held that service in and an honorable discharge from the military service of the United States does not extend the right of naturalization to those persons who are beyond its provision under section 2169. *In re Buntaro Kumagai* (D. C.) 163 Fed. 922; *In re Knight* (D. C.) 171 Fed. 299; *Bessho v. United States*, 178 Fed. 245, 101 C. C. A. 605. It is apparent, therefore, that, however commendable the service of the applicant in the navy, the provisions of law in relation to naturalization of persons in the army and navy were intended by Congress to grant to those serving in the army and navy, who were of the white or African races, exemption from the necessity of a previous declaration of intention and from the necessity of proving residence for five years within the United States, but were not intended to extend the benefit of the naturalization laws to those not coming within the racial qualifications.

[3] The applicant's service in the navy, therefore, has no bearing on the case, and it remains to be determined whether section 2169 is a provision of the naturalization laws applicable to section 30 of the Act of 1906.

Citizens of the Philippine Islands or of Porto Rico, while not citizens of the United States, are not aliens, and, prior to the passage of the Act of 1906, were not capable of becoming naturalized for two reasons: First, the naturalization laws of the United States applied only to aliens; and, second, they required a renunciation of former allegiance. *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317. The effect of section 30 was to make applicable to citizens of the Philippine Islands and Porto Rico those provisions which had theretofore applied only to aliens. If the limitations of section 2169 apply to one provision of the naturalization laws, they must apply to all and consequently to section 30 of the Act of 1906. Section 2169 was intended to limit the application of the whole body of the naturalization laws to aliens being free white persons or of the African race. "Free white persons" includes members of the white, or Caucasian race, as distinct from the black, red, yellow, and brown races. *United States v. Balsara*, 180 Fed. 694, 103 C. C. A. 660; *In re Ah Yup*, Fed. Cas. No. 104; *In re Camille* (C. C.) 6 Fed. 256; *In re Knight*, *supra*; *In re Najour* (C. C.) 174 Fed. 735. The use of the words "white persons" clearly indicates the intention of Congress to maintain a line of demarcation between races and to extend the privilege of naturalization only to those of the races named. *In re Ah Yup*, *supra*; *In re Saito* (C. C.) 62 Fed. 126; *In re Buntaro Kumagai*, *supra*. The petitioner is, ethnologically speaking, one-fourth of the white or Caucasian race and three-fourths of the brown or Malay race. In the case of *In re Camille* (C. C.) 6 Fed. 256, the applicant, a Canadian, with a white father and an Indian mother, was held not to be a white person. In the case of *In re Knight* the petitioner was born on a British

schooner in the Yellow Sea. His father was an Englishman, and his mother half Chinese and half Japanese. It was held that the petitioner was not a free white person, and therefore not entitled to naturalization. As was said in the Knight Case:

"Naturalization creates a political status which is entirely the result of legislation by Congress, and, in the case of a person not born a citizen, naturalization can be obtained only in the way in which Congress has provided that it shall be granted, and upon such a showing of facts as Congress has determined must be set forth. It must have been within the knowledge and foresight of Congress, when legislating upon this question, that members of other races would serve in the army and navy of the United States under certain conditions, and it must remain with Congress to determine who of this class can obtain, under the statutes, the rights of a citizen of the United States."

Section 4 of the act provides that "an alien may be admitted to become a citizen of the United States in the following manner and not otherwise."

The Naturalization Act of 1906 expressly repealed many of the then existing provisions of law in relation to naturalization. Section 2169 was not repealed, and, if Congress had not intended its provisions to apply to section 30 of the Act of 1906, such intention would naturally appear in the act. As it has not excepted section 30 of the act from the provisions of section 2169, Revised Statutes, the latter section must be held to be an applicable provision of the naturalization laws.

I am therefore of the opinion that Congress did not intend to extend the privilege of citizenship to those who had become citizens of the Philippine Islands under the Act of 1902, unless they were free white persons or of African nativity or descent.

The application is denied.

THOMPSON v. RAILROAD COMMISSION OF LOUISIANA et al

(District Court, E. D. Louisiana, Baton Rouge Division. July 27, 1912.)

No. 77.

1. CARRIERS (§ 12*)—STATE REGULATION OF RATES—REVIEW BY COURTS—EVIDENCE.

Where a state Railroad Commission, in establishing rates, has made adequate inquiry, affording all parties in interest a chance to be heard, there is a presumption that the rates established are reasonable; and it is immaterial to their legality how the inquiry was initiated, or what motive actuated the Commission, so long as it had jurisdiction and did not exceed its authority.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

2. CARRIERS (§ 12*)—STATE REGULATION OF RATES—REASONABLENESS OF RATES.

An order of the Railroad Commission of Louisiana annulling a special rate given by a railroad to a single shipper of gravel from a point on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its line to New Orleans, and fixing the rate of charge to be made by such road on sand and gravel in car load lots, *held* reasonable and valid; but a further order, applying to all railroads in the state, and fixing the rate on car loads of gravel and sand at a larger sum per mile for long than for short hauls, and not shown to have been based on any hearing or investigation, *held* unreasonable and void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*

Regulations of charges by carrier for long and short hauls, see note to *Interstate Commerce Commission v. Southern Ry. Co.*, 60 C. C. A. 542.]

In Equity. Suit by John W. Thompson against the Railroad Commission of Louisiana and others. Decree rendered.

W. C. Marshall, of St. Louis, Mo., E. D. Saunders, of New Orleans, La., and T. Jones Cross, of Baton Rouge, La., for plaintiff.

W. M. Barrow, Asst. Atty. Gen., for defendants.

FOSTER, District Judge. This is a suit by John W. Thompson, a citizen of Missouri, against the Railroad Commission of Louisiana and the New Orleans, Texas & Mexico Railroad Company, Louisiana corporations, and against the Texas & Pacific Railway Company, a federal corporation, to have declared null and void three certain orders of the said Commission, and for an injunction to prevent the defendants from executing the said orders. The Commission joined issue, but the railroads merely entered their appearances through counsel and have taken no other part in the proceedings whatever.

The orders complained of are, in their material portions, as follows:

(1206)

It is therefore ordered that the following be, and are hereby, established as reasonable rates on gravel and sand, car loads, straight or mixed, between points on the Texas & Pacific Railway in Louisiana:

Gravel or sand, car loads, minimum weight 80,000 pounds:

| Between points on the Texas & Pacific Railway in Louisiana. | Rates in Cents per 100 Pounds. |
|---|-----------------------------------|
| 25 miles and less..... | 1 |
| 75 miles and over 25..... | 1½ |
| 135 miles and over 75..... | 2 |

All rates in conflict are hereby cancelled.

(1216)

It is therefore ordered that the Texas & Pacific Railway Company be, and is hereby, commanded and required to further cease and desist from granting or allowing to J. W. Thompson & Co., or any other shipper, for or without a consideration, the exclusive right to erect elevators at, and use its loading racks, for shipping sand, gravel, or any other commodity, located at the end of Thompson's Spur, opposite Profit's Island, or elsewhere, and the exclusive right to use its terminals in the city of New Orleans, or elsewhere, for the purpose of loading and storing sand, gravel, or any other commodity; but all such facilities must be open to the use of all shippers and consignees under the same conditions.

(1222)

It is therefore ordered that the following rates, which the Commission believes to be fair, reasonable, and just, be, and they are hereby, adopted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for all railroads operating in the state of Louisiana, applying on sand and gravel, car loads, straight or mixed, minimum weight 80,000 pounds:

| Single Line Rates—Distances. | Rates in Cents per 100 Pounds. |
|------------------------------|-----------------------------------|
| 30 miles and less..... | 1½ |
| 75 miles and over 30..... | 2 |
| 125 miles and over 75..... | 2½ |
| 150 miles and over 125..... | 3 |
| 175 miles and over 150..... | 4 |
| 200 miles and over 175..... | 5 |
| 225 miles and over 200..... | 6 |
| 250 miles and over 225..... | 6½ |
| 275 miles and over 250..... | 7 |
| 300 miles and over 275..... | 7½ |
| Over 300 miles..... | 8 |

Plaintiff contends, first, that the orders were not legally issued for technical reasons. The Commission is composed of three members. Their decisions are not required by law to be unanimous, and they have adopted rules authorizing a quorum to transact business. A quorum was present at each meeting at which any proceedings were had, at least regarding the said orders, and two commissioners concurred in their adoption. That is all that is necessary to make them legal and binding, if the Commission has otherwise acted within its jurisdiction and authority.

It appears from the undisputed allegations of complainant's bill, and from the evidence in the record, that Thompson has a contract to furnish gravel to the Texas & Pacific Railway for ballasting, and gets the gravel from Profit's Island, a gravel deposit in the Mississippi river, about 112 miles from New Orleans by rail, and assembled a plant, consisting of barges and dredges, and erected a wharf and an elevator at a point opposite Profit's Island. The Texas & Pacific built a bin for him at this point, which it leased to him for \$100 a month, and extended a spur track, known as "Thompson's Spur," from its station at Chamberlin, a distance of about a mile and a half, and also permitted Thompson to erect storage bins at New Orleans on property owned, or at least claimed, by the railroad, for which it exacted no rental, and to which it erected approaches at its own expense, under an agreement that Thompson should be permitted to sell the gravel to others, but the railroad should have the preference. Order 1216 is aimed at the exclusive use of these bins and spur tracks. On the hearing of the case, counsel admitted its validity, and a decree was rendered to that effect. It therefore is no longer an issue in the case, but it may be necessary to further consider it in the determination of the other questions.

It is evident plaintiff's main concern is to perpetuate a rate of \$12 per car, of unlimited capacity, from Chamberlin to New Orleans over the Texas & Pacific Railway, canceled by order No. 1206. He contends that the Commission was actuated by a desire to favor his competitors, and not to regulate rates; that the \$12 rate is reasonable and just, especially in view of water competition; that the railroad receives fair compensation for the service and is entirely satisfied, and therefore the Commission could not abrogate it to put in a higher sched-

ule; and that he will be deprived of his property without due process of law if their orders are effective.

[1] The Railroad Commission of Louisiana has the authority, and it is its duty, to establish reasonable and just rates of transportation within the confines of the state. In doing so they may adopt a mileage, or any other recognized, form of schedule; they may order the carrier to desist from giving special privileges; and they may raise or lower existing rates as may be necessary, provided the rates adopted are reasonable and just. When they had made adequate inquiry, affording all parties in interest a chance to be heard, as was done in this case, there is a presumption that the rates established by them are just and reasonable. It is immaterial how the inquiry is initiated, or what motive actuates the Commission, so long as they have jurisdiction and do not exceed their authority. *Texas & Pacific Railway Company v. Railroad Commission*, 192 Fed. 280, 112 C. C. A. 538; *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310.

[2] There is no actual existing water competition, although it is practicable at all seasons of the year by means of barges and towboats. There is great conflict of testimony as to its cost, but it seems reasonably certain that gravel in large quantities can be towed the year around for about 30 cents per cubic yard, not including the cost of unloading at New Orleans. There is no satisfactory evidence showing what this latter cost would be; but Thompson testifies that it costs him 30 cents per cubic yard to transport his gravel from Profit's Island the short distance across the river to his wharf and to load it into the cars. It does not appear what part of this charge should be allocated to the unloading of the barges; but the cost of loading them is not included, and the actual transportation cannot cost much. Therefore it would not seem unreasonable to estimate the unloading cost at 15 cents per cubic yard, which would make the water rate about 45 cents per cubic yard, unloaded at New Orleans. At \$12 per car, of 80,000 pounds, the rail rate would be about 40 cents per cubic yard. Furthermore, any gravel intended for points outside of New Orleans could be more economically and conveniently hauled if received by rail, a matter of considerable importance.

It is apparent this \$12 rate was intended as a special favor to Thompson, to keep his plant running during the time the railroad was unable to carry out their agreement to take practically his entire output, and in putting it in they considered it about cost. Under the stimulus of the rate, the traffic increased greatly, and Thompson built cars of his own of increased capacity, and it appears that the railroad is not now satisfied with the rate as a freight proposition, and they do not consider it pays the cost of hauling. Mr. Braggins, traffic manager of the Texas & Pacific, testifies that the average cost of the Texas & Pacific for the service is $\frac{1}{2}$ cent per ton per mile, and that the railroad only gets a return of about $\frac{1}{4}$ to $\frac{1}{5}$ of a cent per ton per mile. Judge Freeman, first vice president of the Texas & Pacific, states that the road could not make anything at the \$12 rate if cars of unlimited capacity were used, and that as a freight proposition the road would

want 2 cents per 100 pounds. It is difficult to understand how complainant will be deprived of his property without due process of law if this rate is abolished. He does not claim a contract for it. His plant was installed and is necessary to carry out his contract with the Texas & Pacific, and at the increased rates, on his own testimony, he would have a substantial margin of profit on sales, at current prices, in New Orleans.

In my opinion, the Commission was right in annulling the \$12 rate; and not only has the plaintiff failed to overcome the presumption in favor of the rates established by order 1206, but the preponderance of the evidence tends to maintain the finding of the Commissioners. I must therefore hold that order 1206 is legal and valid.

Order No. 1222, however, presents a different aspect. It is not shown that the Railroad Commission conducted any investigation before adopting it; therefore no presumption regarding it exists. In view of the rates established by order 1206, and from an analysis of order 1222 itself, I am inclined to consider the schedule unreasonable. For instance, the greater the distance the larger is the rate per mile. For the first 30 miles the rate is $1\frac{1}{2}$ cents, which presumably includes switching and other expenses not again chargeable on a longer continuous haul. It drops to $\frac{1}{2}$ cent for each of the next divisions of 45 and 50 miles, but then jumps up to double, or $\frac{1}{2}$ cent, for the next 25 miles, and four times, or 1 cent, for each of the next three divisions of 25 miles, making the cost 3 cents for the last 75 miles of a journey of 220 miles, as against $2\frac{1}{2}$ cents for the first 120. And then the rate per mile goes down again. Surely this appears, *prima facie*, to be illogical and unreasonable, and there is no evidence in the record on which I may base a different opinion.

There will be a decree in conformity with these views, the costs to be divided.

MILLER v. CHICAGO & A. R. CO.

(District Court, S. D. New York. June 11, 1912.)

CORPORATIONS (§ 584*)—CONSOLIDATION OF RAILROAD COMPANIES—RIGHTS OF NONASSENTING STOCKHOLDER.

The articles of incorporation of a consolidated railroad company, composed of two constituent companies, each of which owned and operated lines of road, and one of which owned the greater part of the stock of the other, after providing for an issue of prior lien stock to be exchanged for the outstanding common and preferred stock of the other, further provided that, until such exchange was fully made, holders of unexchanged stock should "continue to have the right to share proportionately in accordance with the existing respective rights of said two classes of stock in the earnings and assets" of such constituent company, "as if the said consolidation and merger had not taken place" and the entire shares of stock of the constituent company were still outstanding. Nearly all of the stockholders assented to the consolidation, which was legally made, and the consolidated company operated the lines of both original companies as a single system. *Held*, that a non-assenting stockholder, who refused to exchange his stock, did not have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an absolute right to a proportionate share of the earnings of the old company, but only, as before the consolidation, to such dividends as the directors might declare out of the earnings, and that a court of equity would not require the consolidated company to keep accounts showing the exact earnings of the property of each constituent company, which not only could not be done, but would impose an unnecessary and unreasonable burden on the majority stockholders, but that all he was entitled to was fair and equal treatment with other stockholders of the same class, and such a system of keeping the accounts as the directors might reasonably establish; it not appearing that he had suffered any damage or loss therefrom, or because of the consolidation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. § 584.*]

Rights and liabilities of stockholders of railroads on consolidation, see note to *Bonner v. Terre Haute & I. R. Co.*, 81 C. C. A. 480.]

In Equity. Suit by William Starr Miller against the Chicago & Alton Railroad Company. On final hearing. Provisional decree for complainant.

For former opinion, see 176 Fed. 379.

Philbin, Beekman, Menken & Griscom (Charles K. Beekman and Stephen P. Anderton, of counsel), for complainant.

Joline, Larkin & Rathbone (Arthur H. Van Brunt, Albert Stickney, and Joseph P. Cotton, Jr., of counsel), for defendant.

HOLT, District Judge. This is a suit in equity, brought by the complainant to enforce his rights as owner of 500 shares of the common stock of the old Chicago & Alton Railroad Company. The defendant, the Chicago & Alton Railroad Company, is a corporation formed in 1906 by the consolidation of a former company of the same name with another corporation called the Chicago & Alton Railway Company. Prior to 1900, the old Chicago & Alton Railroad Company was a railroad corporation, organized under the laws of Illinois, having a capital stock of \$22,230,600, of which \$18,751,100 was common and \$3,479,500 was preferred stock. It owned and operated a road more than 800 miles in length. On April 2, 1900, the Chicago & Alton Railway Company was incorporated in Illinois, with an organized capital of \$40,000,000, consisting of \$20,000,000 preferred and \$20,000,000 common stock. On the same day the Alton Railway acquired a line of railway about 58 miles in length, and took from the old Alton Railroad a lease of all its franchises and property for 99 years. By the provisions of the lease, the rental to be paid to the old Alton Railroad by the lessee was interest on its bonded indebtedness, rentals paid to leased lines, taxes, assessments, and governmental charges on the old Alton Railroad, and "an amount equal to the net earnings of the railroads and premises hereby demised, such net earnings to be ascertained by deducting from the gross income or receipts of such railroads and premises the payments" above mentioned, "and any other payments which it may have to make or incur under or by virtue of this lease." Thereafter, from April, 1900, to March, 1906, the two roads were operated as one united operating system, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dividends were declared to the stockholders of the old Alton Railroad, based on its net earnings ascertained by the following method: Those earnings and expenses which could be assigned exclusively to either road were so assigned, and other general expenses were figured by a method of approximation. Thus earnings arising exclusively from the operation of either company were credited exclusively to such company, and such expenses as maintenance of way and structures, taxes, and traffic originating and terminating on the same line, were charged exclusively to the road on which such expenditures were made. But a large class of earnings, such as through interchangeable traffic, and passenger and mail earnings, and a large class of expenses, such as maintenance of general equipment, transportation expenses, and hire of foreign equipment, which resulted from the joint operation of the two roads, were allocated to each road in proportion to the general volume of business done and earnings made on each road, with the result that the net earnings of the old Alton Railroad Company during the period of the lease were computed at \$19,687,392.42, and of the Alton Railway at \$731,242.38, and this computation is admitted to be correct, for the purposes of this suit, by the parties to it. A dividend of 8 per cent. per annum was paid during the period of the lease to the complainant on his stock in the old Alton Railroad, based upon such computation of net earnings.

On March 8, 1906, the old Alton Railroad and the Alton Railway were consolidated by proceedings taken under the statutes of Illinois, and it is conceded by the parties to this suit that the consolidation was duly and properly effected under the Illinois statutes. At that time there were outstanding 34,795 shares of preferred and 187,511 shares of common stock of the old Alton Railroad, most of which were held by the Railway Company. The articles of consolidation provided for an issue of \$40,000,000 of capital stock of the consolidated company, namely, 400,000 shares, of the par value of \$100 each. Of this stock 8,993 shares were issued as prior lien and participating stock, which was exchangeable for the outstanding old Alton Railroad common and preferred stock held by other stockholders than the Railway Company, at the rate of 2 shares for the common stock and 3 shares for the preferred. The articles provided that the holders of the shares of such prior lien stock should be entitled to receive cumulative preferred dividends at the rate of 4 per cent. per annum, payable semi-annually, before any dividends should be declared or paid upon any of the other issues of stock of the consolidated company. In case of liquidation of the consolidated company, the owners of prior lien stock were to be paid the par value of their shares, and any accumulative unpaid dividends, with interest, in priority to any distribution to the holders of the other stock of the consolidated company. The articles further provide as follows:

"Article IV. Until all of the 73 shares of preferred stock and 4,387 shares of common stock of the party of the first part, not now owned by the party of the second part, shall have been exchanged for prior lien stock of the consolidated company as herein provided, every holder of any such unexchanged share of such preferred stock or of such common stock of the party of the first part shall continue to have the right to share proportionately, in

accordance with the existing respective rights of said two classes of stock, in the earnings and assets of the party of the first part hereby consolidated and merged into the party of the second part as if the said consolidation and merger had not taken place and the entire capital stock of the party of the first part, now consisting of 34,795 shares of preferred stock and 187,511 shares of common stock, were still outstanding."

Article V contains a provision at the end to substantially the same effect.

The complainant did not exchange his 500 shares of common stock for the so-called prior lien and participating stock, but has held them ever since. After the consolidation, on November 5, 1906, defendant tendered complainant its check for \$2,000 as a dividend declared on May 24, 1906, in respect to the prior lien stock for which complainant's stock was exchangeable. This check was returned, with a refusal to accept any payment as a dividend in respect to prior lien stock. But the complainant demanded payment of at least \$2,000 on account of the dividend to which he was entitled, and defendant thereupon paid him \$2,000. Another check for \$2,000 was tendered complainant on account of dividends for the period ending December 31, 1906, was refused to be accepted as a dividend on prior lien stock, but was accepted on the same terms as the previous one. Since that time the defendant has tendered to complainant on various occasions checks for dividends similar to those issued to the holders of prior lien stock, which the complainant has refused to accept.

In 1908 the complainant brought this suit in behalf of himself and of other stockholders of the old Alton Railroad similarly situated. No other stockholders have joined in the suit. The relief prayed for in the bill is that the defendant may be adjudged by this court to hold the franchises, properties, assets, and earnings of the old Alton Railroad Company as trustee to the extent that the rights and equities of the complainant may be perpetually preserved and protected, and that the defendant may be perpetually enjoined from in any way assuming, exercising, or enjoying the ownership of the franchises, properties, and assets of the old Alton Railroad, and from in any way applying, appropriating, distributing, or expending any part of the earnings derived by defendant therefrom, and from paying out of such earnings any dividends on defendant's capital stock, or any interest on any obligations incurred by said Alton Railway or by defendant since the consolidation, without keeping accounts and books of account showing correctly and truly all the business and earnings derived as aforesaid, and the application, appropriation, distribution, and expenditure thereof by defendant, and without paying to complainant dividends on the stock owned by him and his proportionate share of the earnings and profits derived from the old Alton Railroad Company as if said articles of consolidation had not been made, and that the complainant may have an accounting of such earnings.

The complainant's claim seems to be principally based on the expression in the provisions of the articles of consolidation that the owners of the old Alton Railroad stock shall "have the right to share proportionately in accordance with the existing respective rights of

said two classes of stock in the earnings and assets of the consolidated road." A stockholder has a right to share proportionately in the assets of a corporation, if it is wound up; but he has not a right to share proportionately in the earnings of the corporation so long as it is a going concern. He has a right to such dividends as the directors may declare out of the earnings, and his right under these sections to share proportionately in the earnings is stated to be in accordance with the existing respective rights of said two classes of stock. So long, therefore, as the defendant continues to operate the roads, complainant's right to share proportionately in earnings is his right to do so in accordance with the rights which he had at the time of the consolidation, and those rights were, not to directly share proportionately in the earnings, but to receive such dividends as might be declared by the directors, based upon the earnings.

As I understand the complainant's claim, it is, in substance, that the defendant should keep its accounts so as to show the exact earnings and expenses of the old Alton Railroad, as they would have appeared if it had never been leased or consolidated with the Alton Railway. Obviously this is impossible, unless the two railways cease to be operated as one road. There are certain earnings and expenses which can be accurately charged exclusively to the road to which they belong; but there are a large number of other general operating expenses which must be apportioned. That was done during the life of the lease without any objection by the complainant, and there is no reason shown on the record why it should not continue to be done since the consolidation. The proceedings for the consolidation are admitted to have been legal, and the consolidation valid. The great majority of the stockholders are apparently satisfied with the consolidation, and with the manner in which the business is now done and the accounts kept; and, in my opinion, it is not the duty of a court of equity to enforce an unreasonable demand, based on a doubtful claim of technical legal right, the alleged violation of which has not caused any actual damage, when the enforcement of such right would cause great inconvenience and expense to a large number of others concerned. *Cella v. Brown*, 144 Fed. 742, 75 C. C. A. 608; *Texas, etc., Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; *Beasley v. Texas, etc., Co.*, 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274.

If the complainant is entitled to such an accounting as he demands, every other stockholder of the old Alton Railroad, if any remain, can maintain a like suit, and the defendant would be subjected to having its entire accounts, covering an enormous business for many years, repeatedly subjected to minute scrutiny and investigation, involving great labor and expense. The complainant, moreover, in my opinion, has no legal right to such an accounting as he demands in this case. A stockholder cannot sue for dividends, nor, under ordinary circumstances, can he sue for an accounting, in order to establish a basis for dividends. He is entitled to an equality of treatment with other stockholders of the same class; but it is for the directors of any corporation to determine what dividends shall be declared, and for the direct-

ors to keep the accounts of the corporation in the manner which they deem appropriate, provided that in doing so they treat the stockholders and all others interested in it fairly and justly. The computation made by Mr. Benson of the earnings of the old Alton Railroad, made upon precisely similar lines to those under which such computation was made during the six years that the lease continued, and to which the complainant never made any objection while taking the dividends based upon such a method of computation, furnishes, in my opinion, all the facts necessary to determine what dividends the complainant is entitled to. By that computation it appears that the aggregate amount of the dividends tendered to the complainant exceeded the amount which he would have received, if they had been computed as they were computed during the period of the lease, by about \$7,000.

The complainant may, at his option, take a judgment in this case, either for the amounts which have been tendered him by the defendant, without interest, or for dividends computed on the accounts as made up by Mr. Benson and introduced in evidence in the record, with interest; and if he elects to take such a judgment, the bill, if necessary, may be amended so as to authorize such a recovery, although, as it contains a general demand for damages, any amendment seems hardly necessary. If the complainant refuses to take judgment for either of these amounts, the bill is dismissed. In any case, the defendant is awarded the costs of the suit.

NORTHERN PAC. RY. CO. v. LITTLEJOHN et al.

(District Court, W. D. Washington, S. D. August 19, 1912.)

No. 1,702.

1. ADVERSE POSSESSION (§ 60*)—NATURE OF POSSESSION—INCLOSURE OF OTHER LANDS BY LESSEE.

The inclosure by a lessee of land of his lessor, adjoining, but not included in, the leased premises, and its use in connection therewith, is presumptively not adverse to the lessor's title, but by license from him; and the possession does not become adverse by a transfer of the fence to another, not connected with the lease, unless and until notice of the transfer is brought home to the true owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-314; Dec. Dig. § 60.*]

2. ADVERSE POSSESSION (§ 29*)—NATURE AND REQUISITES—CONTINUITY OF POSSESSION.

Neither a single act of trespass by defendant on lands of complainant by the cutting of trees thereon, nor the occasional pasturing of stock turned into a field a part of which was concededly owned by defendant, nor both together, constituted such open, notorious, and continuous possession as will support a claim of title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 124, 125; Dec. Dig. § 29.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. ADVERSE POSSESSION (§ 94*)—NATURE AND REQUISITES—PAYMENT OF TAXES.

The payment of taxes on land by one claiming adversely under color of title cannot aid his claim, where the owner of the legal title also paid taxes on the land for the same years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 528, 529; Dec. Dig. § 94.*]

In Equity. Suit by the Northern Pacific Railway Company against A. J. Littlejohn, Angie St. John, and George St. John. Decree for complainant.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, for complainant.
Robert M. Davis and C. M. Riddell, for defendants.

CUSHMAN, District Judge. This is a suit brought by the plaintiff, Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, to quiet title to a strip of land 100 feet wide, the same being a part of its 400-foot main line right of way from Tacoma to Portland, granted by the act of Congress of July 2, 1864, and joint resolutions of April 10, 1869, and May 31, 1870. It is the outer 100 feet on one side of this right of way that is in controversy.

The defendants claim to have acquired title by adverse possession. The claim asserted by them in their answer extended to within 50 feet of the center of the main track of the plaintiff at this point; but, on the trial this portion of the asserted claim was abandoned, and it was only maintained as to the outer 100 feet. The defendants claim possession since 1888. They depend, to establish possession, upon inclosures, the pasturing of cattle in the inclosure, the cutting of timber upon the lands, and the paying of taxes from 1888 to 1900. In 1900 it appears that the county treasurer refused defendants' tender of the taxes, because the collection officers, under decisions of the state courts, held the land to be part of the right of way.

Section 280 of Pierce's Code (Rem. & Bal. Code, § 156) provides:

"Ten Years a Bar.—The period prescribed in the preceding section for the commencement of actions shall be as follows:

"Within ten years:

"1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action."

Section 1158 of Pierce's Code (Rem. & Bal. Code, § 786), February 16, 1893, provides:

"Limitation of Action Against Record Title and Possession—Seven Years.—That all actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed, by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States or from any public officer, or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

next after possession, being taken as aforesaid but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title."

The act of April 28, 1904 provides:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company of land forming a part of the right of way of the Northern Pacific Railroad granted by the government by any act of Congress are hereby legalized, validated and confirmed: Provided, that no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

"Section 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions." 33 Stat. p. 538, c. 1782.

The terms of this act were accepted by the railroad company on June 22, 1904, and duly certified. The acceptance was filed with the Secretary of the Interior July 7, 1904. *N. P. R. R. Co. v. Ely*, 197 U. S. 1, 6, 25 Sup. Ct. 302, 49 L. Ed. 639. In the state of Washington the adverse possession for a sufficient time takes away the title, as well as the remedy, from the real owner, and transfers it to the adverse possessor. *N. P. R. R. Co. v. Ely*, supra.

No evidence concerning the recitals of the patent, if any, from the government to the defendants' grantor in interest was submitted. The burden of proof, to establish adverse possession, is upon the defendants.

They have offered testimony tending to show the maintenance of a fence, inclosing this and other land conceded to be theirs, continuously since 1888; but this testimony has been overborne by the evidence of the plaintiff, which clearly shows that no fence was kept up around the whole tract, and leaves it very doubtful whether there ever was such a completed inclosure.

[1] Defendants also rely upon a fence built by one Nelson Bennett subsequent to 1900. The evidence is not clear as to exactly when it was built; Bennett testifying that it was built in 1903 or 1904. This latter fence, the evidence shows, has been maintained since its erection and incloses the greater part of the land in controversy, as well as a part of the lands conceded to belong to the defendant Littlejohn, a part of plaintiff's land not in controversy, and certain land not claimed by either party.

It is shown that Bennett, in 1888, leased from the railroad company certain land on its right of way opposite the land in dispute, on which he built a warehouse. This lease has been renewed from year to year since. There is no direct testimony concerning any arrangement by him for the erection of the inclosure. It can only be inferred from the circumstances and situation. This warehouse was used for the storing of equipment and supplies used in Bennett's contracting work. Later he used the warehouse as a stable for his stock, and, in the care of this stock, built the inclosure; the warehouse itself forming a part of the inner, or railroad, side of the inclosure.

Though a witness in the case, he asserted no claim to the ground

inclosed hostile or adverse to the railroad. So far as the right of way was concerned, the use made of it by Bennett was connected with the leased premises in such a way as, in the absence of positive, convincing evidence to the contrary, would impress his possession of the right of way within the inclosure with the character of a lessee's possession, or that of a licensee, and not adverse to the plaintiff, though it was, so far as the defendants' lands are concerned, undoubtedly, a trespass.

When the defendant Littlejohn, about 1905, called Bennett's attention to the fact that his fence inclosed some of defendant's land, Bennett admitted the fact, disclaimed the assertion of any claim or interest in it, and turned over to the defendant his fence and a scraper in settlement for the trespass.

The inclosure by Bennett, not being hostile to the plaintiff in the first instance, would not become so merely by his surrendering his interest in the fence to the defendant. The plaintiff would have no knowledge or means of knowing that this defendant was asserting title because of it. 1 Am. & Eng. Encyc. (2d Ed.) p. 805. It might as well be presumed that Bennett and his grantee of the warehouse were asserting title to the defendant's land by the inclosure—in fact, better, for constructive possession follows the true title. 1 Am. & Eng. Encyc. (2d Ed.) p. 869 (2); Id. p. 871 (d).

The change from the possession of the lessee or licensee to that of a stranger must be brought home to the plaintiff before there would be any ouster and the possession by the inclosure become adverse.

[2] Defendants' counsel has relied upon the case of *N. P. R. R. Co. v. Ely*, *supra*; but whether it be conceded, or not, that the adverse possession for the necessary time must, necessarily, precede the date of the confirmatory act of 1904, there has been no actual pedal possession shown, as in the *Ely Case*, where the ground was covered by occupied buildings. The mere fact that, at some time, the defendant Littlejohn went upon the land and cut timber, which he sold, as stated by him, for \$15, would not constitute an ouster, being lacking in continuance or duration, and being only a single act of trespass, and does not establish open and notorious possession. The occasional pasturing of stock, turned into the field, a portion of which was concededly owned by the defendants, would not constitute an ouster; nor would the payment of taxes alone. 1 Am. & Eng. Encyc. (2d Ed.) pp. 828, 831.

[3] Regarding the effect of the payment of taxes prior to 1900, if it be conceded that they were paid by defendant Littlejohn from 1888 to 1900, and that he and his grantors had color of title during that time, defendants cannot prevail, for during all that time the plaintiff not only had color of title, but legal title, and was paying taxes on the same ground, although the taxes were computed on the length of the right of way, without regard to its width or area. It would therefore, so far as this case is concerned, be considered as double taxation. The equities at least would be equal, and the legal title would prevail.

Findings and decree may be prepared in accordance with the foregoing.

BALFE et al. v. TILTON.

(District Court, D. New Hampshire. August 16, 1912.)

No. 373, Equity.

1. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—SUIT TO SET ASIDE SETTLEMENT MADE OUT OF COURT—EFFECT OF RELEASE.

In a suit by the widow and sole heir of a decedent against the executrix of his brother and partner, who was also executor of his alleged will and settled his estate, for an accounting and to set aside releases by which complainant released to him her interest in the estate for a consideration alleged to be wholly inadequate, complainant is not entitled to such accounting, involving large expense and an examination of the books of the partnership and of defendant's testator, until the question of the validity of the releases has been fully determined.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041-2060; Dec. Dig. §§ 473, 474.*]

2. EQUITY (§ 401*)—RELEASE BY HEIR—CONSIDERATION.

But when the validity of releases under fiduciary relations is in question, and where an allegation of wholly inadequate consideration is not aptly denied, a master may, in the discretion of the court, be appointed to ascertain whether the consideration was approximately, measurably, or reasonably commensurate with the actual interests sought to be released.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 869-873; Dec. Dig. § 401.*]

3. DESCENT AND DISTRIBUTION (§ 72*)—RELEASE BY HEIRS—VALIDITY.

The fact of palpable disproportion between the consideration and the actual interests would have a material bearing upon the question of the invalidity of the releases from the one party to the other under fiduciary relations, and the fact of proper and reasonable proportion would be significant in support of the alleged validity.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 221, 222; Dec. Dig. § 72.*]

In Equity. Suit by Louise E. Tilton and Mary A. Balfe, administratrix of the estate of Myra Tilton, deceased, against Genieve E. Tilton, individually and as executrix of the will of Charles E. Tilton, deceased. On application by complainants for discovery and accounting. Denied pending hearing on other issues.

Artemas H. Hoimes, of New York City, and Niles & Upton, of Concord, N. H., for complainants.

Foster & Lake, of Concord, N. H., and E. G. Eastman, of Exeter, N. H., for defendant.

ALDRICH, District Judge. This is a bill in equity which in effect is one for discovery and an accounting and for substantial affirmative relief in respect to property interests.

The bill is by Louise Tilton, widow of Alfred E. Tilton, and Mary A. Balfe, administratrix of Myra, the daughter of Alfred and Louise.

Alfred E. Tilton and Charles E. Tilton were brothers, and were in partnership in various large enterprises in different states, and Alfred

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

had large business enterprises of his own according to the allegations of the bill.

Alfred died some years before Charles, leaving a widow, Louise, and a daughter, Myra.

Under what purported to be the will of Alfred, in which Charles was named as executor, Charles undertook the settlement of Alfred's estate in various states. During quite a period he furnished the widow of Alfred \$200 a month and the daughter Myra \$100 a month for their support, and after several years and while things were going on in this way, and after the daughter of Alfred had died, he procured from the widow of Alfred releases covering the interests of herself and the daughter in the estate of Alfred. These releases, as it is understood, were secured out of court, and were the result of negotiations between the executor and others representing him and the widow, Louise, and, if they stand, doubtless operate to extinguish the interests of Louise and her daughter, Myra, in the estate of Alfred. The allegations of the bill are very sweeping, and in effect charge that the purported will of Alfred was a forgery by Charles; that Alfred's interests were large, and that, while not particularly apt in that respect, they in effect charge that Alfred had very large partnership interests, and that he had large individual interests in lands and other properties in various states; that while the estate of Alfred was in process of settlement in the various jurisdictions, and while Louise was in confidence and trust relations with Charles and in reliance upon him, he procured fictitious claims to be put up against the estate of Alfred which operated to absorb and dissipate the interests of Louise and the daughter, Myra; that Louise was ignorant of the extent of the interests of Alfred; that Charles was in trust and fiduciary relations to Louise; and that under his influence and the influence of his agents she was overreached and finally induced under circumstances of financial stress, for a consideration of \$25,000, to release interests which according to the allegations of the bill were wholly out of proportion to the consideration of the releases which Louise executed.

The answer, in effect, denies many of the allegations, but makes no apt and emphatic denial of the allegations which indicate that Alfred's property rights were of much greater value than \$25,000, and demands proofs in that respect. The answer sets up probate settlements in respect to Alfred's interests, also sets up the defense of laches, and that the will was not a forgery, and a strong argument is presented and a pretty effective one on the ground of laches.

The present hearing is upon the question whether there should be an accounting, and whether in connection with that there should be an examination of the books of Alfred and Charles as partners and the books of Charles, to the end that the actual value of the interests of Alfred may be known.

As a result of the present hearing, it is not proposed to deal with the question of the forgery of the will, or the question of laches, or with what may be said to be any of the ultimate questions of right. If the releases are valid, they, of course, operate as an extinguishment

of the individual interests of Louise as widow of Alfred and of the interests of Myra, to which Louise succeeded upon her death.

In view of the supposed releases, it would seem that the plaintiffs have not made out a case for an accounting. That would mean an extensive and expensive investigation, and one which ought not to be entered upon unless the plaintiffs have an interest in the estate and a right to have it, and whether they have a right to have it or not depends upon the validity of the releases. There is not enough in the record to justify an adjudication in respect to the validity of the releases.

[2, 3] The New Hampshire cases seem not to favor and do not treat as conclusive, settlements out of court between executors and the heirs of estates. This is upon the theory, it is understood, that the interests are in custodia legis, and that outside settlements should be subject to approval, upon proper examination, if any issue is raised about them, and as a consequence such settlements and releases are not as conclusive as settlements between individuals in respect to rights not in the custody of the law. *Clarke, Adm'r, v. Clay*, 31 N. H. 393, is among the cases which suggest this idea, and various phases of the proposition are discussed in *Bean v. Bean*, 33 N. H. 284; *Twitchell v. Smith*, 35 N. H. 51, *Stark v. Gamble*, 43 N. H. 467, *Flanders v. Lane*, 54 N. H. 392, *Woodman v. Rowe*, 59 N. H. 454, *Bartlett v. Fitz*, 59 N. H. 504, *Mudgett v. Melvin*, 66 N. H. 403, 34 Atl. 158, and *Langley v. Farmington*, 66 N. H. 434, 27 Atl. 224, 49 Am. St. Rep. 624.

If, under ignorance in respect to the extent of the property rights of Alfred and through the influence of Charles, who purported to be the executor of the will of Alfred, and one upon whom she relied, Louise signed papers purporting to release her interests for a wholly inadequate consideration and one which did not at all correspond to her actual interests and rights, the discharge ought not to operate as an extinguishment of her rights. An inquiry in respect to whether the discharges were valid may possibly become a broad one. It would perhaps involve an inquiry as to her knowledge of her husband's business interests, as to her ability to appreciate and value them, as to the extent of her reliance upon Charles under the fiduciary and family relations, and as to various other considerations and situations.

Judge Mitchell, who testified in respect to the execution of the releases, said that he was requested to prepare such papers as would be proper and sufficient to evidence a complete settlement of matters between Charles and Louise growing out of the estate of Alfred. It has not been pointed out to me that Judge Mitchell was in any way connected with the fiduciary negotiations leading up to the alleged settlement. His part was that of a lawyer to draw the papers. There was a pretty sharp issue between him and Louise as to what occurred at the time of the execution of the papers; but it is quite unnecessary to go into that, because, if there is anything in the transaction which entitles the widow, Louise, to relief, it is something which has reference to the relations of the parties and earlier conditions of trust and reliance, and something about which Judge Mitchell does not pretend to have any knowledge whatever.

[1] The conclusion is that the plaintiffs have not made out on this hearing a case which would justify common-law discovery and accounting, and this is so because the releases and the probate adjustments stand in the way, but, in view of the sweeping allegations of the bill as to the large property interests of Alfred, of ignorance, trust, confidence, and reliance on the part of Louise, none of which are aptly denied by the answer, it seems important to know whether the widow, Louise, released large interests for a wholly inadequate consideration. If, under conditions of family trust and reliance, she was induced for \$25,000 to agree to execute a release of her interests in an estate which was worth hundreds of thousands and perhaps millions of dollars, it would be a release which ought not to stand.

The allegations of the bill are that Charles, with whom Alfred was associated, left an estate of \$5,000,000, and the general effect of the allegations is, and the argument is, that Alfred's interests were coextensive with those of Charles. If Alfred was a spendthrift, or a speculator, or if his interests were contingent, or involved in controversy, it can be shown, and, if the agreement of Louise was one fairly reached, it should stand. But, in view of the fiduciary relations, if the consideration of the releases was not approximately, measurably, or reasonably commensurate with the actual interests sought to be released and transferred from the widow to one in fiduciary relationship, then the releases should not stand however many probate settlements there may have been in jurisdictions where Louise was only represented by Charles, the beneficiary under the supposed releases. The fact of proper and reasonable proportion between the consideration of the releases and the actual interests of Alfred would be significant in support of the alleged validity of the releases, and the fact of palpable disproportion between the consideration of the releases and the actual interests of Alfred would have a material bearing upon the question of the reasonableness of the releases from one party to the other under fiduciary relations.

Under this view, I think there should be a master to hear evidence and determine the fact as to the approximate value of the individual and partnership estate of Alfred at the time of his death and also at the time of the alleged releases.

A hearing before a master in respect to such questions may or may not involve an examination of the books and papers of Charles. That is something that can be determined later.

The parties may agree upon a master, or I will appoint one.

In re GRANT.

(District Court, S. D. New York. August 2, 1912.)

1. WITNESSES (§ 308*)—PRIVILEGE—PRODUCTION OF DOCUMENTS.

The privilege against incrimination in the case of corporate records depends upon the nature of the record itself, not upon the lawfulness of the custody in which they happen to be.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1065-1067; Dec. Dig. § 308.*]

2. WITNESSES (§ 204*)—CONFIDENTIAL RELATIONS—PRODUCTION BY ATTORNEY OF DOCUMENTS OF CLIENT.

Where a witness declined to produce books in his possession on the ground that they were delivered to him in his professional character as a lawyer by a client, it is no defense to his claim of privilege that the books were the property of a corporation, of which the client was the sole stockholder.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 759, 760, 762; Dec. Dig. § 204.*]

3. WITNESSES (§ 204*)—PRIVILEGE—CONFIDENTIAL RELATIONS—ATTORNEY AND CLIENT.

An attorney cannot assert a privilege to refuse to produce books of a client in his possession where they were not delivered to him for the purpose of consultation or otherwise in his professional capacity, but to avoid their seizure by the authorities, and he may be compelled to open a package supposed to contain them, although instructed to the contrary by his client.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 759, 760, 762; Dec. Dig. § 204.*]

Proceedings for contempt against Walter B. Grant, an attorney at law, for refusing to produce documents as a witness. Finding against respondent's claim of privilege.

William A. Keener and Dallas Flannagan, for Walter B. Grant.

Henry A. Wise, U. S. Dist. Atty. (Robert Stephenson, of counsel), for the United States.

HAND, District Judge. [1] In *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Wilson originally had custody of the corporate records as president; but before the second presentment of the grand jury the directors had demanded them of him, and he had refused to deliver them. Therefore the first subpoena went before the demand, the second after, but the court did not distinguish. Now with the first I have here no concern, because, while Wilson did not maintain any possession against the corporation, his custody was the corporation's, and the only question was whether he could protect himself from self-incrimination through that fact. That too was *Dreier's Case*, 221 U. S. 394, 31 Sup. Ct. 550, 55 L. Ed. 784, which was decided at the same time as *Wilson's*. However, after Wilson assumed personal possession of the books, a different question arose. The court might have said that his possession would be respected as privileged, whether as against the corporation it was lawful or not, and that, until the corporation had got back the books from Wilson's wrongful possession, no writ should go. That would have been to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

deny the privilege to the corporation only, but to allow it to the individual no matter what was the original character of the books. Of course, such a result would have been most undesirable in practice, and yet I think that it would necessarily be the result if the papers had not been public in character. For instance, suppose that A., knowing that B. has papers which would incriminate him, gets wrongful possession of them from B., whom they do not incriminate. If B. is content, and leaves A. in possession, I do not understand that it would be any answer whatever to A. to say: "You cannot keep these back, because you came by them wrongfully, or at least you have no right to them now." All the law considers is whether A. has got possession in fact, and whether the documents actually will tend to incriminate him. To get them in evidence the law would have to force him to bring them out of a possession which is good enough against any one but B. Certainly, I can find nothing in the books which suggests such a distinction, and it contradicts the whole history of the matter. For the privilege runs along side by side with the power to compel production, and that power depends only upon serving the actual possessor. There are cases to be sure where one having custody is not required to produce, but it is only because his custody is so subordinate as not to justify his meddling with documents even to bring them to court. Certainly, a full possessor of the documents is always subject to subpoena, whether his possession is lawful or unlawful, and regardless of ownership.

Now the Supreme Court paid no attention whatever to this distinction, for they put the decision upon the quasi public character of the record when it was originally made, which, as I read it, subjected it as a document to production in any one's hands, whether it hurt him or not to discover it. That certainly is the burden of Mr. Justice Hughes' opinion, and, for the reasons I have given, I think it is the logic of the decision. If so, the question of legal title does not matter; indeed, this case shows how little it should. For the respondent concedes that Burlingame would have had to produce these books during the years 1908 and 1909, merely because he had no legal title, though he owned all the stock; but he insists that the passage of title makes the whole difference. Surely that is very dry straw.

[2] However, the referee made a finding on the question of title, and the parties seem to think that my finding may affect the scope of an appeal, though it really is only a matter of legal conclusion from undisputed evidence. The respondent relies upon Burlingame's assumption of ownership when he delivered the books to Granger for storage, coupled with his previous expression of intention to take them over as his own. Was there an adequate delivery of the property? Since Burlingame already had possession, all that was needed was words in *præsenti* (*Kilpin v. Ratley*, 1892, 1 Q. B. 582; *Allen v. Cowan*, 23 N. Y. 502, 80 Am. Dec. 316); indeed, not even words were necessary, if there were any other act which showed the purpose. Nor was it as though only the separate stockholders signed a consent, for Burlingame was the corporate manager vested with all powers as well as the sole stockholder. No one disputes that a bill

of sale on behalf of the corporation signed by him would have served. Whether he had formal authority or not, he had actual authority to bind the corporation. How must his acts be interpreted, if one believes his testimony? I think they should be interpreted like those of an executor who is sole legatee and who begins to use the goods after he had advertised for debts, and paid them off. *Blood v. Kane*, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490; *In re Mullon*, 145 N. Y. 98, 39 N. E. 821. The title is in the individual. There may be a fictitious executorial "persona" or not; there may be corporate "persona." Certainly, for most purposes it is better to speak in the simpler terms which such ideas permit, but I will not force the necessity of form so far as to hold that when the sole stockholder stops the business, pays the debts, takes over possession of the property, and announces that he has wound up the corporation, he must either execute a bill of sale to himself or make a public declaration of gift from the corporation. I concede this, if, as in the case of realty, some writing was a necessary form to the passage of title; but, where the law allows it to be all done in pais, such conduct as this will answer all the requisite forms.

However, all this is a very barren and futile inquiry from any point of view, because, whether Burlingame had title or not, he certainly had the right to keep the possession which he already had, and if the case of *Wilson v. U. S.*, *supra*, turns in any sense upon the fact that Wilson was a trespasser quoad his corporation, then the only material consideration here is that Burlingame had absolute right of possession as against every one, including himself in his incorporated persona.

[3] The next question is whether Grant held the box and packages bona fide as attorney and for purposes of consultation, or whether they were given him to avoid seizure by the authorities. Much, perhaps most, of the testimony was taken upon this issue before an unusually capable and careful referee who has found that the deposit was made without any intention to use the books for purposes of consultation. He saw the witnesses, and his conclusion I shall accept. The testimony of McLean is certainly valueless, even in type, because what he says is a hopeless jumble of words for the most part, and for the rest so uncertain and vague as to be unreliable. Burlingame's own testimony was most contradictory, and his interest entitled the referee to disregard it. As to the respondent's own testimony, he feels clear now that his original instructions included consultation; but he concedes that, as to a part of the conversation he is vague, i. e., whether he originally received the injunction not to open them. His first impression certainly was that he had no such right from the original circumstances of their deposit with him. There was a probable reason for getting the books out of Burlingame's hands which did not include any consultation, and in fact no consultation ever occurred. I must confess that on a mere reading of the testimony I should not have come to the same conclusion as the referee, but there was enough in the case to justify his conclusion that the claim of professional privilege was not made out, giving that conclusion the benefit to which it is entitled from the fact that he could so much better

get the actual sense of the situation. Questions of credibility and the value of the recollection of witnesses should always, except in clear cases, remain as they are determined by the tribunal which actually sees them.

Since the respondent has been found not to have received the boxes as a lawyer, he has no privilege to decline to answer whether or not they are the books mentioned in the subpoena, and Burlingame's injunction to the contrary cannot prevail over the demands of justice. It is not Burlingame who is compelled to act in a testimonial character, but Grant, who did not receive them within his professional privilege.

Therefore the respondent will be required in this proceeding to examine the box and packages without injuring their wrappings and to answer the question whether they contain any of the books mentioned in the subpoena. If so, he will hold these subject to the order of a new subpoena to produce the books as evidence. He is fined in any event the costs of this proceeding; that is, the referee's and stenographer's fee. If he should decline to produce the books upon another subpoena, the March grand jury having adjourned, a summary motion upon that subpoena will at once be followed by a committal; but there is no need in this proceeding to go further.

I confirm all the findings of the referee except the seventh. An order may be entered in accordance with this opinion.

IN RE CHURCHILL

(District Court, E. D. Wisconsin. September 7, 1912.)

1. BANKRUPTCY (§ 143*)—ASSETS—INSURANCE POLICIES.

Aside from the question of exemption, insurance policies or bonds having a surrender or disposable value are assets passing to the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—STATE STATUTE—INSURANCE POLICY.

St. Wis. 1898, § 2347, provides that a married woman may insure for her sole use the life of her husband, and that he may cause his life to be insured for her sole use, and every policy, when expressed to be for the benefit of, or assigned or made payable to, any married woman, shall inure to her separate use and benefit, and that of her children, and in case of her surviving the term of the policy the amount of the insurance shall be payable to her or to her trustee, for her use, free from the claims of her husband's creditors. *Held*, that such section referred only to ordinary life insurance, and did not include a policy payable to a married woman in case her husband, the insured, died within 20 years, but declaring that in case he survived that period he should have the option of settling the policy for his own benefit in one of four different ways, and that, in default of selection, it should be deemed settled according to the first option, which provided for paid-up insurance, with an annual income to the insured for life, which policy, on the husband becoming a bankrupt, inured to the benefit of his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.*]

In the matter of bankruptcy proceedings against Charles Churchill. A referee's order having been entered, directing the bankrupt to turn over to his trustee a certain policy of life insurance, he applies for review. Affirmed.

The bankrupt scheduled a policy of insurance in the New York Life Insurance Company for the sum of \$2,000, issued to him December 20, 1892. It provided, first, for the payment of \$2,000 to his widow, in case of the death of the assured during "the continuance of this bond policy," or, in the event of her prior death, to the insured's executors, administrators, or assigns; second, that if the death of the assured occur prior to December 8, 1912, and the premiums paid, with interest as stated, exceed the face amount of the bond policy, such excess would be paid as a mortuary dividend. Certain clauses of the policy gave the assured benefits or options as follows: "If the insured is living on the 8th day of December in the year nineteen hundred and twelve, and if this bond policy is then in force, the premiums having been paid in full to that date, the insured shall be entitled to one of the following benefits:

"1. The continuance of this bond policy, which then becomes a paid-up insurance, payable at the death of the insured, together with an annual income during the life of the insured of eighty dollars and ——— cents per annum (being equal to four per cent. of the total amount of annual premiums paid), the first payment of said income to be made to the said insured, if living, on the 8th day of December, nineteen hundred and thirteen, and an equal payment to be made annually thereafter, provided the said insured shall be living when such annual payment becomes due, and, in addition, the conversion of the surplus then apportioned by the company to this bond policy into a life annuity, payable together with the income above guaranteed.

"2. The continuance of this bond policy, guaranteeing a paid-up insurance and an annual income as specified in benefit '1,' and the withdrawal in cash of the above-defined surplus.

"3. The surrender of this bond policy to the company for its cash value, which is hereby guaranteed shall not be less than two thousand dollars, and which shall, in addition to that amount, include the above-defined surplus.

"4. The surrender of this bond policy, and the conversion of its cash value, as above defined, into an annual income during the life of the insured, payable in like manner as provided in benefit '1,' it being hereby guaranteed that the annual amount of such income shall not be less than two hundred and forty-nine dollars and ten cents.

"Provided, however, that the insured shall notify the company, in writing, not less than three months before the first-named date above, which privilege is selected, and that, in default of such notice, benefit '1' shall be considered selected."

In the bankruptcy proceedings the policy is stated to be payable to his wife as beneficiary, and that the interest of the bankrupt therein is of no value. The adjudication occurred September 15, 1910, the policy being in force, 18 annual premiums having been paid.

The bankrupt and his wife made application for an order declaring the insurance policy to be exempt and free from any claim on the part of the trustee, which application the referee denied, but directed the bankrupt to turn over to the trustee the policy of insurance. The order of the referee is brought here for review.

D. L. Jones, of Waukegan, Ill., and Peter Fisher, of Kenosha, Wis., for bankrupt.

E. E. & E. L. Browne, of Waupaca, Wis., for trustee

GEIGER, District Judge (after stating the facts as above). The question is presented whether the insurance policy is property passing to the trustee, to be disposed of for the benefit of creditors, or

whether it is exempt under the laws of the state of Wisconsin. The policy, it is conceded, was not of the class referred to in section 70a, subd. 5, of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), as having a cash surrender value payable to the bankrupt; but the question is whether the policy, if property, comes within the provision of section 6 of the act, allowing the bankrupt to retain the exemptions provided in the state law.

[1] Aside from the question of exemption, insurance policies or bonds, of the character held by the bankrupt, have uniformly been treated as property of the bankrupt, passing to the trustee. In *re* Welling, 113 Fed. 189, 51 C. C. A. 151; In *re* Hettling, 175 Fed. 65, 99 C. C. A. 87; In *re* Schofield (D. C.) 147 Fed. 862; In *re* Slingsluff (D. C.) 106 Fed. 154; *Hiscock, Trustee, v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771; In *re* Orear, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990; In *re* Coleman, 136 Fed. 818, 69 C. C. A. 496.

An examination of these cases shows that a liberal construction has been given to the language of the Bankruptcy Act, and the right of the trustee to take the policies has been upheld, whether at the time of the adjudication a cash surrender value was obtainable, either by the express terms of the policy, or through a practice or concession of the company issuing the policy, or even where the proof would show that the policy, whatever its terms may be, was salable or capable of transfer in the market. An examination of the policy in question, and particularly the terms relating to benefits or options accruing to or to be exercised by the assured at the expiration of the 20-year period, clearly shows a reservation of rights, doubtless valuable, and susceptible of appraisal and sale; and this brings the case to the single point as to the exemption of the policy under the laws of the state of Wisconsin.

[2] Subdivision 19 of section 2982, Statutes of the State of Wisconsin, provides that money arising under any policy of insurance, payable to a married woman, shall be exempt from the claim of her husband and his creditors, subject to the provisions of section 2347, which latter reads as follows:

"Any married woman may, in her own name, or in the name of a third person as her trustee with his assent, cause to be insured, for her sole use, the life of her husband, son or other person, for any definite period, or for the natural life of such person, and any person, whether her husband or not, effecting any insurance on his own life or on the life of another, may cause the same to be made payable or assign the policy to a married woman, or to any person in trust for her or her benefit; and every such policy when expressed to be for the benefit of, or assigned or made payable to any married woman or any such trustee, shall inure to her separate use and benefit and that of her children, and in case of her surviving the period or term of such policy, the amount of the insurance shall be payable to her or her trustee for her own use and benefit, free from the claims of her husband and of the person effecting or assigning such insurance, and from the claims of their respective representatives and creditors. * * *

Is the policy now before the court such as is intended by the statute to be exempt?

It is my judgment that the insurance referred to in the statute means the ordinary life insurance, and does not mean investment insurance, such as is covered by this "bond" or policy. If the bankrupt should not survive the 20-year period, the widow's right under the policy would accrue; but, unless the bankrupt dies within that period, the terms of the policy leave to him the sole disposition of whatever may accrue upon the policy, either through direct exercise of options, or through nonaction on his part, which latter is expressly declared to be equivalent to an election of the first benefit specified.

These provisions of the bond are like those under consideration in *Ellison v. Straw*, 119 Wis. 502, 97 N. W. 168, and held not to be within the contemplation of the exemption law; and in the recent case of *Allen v. Central Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107, where the 20-year period had expired, and, through one of the options, the assured, prior to bankruptcy, made his wife the sole beneficiary, thereby transforming the contract and giving it the essential character of a pure life insurance agreement, the court, while sustaining the claim of exemption, intimates that, except for the transformation which had occurred prior to bankruptcy, the policy would be deemed to be nonexempt, because by its terms the fund was payable to be assured in his lifetime.

A failure to restrict the exemption statute to such policies as contain only the elements therein specified must, as a practical matter, frustrate to a very large extent the purpose of the Bankruptcy Act to secure to creditors the valuable property rights in life insurance contracts. Such rights might then be secured and preserved to a bankrupt by embodying in the policy, as incidental or collateral, or even as dominant, for a limited time, the elements contained in the state statute as a basis for exemption. In the *Ellison Case*, supra, the following language is used:

"Life insurance is one thing; investment is another. But the ingenuity of the life insurance companies in formulating contracts which confuse the distinction has been active for generations. Pure life insurance has become rare, except with beneficial associations; but the gradations from that contract, with some slight provision for accumulation of dividends, to contracts where the accumulation is the predominant, if not even the exclusive, purpose, are almost numberless. Life insurance is a promise to pay a certain sum upon the death of the assured. [Citing cases.] Doubtless the amount so payable may be augmented by accumulation of excessive premiums and their earnings in the hands of the company without destroying the essential character of the contract. When, however, we find, as frequently, a promise to repay a sum made up from a portion of the premiums and their earnings at a date certain in the lifetime of the assured, we have only a contract such as a savings bank may as well make. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 430, 17 N. E. 363 [4 Am. St. Rep. 482]. Whether such fund, if payable to a married woman, is life insurance within the terms of section 2347, and exempt from debts of either the husband or wife, in absence of intent to defraud creditors, we need not decide, nor perhaps question, in this case. See *Talcott v. Field*, [34 Neb. 611, 52 N. W. 400, 33 Am. St. Rep. 662]; *Studebaker Bros. Mfg. Co. v. Welch*, 51 Neb. 228, 70 N. W. 920. We have already shown and declared that the particular provision now under consideration is in no wise for the benefit of Mrs. Straw. The fund is by the terms of the policy as absolutely the property of and payable

to A. W. Straw as would be an accumulation in a savings bank or building and loan association. It is not 'made payable to a married woman,' or to any trustee for her, within the terms of section 2347, and therefore is not protected by the further provision that insurance so payable shall be free from the claims of creditors."

So, in the case at bar, except for the agreement to pay to the widow upon the death of the bankrupt *within 20 years*, the policy is not "made payable to a married woman." Whether she will have any other benefits depends wholly upon the option of the husband to give them to her. He has the absolute option under the contract to appropriate them to himself. I think the exemption statute contemplated such insurance policies as by their terms secure to a married woman the intended benefits upon the death of her husband, and not such limited contracts by which such benefits would accrue only in the event of his death within a period specified, at the expiration of or beyond which he could secure to himself, as against his wife, the very benefits which the exemption statute contemplated should accrue to her, and which the Bankruptcy Law contemplates should accrue to the creditors unless secured to the wife by the exemption law. While full recognition should be given to the laudable intent of the exemption law to afford protection to married women and widows by securing insurance payable to them, equal heed must be given to the legislative intent "not to screen the husband in building up for himself a fund beyond the reach of his creditors."

The conclusion is therefore reached that the policy in question is property passing to the trustee, not exempt by the laws of Wisconsin.

The order of the referee is affirmed.

In re YOUNG.

(District Court, W. D. Washington, N. D. August 15, 1912.)

No. 1,089.

ALIENS (§ 61*)—NATURALIZATION—"WHITE PERSON."

The son of a German father and a Japanese mother is not a "white person," within the meaning of Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), and not eligible to naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7446, 7447.]

Petition by Albert Henry Young for naturalization. On rehearing. Petition denied.

For former opinion, see 195 Fed. 645.

John Speed Smith, Chief Naturalization Examiner, for the United States.

A. J. Balliet, E. S. McCord, and R. W. McClelland, for applicant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CUSHMAN, District Judge. The following causes are relied upon by applicant: *Ludlam v. Ludlam*, 31 Barb. (N. Y.) 486; *In re Saito* (C. C.) 62 Fed. 126; *In re Kumagai* (D. C.) 163 Fed. 922; *U. S. v. Balsara*, 180 Fed. 694, 103 C. C. A. 660; *In re Hallajian* (C. C.) 174 Fed. 834; *In re Mudarri* (C. C.) 176 Fed. 465; *Bessho v. U. S.*, 178 Fed. 245, 101 C. C. A. 605; *In re Camille* (C. C.) 6 Fed. 256; *In re Knight* (D. C.) 171 Fed. 299.

This applicant for naturalization has fully complied with all of the requirements of the statutes as an alien petitioner to be admitted as a citizen of the United States, but it was heretofore decided by the judge of this court that he was not eligible for the reason that he was not a white man. By the proofs submitted, it was shown that he was born at a place in Yokohama, Japan, under the dominion of the Emperor of Germany, that he is a subject of the Emperor of Germany, and that his father is a German and his mother a Japanese woman. The court ruled that the right to become a naturalized citizen of the United States depends upon parentage and blood, and not upon nationality or status. After the making of this ruling, it was ordered that the cause be reopened for further consideration, presentation of argument and authorities, and disposition, which hearing has now been had.

In the former ruling, the court approved and adopted as its own the reasoning in the decision of *In re Knight*, 171 Fed. 299, which authority is reinforced by *In re Ah Yup*, 1 Fed. Cas. 223, No. 104, refusing the right of naturalization to a Chinaman, which case was decided prior to the act of May 6, 1882, section 14 of which (22 Stat. at Large, 61, c. 126 [U. S. Comp. St. 1901, p. 1333]) expressly prohibits the admission of Chinese to citizenship; *Fong Yue Ting v. United States*, 149 U. S. 698, 716, 13 Sup. Ct. 1016, 37 L. Ed. 905; *In re Camille* (C. C.) 6 Fed. 256, in which latter case the son of a white Canadian father and an Indian mother was denied the right of naturalization; *In re Saito* (C. C.) 62 Fed. 126, rejecting the application of a Japanese; *In re Kanaka Nian*, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726, to the same effect in the case of a Hawaiian; *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643.

The fact that the petitioner was born within the German legation, giving him the status of a German subject, in no way affects the question. "The power to say when and under what circumstances an alien may become a citizen belongs to Congress." *In re Camille*, supra. Congress has, by section 2169, R. S. (U. S. Comp. St. 1901, p. 1333), limited the right of naturalization to those aliens being "free white persons and to aliens of African nativity and to persons of African descent."

The term "white person" must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as "fair whites" or "dark whites," as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

It is just as certain that, whether we consider the Japanese as of

the Mongolian race, or the Malay race, they are not included in what are commonly understood as "white persons." In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it cannot be said that one who is half white and half brown or yellow is a white person, as commonly understood. In Louisiana, a person was deemed white if the African blood did not exceed one-eighth. The same was true in the Colonial Code Noir of France, 2 Kent, 72, note "b." In Ohio, if there was more white blood than black or red, the person was considered white; but, if the colored blood was equal, the person was not white. *Jeffries v. Ankeny*, 11 Ohio, 372; *Gray v. State*, 4 Ohio, 354. In Virginia and Kentucky the dividing line was generally recognized as the quarter-blood. *Dean v. Commonwealth*, 45 Va. 541; *Gentry v. McMinnis*, 3 Dana (Ky.) 382; 30 Encyc. Law, 2d Add., 517.

Courts have found it necessary in certain cases to ascribe to a child either the status of the father or mother, as where one parent was a slave and the other free; and, treating a slave as any other animal property and following the civil law, they have held that the child took the status of the mother. In cases involving the jurisdiction of the court, as where the court had no jurisdiction to try an Indian for a crime committed against an Indian, and it was considered necessary to ascribe the defendant's status to one or the other parent, Indians being freemen, the common law has been followed, and the child has been held to take the status of the father. These decisions arose from the necessity for the adoption of an artificial rule. There is no such necessity in the case at bar. It is not necessary to determine the exact status of the petitioner. All that is necessary is to determine whether he is a "white person" within the meaning of the law.

Counsel for petitioner chiefly rely upon the case *In re Rodriguez* (D. C.) 81 Fed. 337. In that case the petitioner was a Mexican. It appears that the case was controlled by the fact that the natives of Mexico had for over 300 years been mixing their blood with that of the natives and descendants of Spain; indulging in the presumption that after that length of time the dominant race would have established itself. Further, the court was controlled by the treaty with Mexico of 1868, expressly recognizing the right of Mexicans to become naturalized citizens of the United States. This treaty had, prior to the decision, been abrogated; but, as showing the government's construction of the law limiting the right to citizenship, applied to natives of Mexico, it was considered persuasive. If this decision goes further than here indicated, it is opposed to what this court considers the weight of authority.

Petition denied.

THE PHILIP MINCH. THE CHRIS GROVER. THE ALVA B.

(District Court, N. D. Ohio, E. D. June 6, 1912.)

No. 2,478, in Admiralty.

COLLISION (§ 61*)—STEAMER IN TOW AND DREDGE—FAULT OF TUGS.

While the steamer Minch was being towed stern first into the entrance of the Cuyahoga river by two tugs, one at the stern and one at the bow, her bow swung around and came into collision with the dredge Napoleon, which was at work on the west side of the river; the bow hawser parting when the tug attempted to prevent the swing. The hawser was furnished by the steamer, was purchased from a reputable dealer, was of proper material and dimensions, and had been inspected and tested. The entrance to the river was 325 feet wide, leaving 245 feet of clear water to the eastward of the dredge. *Held*, that the steamer was not in fault, but that the collision was due to the fault of the tugs in passing unnecessarily near the dredge.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englia*, 100 C. C. A. 581.]

In Admiralty. Suit for collision by the Great Lakes Dredge & Dock Company, owner of the dredge Napoleon against the steamer Philip Minch, Kinsman Transit Company, claimant, with petition by such claimant against the tugs Chris Grover and Alva B., the Great Lakes Towing Company, claimant. Decree against the tugs.

George Eichelberger, for Great Lakes Dredge & Dock Co.

Goulder, Day, White, Garry & Duncan (O. D. Duncan, of counsel), for Kinsman Transp. Co.

Hoyt, Dustin, Kelley, McKeehan & Andrews (George W. Cottrell, of counsel), for Great Lakes Towing Co.

DAY, District Judge. This case was begun by the filing of a libel by the Great Lakes Dredge & Dock Company, owner of the dredge Napoleon against the steamer Philip Minch, for damages claimed to have been sustained by the dredge in consequence of a collision between the barge and the Minch in the Cleveland harbor, July 1, 1908. Later the owner of the Minch (the Kinsman Transit Company) filed a petition against the tugs Chris Grover and Alva B., under the fifty-ninth rule in admiralty (29 Sup. Ct. xlv), setting up the fact that the two tugs mentioned had lines from the steamer and were engaged in assisting her up the Cuyahoga river at the time of the accident in question.

The Great Lakes Towing Company filed answers to both the petition and original libel, denying fault on the part of the tugs. Both the steamer Philip Minch and the tugs Chris Grover and the Alva B. claim, through their proctors, in oral argument and in their briefs, that the collision was the result of an inevitable accident.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I cannot reach this conclusion. It appears from the testimony that on July 1, 1908, at about 4 o'clock in the afternoon, the steamer Philip Minch was taken from a position alongside of another steamer and the East Breakwater at Cleveland, Ohio, by the tugs Chris Grover and Alva B., the Alva B. being at her stern and the Chris Grover at her bow, and located in this manner the steamer was taken stern first into the entrance between the pier marking the entrance to the Cuyahoga river. The dredge Napoleon was lying on the westerly side of the river at a short distance inside of the pier, engaged under a government contract, with a government inspector on board designating the work to be done. As the Minch, in tow of the tugs, proceeded into the river entrance, the port bow of the Minch came in contact with the dredge. The wind was from the northeast and blowing about 10 or 11 miles an hour. The direction of the piers was about north and south, and they ran parallel to each other at a distance of about 325 feet apart. The Minch was a freighter, 480 feet in length and 52 feet beam; the Chris Grover is a steam tug, 69 feet in length and 18 feet beam; the Alva B. is a steam tug, 73 feet in length and 18 feet beam; the dredge Napoleon was 135 feet in length and about 40 feet beam.

The captain of the Minch procured the services of the tugs. As the Minch, in tow of the tugs, proceeded to the river entrance, it appears from the testimony that the Minch had up some steam and was assisting the tugs in their work of towing the steamer into the river. As the Minch proceeded into the river near to the position of the Napoleon, the stern of the Minch being pulled up the river partly by her own power and partly by the tugs, the Minch being towed up the river stern first, when the stern of the steamer passed the dredge, her bow was swung to the westward. The tug Chris Grover had a line on the bow of the steamer, and while endeavoring to prevent this swinging to the westward toward the dredge Napoleon the line parted and the collision occurred. The captain of the Minch caused the anchor to be dropped; but the swinging of the bow was not prevented, and the dredge was accordingly damaged.

It is clear from the testimony that there was no fault on the part of the dredge Napoleon. She was engaged in government dredging, under the supervision of a government official, who was on board of the dredge. It is apparent, then, that the collision was caused by the maneuvering of the tugs and the steamer in going up the river. It is well established that, where an anchored steamer is moored at a proper place and is struck by a moving steamer, the presumption is that the moving vessel is at fault. *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; *The Minnie* (D. C.) 87 Fed. 780; *The Ogemaw* (D. C.) 32 Fed. 919; *Henderson v. City of Cleveland* (D. C.) 93 Fed. 844.

The case was tried by the proctors for the Minch on the theory that the tugs were negligent on executing the maneuver, resulting in the collision, and by the proctor for the tugs on the theory that the line furnished by the steamer was insufficient. There is considerable conflict of testimony; but it appears that the Great Lakes

Towing Company, the owner of the tugs, had a contract with the owner of the Minch whereby the Minch was to furnish a good and sufficient line. It appears from the testimony that the towline was bought from a reputable ship chandler, was of proper material and size for the purpose for which it was used, that it had been inspected and showed no defect ascertainable by visual inspection, and that it had been tested and found to be proper and sufficient. The vessel being equipped with an article of this nature, it was sufficient. *The Olympia* (D. C.) 52 Fed. 985; *The Richmond* (D. C.) 114 Fed. 208.

The Minch not being at fault in the furnishing of this towline, the next inquiry would be as to whether or not the tugs were at fault in executing the maneuver in question, which resulted in the collision. The Minch employed two tugs to tow her into the Cuyahoga river. It was apparent from the testimony that the tugs had charge of the steamer from the time they took her in tow under the breakwater until she was placed in position at her dock up the river. The steamer had up steam to assist the tugs in the maneuvering. As was said in *The Margaret*, 94 U. S. 494, 24 L. Ed. 146, the tugs were the dominant minds and wills in the adventure. The tugs were in control of the navigation of this boat, and it is quite apparent to me, from the testimony, that all the Minch was doing was to use such power of her own as would assist these tugs so far as practicable. The tug which had the stern line of the Minch, it being borne in mind that the Minch was being towed stern first up the river, furnished the power. The tug at the bow was to assist in the steering of the boat. It is plain that the Minch was placed in a position whereby an emergency signal was necessary on the bow tug, and an unusual strain was brought on the towline while the bow of the Minch was swung towards the dredge, and the line thus parted. The anchor on the Minch was let go as soon as it was practicable, but the collision could not be prevented. Despite the parting of the towline, the real cause of the collision was the manner of the maneuvering employed by the tugs in taking this tow up the river. There was a wide channel, clear and unobstructed for a distance of some 245 feet to the east of the scow. It was broad daylight. There was no wind sufficient to cause the collision, had the tugs exercised proper care in the manner in which they towed this vessel. The collision could have been prevented by the exercise of ordinary care and maritime skill. The conceded facts and probabilities all point to fault on the part of the tugs as the proximate cause of the collision. The maneuver by which the steamer was brought into the river was an improper one. The tugs were in control of the situation. Untimely precautions were taken to prevent the swinging of the bow of the Minch, and when the bow tug finally undertook to stop this swinging the line parted and the collision occurred.

I am accordingly of the opinion that the tugs *Alva B.* and *Chris Grover* were at fault in causing this collision.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
(Circuit Court of Appeals, Second Circuit. July 18, 1912. On Petition for
Rehearing October 16, 1912.)

Nos. 233, 194, 161, 236, 237, 240, 234.

1. RECEIVERS (§§ 1, 65*)—NATURE AND PURPOSE OF REMEDY—EFFECT OF APPOINTMENT—"CHANCERY RECEIVER."

A "chancery receiver" is an indifferent person, appointed to hold property in litigation pending suit, who derives his authority from the court, and not from the parties, at whose instance he is appointed. He acts in behalf of no particular interest, but guards the rights of all, and, being a mere holder, his appointment does not change the title to the property in his charge, nor affect any lien.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 1, 114, 115; Dec. Dig. §§ 1, 65.*]

2. STREET RAILROADS (§ 58*)—RECEIVER FOR LEASEHOLD—RIGHTS AND DUTIES.

When a court appoints a receiver of the property of a railroad company, which embraces a leasehold estate, it is his duty to take possession of it; but he does not by such act become assignee of the term, and is under no obligation to adopt the company's contracts.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

3. STREET RAILROADS (§ 58*)—RECEIVER FOR LEASEHOLD—ADOPTION OF LEASE.

If a receiver elects to adopt a lease, he becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and him, by which he becomes liable upon the covenant to pay rent; but unless and until he does adopt a lease there is no such privity, and no liability upon the lease, and he is entitled to a reasonable time after taking possession in which to decide whether the interests of his trust will be better subserved by making the lease his own or by returning the property to the lessor.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

4. STREET RAILROADS (§ 58*)—RAILROAD RECEIVERS—PROVISIONAL OPERATION OF LEASED PROPERTY—RENT.

A receiver for a lessee railroad corporation, by provisionally operating the leased road, does not thereby become bound to pay rent for the trial period at the rate stipulated in the lease, in case he elects to renounce it, but, in the absence of special equities, cannot be required to do more than to turn over the net earnings to the lessor; and this rule being based on the lessor's acquiescence, in that the receiver, in performing the duties which it owes to the public and protecting its franchise, is operating the road to a large extent for its benefit, it may also be charged with the deficit, where the operation results in an actual loss.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

5. STREET RAILROADS (§ 58*)—RECEIVERS—LOSSES IN OPERATION—LIABILITY AS BETWEEN LESSOR AND LESSEE.

The Metropolitan Street Railway Company, by purchase, consolidation, and lease, acquired control of substantially all of the street railroad lines in New York City, which it operated as a unitary system and subsequently leased for long term to the New York City Railway Company, which previously owned and operated a small line. The City Company assumed payment of rentals and interest on underlying mortgages of the subsidiary and lesser companies. The City Company became insolvent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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and receivers were appointed in a creditors' suit, and a week later the Metropolitan Company became a party, and on its application the same receivership was extended to its interests in the property. The joint receivers operated the property for a number of months at a large loss, caused by their payment from cash and quick assets belonging to the City Company of rents, interest on underlying mortgages, and for improvements and betterments necessary to keep up the service and to keep the system together. The receivers renounced the lease of the City Company, and on separation of the receiverships the receiver for the City Company surrendered the property to the Metropolitan receivers. *Held*, that such losses in operation, having been caused by disbursements which inured only to the benefit of the Metropolitan Company, should be charged to that company, and that the receiver for the City Company was entitled to recover from the Metropolitan receivers the funds of his trust which were so expended.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

6. CORPORATIONS (§ 565*)—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ESTATE—PROVABLE CLAIMS.

A court of equity, in prescribing what claims shall take in the distribution of the estate of an insolvent corporation, being administered through a receiver, must regard on the one hand the substantial right of all creditors to share in their debtors' property, and on the other the necessity for expeditious administration, and, giving due consideration to both, must make rules which are practicable as well as equitable. In so doing, without regard to whether claims are (1) past due, (2) immature, or (3) contingent, they may be divided with respect to the question of provability into two classes: (1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estate; (2) claims which are so uncertain that their worth cannot be so ascertained. All claims of the first class may be proved, but those of the second class cannot be, because, while they may be meritorious, their amounts cannot be ascertained. The time at which the status of claims shall be fixed is not necessarily the date of the appointment of the receiver; but the rule should be that claims which, when presented within the time limited by the court for their presentation, are certain or are capable of being made certain by recognized methods of computation, should be allowed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

7. CORPORATIONS (§ 565*)—RECEIVERS—CLAIMS—ANTICIPATORY BREACH OF CONTRACT—APPOINTMENT OF RECEIVER.

Where one party to an executory contract puts it out of his own power to perform it, there is an anticipatory breach, which gives the other party an immediate right of action for the damages which he sustains thereby; and where one party is a corporation, its insolvency and the appointment of a receiver, who refuses to further perform, is such a disableness, and the breach dates from the receiver's appointment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

8. DAMAGES (§§ 40, 176*)—BREACH OF CONTRACT—LOSS OF PROFITS—EVIDENCE.

Gains prevented, when fairly shown, are recoverable as damages for breach of a continuing contract; and as future gains must be measured by past performance, profits made under the contract for a reasonable period before the breach may be shown to establish gains prevented thereby.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88, 461, 468, 471, 493; Dec. Dig. § 40, 176.*]

9. CORPORATIONS (§ 565*)—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ASSETS—PROVABLE CLAIMS—BREACH OF EXECUTORY CONTRACT.

A street railroad company, operating an extension system, made a contract by which it granted to claimant, an express company, the right to conduct an express business over its lines for a term of 20 years, and agreed to furnish cars therefor for a percentage of the gross receipts. It afterward leased its lines, and the lessee assumed the contract. Claimant later assigned the contract, as permitted by its terms, to another company, financially responsible, which agreed to pay claimant \$10,000 per year during the remainder of the term. Both railroad companies became insolvent, and receivers were appointed with their consent, who renounced and refused to further perform the contract. *Held*, that there was a breach of the contract, from which claimant suffered substantial damages, for which it was entitled to prove a claim against the insolvent estates; the amount of damages being a matter of proof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

10. CONTRACTS (§ 187*)—RIGHT OF ACTION FOR BREACH—PROMISE FOR BENEFIT OF THIRD PERSON.

By the general American rule a third person may sue on a promise made to another for his benefit; but it is essential to such right that he be the real promisee, that the promise be made to him in fact, though not in form. It is not enough that the contract may operate to his benefit, but it must appear that the parties intended to recognize him as the primary party in interest and as privy to the promise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

11. CORPORATIONS (§ 565*)—MORTGAGE—EFFECT OF ASSUMPTION BY LESSEE.

An agreement in a lease of a street railroad, by which the lessee assumed and agreed to pay mortgage bonds to be issued by the lessor, imposes on it no higher obligation than to save the lessor harmless from the consequences of a foreclosure by paying any deficiency which may exist after the sale of the mortgaged property, which remains the primary fund for payment of the debt; and conceding the right of the bondholders to enforce it, as made for their benefit, they have no claim which can be proved against receivers of the lessee prior to such foreclosure and sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

12. GUARANTY (§ 1*)—FAILURE OF CONSIDERATION—NECESSITY OF PRINCIPAL OBLIGATION.

A guaranty is a collateral undertaking, and cannot exist without a principal liability; default of a principal being essential to liability of the guarantor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 1; Dec. Dig. § 1.*]

13. CORPORATIONS (§ 565*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVABLE AGAINST RECEIVERS.

Pursuant to an assumption clause in a lease of a street railroad, the lessee made an indorsement on mortgage bonds issued by the lessor, by which it guaranteed to the trustees of the mortgage for the benefit of the bondholders the punctual payment of principal and interest of the bonds in accordance with their tenor. The lessee became insolvent, and the bondholders filed a claim against its receivers for the principal and interest of the bonds. *Held*, that the agreement was one of guaranty, and, there having been no foreclosure of the mortgage, that the claim for the principal and future interest was wholly uncertain and not provable, but that the claim for interest past due at the time it was filed was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

certain and in the nature of rent, and was provable and might be proved by the bondholders, since, while the promise was in form to the mortgage trustee, it was expressly for their benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

14. CORPORATIONS (§ 565*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVABLE AGAINST RECEIVERS.

Where receivers of an insolvent lessee street railroad company operate the leased road for an experimental period without paying the stipulated rental, and then renounce the lease, the lessor's demand for the unpaid rental during such period constitutes a general claim, provable against the lessee's estate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

15. CORPORATIONS (§ 565*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVABLE AGAINST RECEIVERS—CERTAINTY.

Where receivers of an insolvent lessee street railroad company are operating the leased road experimentally, to determine whether or not they will adopt the lease, but without paying the stipulated rental, and they subsequently renounce the lease, the court should extend the time within which the lessor may file a claim for such rental until after the experimental period has terminated and its claim has become certain.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

16. CORPORATIONS (§ 565*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVABLE—COVENANTS IN LEASE.

Under a covenant in a lease of a street railroad binding the lessee to pay franchise taxes assessed against the lessor, but permitting it to contest their validity in the courts, the estate of the lessee in insolvency is liable to the lessor for the amount of such unpaid taxes which became due and payable prior to the time limited for filing claims against its receiver, although they were then in litigation and their validity had not been determined; but claims for such taxes to become due in the future are not provable, because of uncertainty.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

17. CORPORATIONS (§ 565*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVABLE AGAINST RECEIVERS.

Provisions in a lease of street railroad property (1) that the lessee should pay rental equal to 7 per cent. annually on the capital stock of the lessor, (2) that the intention was that all of such rental should be applied to the payment of dividends on such stock, (3) giving the lessee the option of paying it directly to the stockholders, and (4) containing a guaranty by the lessee to "every present or future holder" of such stock that dividends at the rate of 7 per cent. should be paid thereon "during the term of this lease," but providing (5) that payment to the lessor company should be deemed a compliance with such guaranty, constituted a contract for the benefit of the stockholders, on which they could maintain a direct action against the lessee. But whether the liability of the lessee to the stockholders be considered as based on an original engagement to pay rentals to them, or on the guaranty as a collateral undertaking, their claims are provable against its receiver in insolvency as to unpaid rentals which became due prior to the date fixed by the court for filing claims against the receiver, and also prior to the termination of the lease, but claims for rentals accruing thereafter are too uncertain for allowance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

18. STREET RAILROADS (§ 49*)—LEASE—CONSTRUCTION—"TERM OF THIS LEASE."

A guaranty in a lease of a street railroad of the payment of dividends to stockholders of the lessor during the "term of this lease" is to be construed as meaning during the existence of the lease, and not during the term for which it was made.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6916, 6917.]

19. STREET RAILROADS (§ 58*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVA-BLE AGAINST RECEIVER.

A settlement of mutual accounts between lessor and lessee street railroad companies, and an acknowledgment by the lessor that it had no indebtedness for which the lessee was responsible, *held* to refer to large accounts between them only, and not to current charges, and not to estop the receivers of the lessor to assert claims for taxes assumed by the lessee in the nature of rentals against the receiver of the lessee.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 135; Dec. Dig. § 58.*]

Appeals from the District and Circuit Courts of the United States for the Southern District of New York in the New York City Railway Company and Metropolitan Street Railway Company Receivership Causes.

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company and others. From decrees of the Circuit and District Courts (188 Fed. 339, 343; 189 Fed. 661; 190 Fed. 609; 194 Fed. 543), the Pennsylvania Steel Company and others, the Metropolitan Express Company, the National Conduit & Cable Company, Alexander J. Hemphill and others, as a committee, the Central Crosstown Railroad Company, John J. Waterbury and others, as a committee, and Charles Benner and others, as a committee, separately appeal. Certain decrees affirmed, others modified, and others reversed.

I. Appeal Presenting the Question Whether the Losses Incurred in Operating the Leased Railway System During the First Part of the Receiverships Should be Borne by the Estate of the Lessor Corporation or That of the Lessee Corporation: Called the "Termination of Lease Proceeding."¹

For opinion below, see 190 Fed. 609.

The New York City Railway Company is a street railway corporation under the laws of the State of New York which was organized

¹ It is a misnomer to designate this appeal as the "Termination of Lease Proceeding." While one of the questions referred to the special master was as to the termination of the lease, the real controversy is whether the Metropolitan estate or the City estate should bear certain burdens of the receivership. Whether or at what time the Metropolitan-City lease terminated as between the parties has no bearing upon that question and the lease could not have been terminated as to the receivers because it never became binding upon them.

If the ruling of the special master with respect to the termination of the lease be intended as a conclusion that the lease never affected the trust

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in 1901 under the name of Interurban Street Railway Company and which will hereinafter be referred to as the City Company. In 1902 this corporation had acquired the property and franchises of a small street railway in Mt. Vernon, New York, of slight value.

The Metropolitan Street Railway Company, which will hereinafter be called the Metropolitan Company, is a street railway under the laws of the State of New York, which was formed in 1895 by the consolidation of various companies and which by the year 1902 had acquired and was operating nearly the entire street railway system in the county of New York. At this time the Metropolitan Company owned and controlled most valuable railway franchises. It held many properties by leases and similar arrangements and had guaranteed interest upon underlying securities.

On February 14, 1902, the Metropolitan Company leased to the City Company its entire railway system for the period of 999 years for the consideration of the assumption of all its obligations except the principal of its funded debt and for the further consideration of the agreement of the City Company to pay an annual rental equal to 7 per cent. upon its capital stock.

The City Company took possession of the Metropolitan Company system under the lease and operated it with continually increasing deficits until September 24, 1907, when receivers of its property were appointed in a suit brought in the court below by its creditors alleging its insolvency.

On October 1, 1907, the Metropolitan Company, averring that it was of vital importance to it and its creditors that its property should be kept intact, petitioned to become a party to the creditors' suit and the persons who had been appointed receivers of the City Company were appointed also receivers of the Metropolitan Company. Afterwards the same men were appointed receivers in foreclosure proceedings instituted in behalf of Metropolitan bondholders.

Neither the Metropolitan Company nor the trustees for the bondholders asked for the appointment of separate receivers for the Metropolitan interests until June, 1908. Thereupon in July, 1908, a separate receiver was appointed for the City Company and an order was entered directing the surrender of the properties to the Metropolitan receivers.

On August 1, 1908, the lease aforesaid was formally surrendered to the Metropolitan receivers. It had, however, been practically laid out of consideration after the receivers had been in office but a short

estate, it adds nothing to other rulings. And if it be intended as a conclusion that the lease came to an end at the time stated as to all parties, it relates to a question outside any substantial controversy presented upon this appeal and, moreover, the facts found do not support it. As pointed out in other appeals, this question of the termination of the lease involves an inquiry as to the right and fact of re-entry and should be passed upon only when necessary to a real controversy and upon a complete statement of facts.

But as the name "Termination of Lease Proceeding" is used in the records and briefs, it will, although inappropriate, be retained throughout this series of appeals.

time. The facts then appearing made it obvious that the lease could not be adopted with profit to the City estate.

The Metropolitan system was to some extent disintegrated in January, 1908, when the Third Avenue Railroad, comprising a substantial part of it, was transferred to a separate receiver appointed in a foreclosure suit brought in behalf of Third Avenue bondholders. Other roads were also surrendered to their owners.

No order appears to have been made defining the duties of the receivers in their dual capacity as receivers of the City Company and of the Metropolitan Company. The reason for this is stated in the opinion of the Circuit Judge to have been a desire to have the receivers concerned solely with the operation of the railroads and their restoration to a state of efficiency and to reserve for later consideration the question as to which estate should bear the burden of any losses incurred through the operation.

The reports and accounts of the receivers showing the operation of the roads from September 24, 1907, to July 31, 1908, were, as a general rule, made out by them as receivers of the City Company. The facts would also justify the finding that, with respect to third persons, the roads were actually operated by the City Company receivers during such period.

The operation of the railroads by the receivers during the period aforesaid resulted in large losses. According to a statement filed by them the losses from operation amounted to \$1,202,137.05 and in addition large expenditures were made for betterments and improvements. The losses from operation, however, did not arise through the mere running of the road. If the receivers had done nothing more than to move the cars there would have been a surplus instead of a deficit. The loss arose through the payment of interest upon underlying securities and rentals upon leased lines of the Metropolitan Company—payments necessary to keep its system together.

The receivers of the City Company upon their appointment took over quick assets belonging to that corporation of large value which were available for the payment of its debts. If the deficits stated in the last paragraph be charged against the City estate, substantially all of such assets will be used up.

The present appeal involves, broadly speaking, the question whether operating deficits and expenditures for betterments should be borne by the Metropolitan estate or by the City estate. The Circuit Court referred certain questions to a special master who held, in substance, that expenditures for the entire period should be charged against the Metropolitan estate. The Circuit Court modified the report of the special master by holding that the losses from September 24, 1907, to October 1, 1907—the period prior to the appointment of the Metropolitan receivers—should be charged against the assets of the City Company but approved the report of the Master with respect to the remaining period.²

Other material facts are stated in the opinion.

² Strictly speaking the questions presented by this appeal are somewhat narrower than is indicated by the above statement.

Bronson Winthrop and Charles T. Payne, for Farmers' Loan & Trust Co.
James Byrne and C. M. Travis, for Pennsylvania Steel Co.

Morgan J. O'Brien, C. E. Rushmore, and George N. Hamlin, for contract creditors' committee.

Matthew C. Fleming, for receiver of New York City Ry. Co.

B. S. Catchings, for tort creditors' committee.

Julien T. Davies and Brainard Tolles, for Guaranty Trust Co.

Richard Reid Rogers, for New York Rys. Co.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] A chancery receiver is an indifferent person appointed by the court to hold property in litigation pending suit. He is a ministerial officer with the function of a custodian. He derives his authority from the court and not from the parties at whose instance he is appointed. He acts in behalf of no particular interest, but guards the rights of all. Being a mere holder, his appointment does not change the title to the property in his charge, nor alter any lien of contract. *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164; *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; *Gaither v. Stockbridge*, 67 Md. 222, 9 Atl. 632, 10 Atl. 309. See, also, *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155.

[2] When a court of chancery appoints a receiver of the property of a railroad company which embraces a leasehold estate, it is his duty to take possession of it, but he does not by such act become assignee of the term. He does not stand in the shoes of the lessee and is under no obligation to adopt its contracts. As said by the Supreme Court of Maryland (*Gaither v. Stockbridge*, *supra*) in language approved by the Supreme Court of the United States (*Quincy, etc., R. Co. v. Humphreys*, *supra*):

"The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the

The special master reported that expenditures made and incurred by the receivers during the period from September 24, 1907, to August 1, 1908, of which the expenditures for conductors' wages were types of operating expenses and the expenditures for scraper cars and feeders were types of betterments and improvements, should be charged against the Metropolitan estate.

The court in its decree modified the report of the special master with respect to the period for which the Metropolitan estate was charged, but still confined itself to the types of expenditures aforesaid and provided that the decree should not prevent any party from claiming nor the court from deciding that other types of expenditure should be charged against the Metropolitan estate. Therefore we shall, in the relief to be granted, confine ourselves to the particular subject-matter of the decree appealed from. But other expenses, e. g., expenditures for preserving the integrity of the system by preventing forfeitures and foreclosures, are allied to operating expenses and as the records are complete and the briefs very full, we deem it desirable for all concerned that the case shall be discussed in the following opinion along somewhat broad lines.

term, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term."

See, also, *High on Receivers*, page 321, and cases cited.

[3] If a receiver elect to adopt a lease, he becomes vested with the title to the leasehold interest and a privity of estate is thereby created between the lessor and him by which he becomes liable upon the covenant to pay rent. *United States Trust Co. v. Wabash R. Co.*, 150 U. S. 299, 14 Sup. Ct. 86, 37 L. Ed. 1085, and cases cited. But unless and until he does adopt a lease, there is no such privity and no liability upon the lease. He holds possession not as a trespasser but rather as a licensee for the purpose of determining what disposition to make of the leasehold estate. The rule is well settled that a receiver in taking possession of a leased road is entitled to a reasonable time in which to decide whether the interests of his trust will be better subserved by making the lease his own or by returning the property to the lessor. *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632; *St. Joseph, etc., R. Co. v. Humphreys*, 145 U. S. 113, 12 Sup. Ct. 795, 36 L. Ed. 640; *U. S. Trust Co. v. Wabash R. Co.*, 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; *New York, etc., R. Co. v. New York, etc., R. Co. (C. C.)* 58 Fed. 278; *Park v. New York, etc., R. Co. (C. C.)* 57 Fed. 799; *High on Receivers*, page 321; *Smith on Receiverships*, page 105.

This rule grows out of the necessities of the case and is not inequitable toward the lessor. The contract of lease is not necessarily affected by the appointment of the receiver. The right of the lessor to enter for condition broken is not impaired. It may stand upon its legal rights. But ordinarily it is not in a position to stand upon them. A lessor railroad company is seldom so situated that it can take back its property immediately upon the appointment of a receiver for its lessee. It may have no working organization. Its rolling stock may have become worn out. It may have insufficient immediate funds. Its public duties, however, must be performed without interruption. It is a quasi public corporation and must keep its railroad going. Its franchises must be preserved. Its obligations as a common carrier must be fulfilled. And these obligations can seldom be fulfilled except by the temporary operation of the leased road by the receiver of the lessee. A court of equity in provisionally operating a leased line confers a benefit upon the lessor company as well as upon the lessee which renders it highly equitable that the receiver by such operation should not be held to adopt the lease but should have a breathing spell within which to determine whether to accept or reject it.

These equitable considerations are indicated in the opinion of the Supreme Court in the leading case of *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82, 101, 12 Sup. Ct. 787, 793 (36 L. Ed. 632), already referred to, where Mr. Chief Justice Fuller said:

"The court did not bind itself or its receivers *eo instanti* by the mere act of taking possession. Reasonable time had necessarily to be taken to ascertain the situation of affairs. The Quincy Company as a quasi public corpora-

tion, operating a public highway, was under a public duty to keep up and maintain its railroad as a going concern, as was the Wabash Company under the contract between them, but the latter had become unable to perform the public service for which it had been endowed with its faculties and franchises, and which it had assumed to discharge as between it and the other company. Its operation could only be continued under the receivers, whose action in that respect cannot be adjudged to have been dictated by the idea of keeping the property in order to sell it, or using it to the advantage of the creditors, or doing otherwise than 'abstain from trying to get rid of the property.'"

[4] The further rule is also settled by the great weight of authority in the case of railroad leases that a receiver of a lessee corporation by provisionally operating a leased road does not thereby become bound to pay rent for the trial period at the rate stipulated in the lease in case he elect to renounce it. In the absence of special equities he does his full duty when he turns over to the lessor the entire net earnings of the road.⁸ *U. S. Trust Co. v. Wabash R. Co.*, 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; *Mercantile Trust Co. v. Farmers' Loan, etc., Co.*, 81 Fed. 254, 26 C. C. A. 383; *Park v. N. Y., etc., R. Co. (C. C.)* 57 Fed. 799; *N. Y., etc., R. Co.*, 58 Fed. 268; *Central Trust Co. v. Wabash, etc., R. Co. (C. C.)* 34 Fed. 259; *Farrar v. Southwestern R. Co.*, 116 Ga. 337, 42 S. E. 527.

While the reason for the rule that the receiver is bound to account only for net earnings is not always stated in the authorities, it is clear that it must be based upon the lessor's acquiescence. As we have seen, the lease in no way governs the relations between the receiver and the lessor. The receiver for the time being is operating the property of almost a stranger corporation for, to a large extent, its benefit. The corporation is willing that he should so act. If, then, he turn over the entire net earnings of the road, it is not apparent upon what equitable principles the acquiescing lessor can demand more. If the lessor do not acquiesce—if it knock at the door of the court and demand back its property—it is in a position to demand the stipulated rental. *Farmers' Loan, etc., Co. v. Northern Pacific R. Co. (C. C.)* 58 Fed. 257. But if it do nothing, it is not unfair that it should take what its property earns and no more.

But this does not cover the contingency where there are no net earnings and the leased road is operated by the receiver at an actual loss. There is a difference between giving a lessor corporation that which its road earns and making it pay a deficiency. And yet we think that the difference is not one of principle. If a lessor assent to the performance of its public duties by the receiver of

⁸ Exceptions to the rule that a receiver is obliged to account only for earnings are established in cases when the leased property is in itself non-producing and yet is a benefit to the system as a whole, e. g., a depot or terminal, and would undoubtedly be established in a case where a leased road is not wholly non-producing but the net earnings furnish no fair criterion of its value to the system, e. g., a feeder or connecting line. In such cases the special equities would require a receiver to pay a reasonable rental. In the present case, however, it is not necessary to consider this phase of the subject.

the lessee, it should take the results as they come. Its franchises are the ones which are preserved by the continued operation. It is essential to it that operations should go on. The same principles which give the acquiescing lessor net earnings instead of rentals make it liable for deficiencies when there are no net earnings. In other words, we think that the receiver must be considered as operating the leased road for the account of the lessor.

It is not necessary in order to hold a lessor corporation which acquiesces in the operation of its road by the receiver of the lessee responsible for losses in operation that it should expressly promise to pay for them. The law would imply a promise in such circumstances. A lessor corporation may demand the return of its property. It is free to take the benefit of, or reject, a receiver's services. If it accept them, there is an implied promise to meet the necessary consequences of them.⁴

The conclusion which we have reached has, we think, the support of authority. In *Mercantile Trust Co. v. Farmers' Loan & Trust Co.*, 81 Fed. 254, 258, 26 C. C. A. 383, 387, the Circuit Court of Appeals for the Eighth Circuit said:

"If the lease should have been renounced, no part of the deficiencies resulting from the operation of the leased lines can be charged against or paid out of the income or out of the proceeds of the corpus of the trust estate, but these deficiencies must all be paid by the railroads which respectively caused them."

As in that case the leases referred to were not renounced, the proposition of law stated was not necessary to the decision, but it was one of the reasons for it and we are satisfied that the term "deficiencies" was used advisedly and as meaning loss in operation and not mere failure to earn the stipulated rental.⁵

⁴ While we have examined the underlying principles, and shall test them in the application, upon the theory that there was but one receivership—that of the lessee—it must be observed that the real question is not whether a promise would be implied which would support an action at law. In this case the receivership was extended to the lessor's estate and the court had full power to impose the burdens of the receivership as equity might require and was not confined to strictly legal obligations.

⁵ *Ames v. Union Pacific R. Co.* (C. C.) 74 Fed. 335, is also to be regarded as authority for the general proposition that where receivers of a railroad system operate a subsidiary road as a part of it (although they may also be receivers of such subsidiary) and keep a general account, profits accruing in the operation of the subsidiary belong to it and losses sustained must be charged against its estate. In that case Judge Sanborn said: "If, as receivers of the property of the Gunnison Company, these receivers had realized a large net income from the property of its railroads, could they have lawfully diverted that income from its creditors or stockholders to the creditors and stockholders of the Union Pacific Company? Could they have lawfully used that income to pay a loss occasioned by the operation of a railroad of the Union Pacific Company or by the operation of the railroad of any other corporation than the Gunnison Company? These questions are their own answers and they are fatal to the claim of this trustee that the deficiency incurred by the operation of the railroads of the Gunnison Company, or the taxes upon its property, or the purchase price of the materials and supplies furnished to the succeeding receiver, may be lawfully paid out of the trust funds of the creditors of the Union Pacific

[5] Holding, then, that the general rule established by equitable considerations is that a leased railroad is operated by the receiver of the lessee during the trial period for the account of the lessor or, from the standpoint of results, that the lessor takes net earnings and must bear losses, we come to the inquiry whether any special equities prevent the application of the rule in the present case.

It is obvious at the outset that this is not the ordinary case of a railroad lease under a receivership. The lease of the vast Metropolitan system with its valuable franchises and its own underlying leaseholdings and obligations to the owner of the little Mount Vernon road differs widely from the usual case of the lease of a connecting road to a main line. But there are no special equities in favor of the lessor corporation on that account. Rather the differences serve to accentuate the fact that the franchises to be preserved belonged to the lessor and that the imperative necessity for continued operation after the receivership was to hold its property together.

Going further, let us consider the case as if the Metropolitan Company had merely intervened in the cause and had not obtained the appointment of receivers for its own properties until August, 1908. Let us assume also that the receivers of the City Company were operating the road until that time for the purpose of determining whether to accept or renounce the lease. The special master has found that the time was reasonable and no objection is made to his conclusion.

In this view of the case, every equitable consideration which we have examined in formulating the rule is present. The franchises to be preserved belonged to the lessor corporation. The payments were necessary to preserve them as well as the integrity of its system. The City receivers might have held on to their quick assets and have failed to operate without damage to their trust estate. But they could not have failed to operate without imperiling the franchises and properties of the lessor. The lessor, by intervening in the suit to keep its properties intact, assented to their operation and to their performance of its public duty. If there were nothing more in the case than this, we should have no doubt that the receivers operated for the account of the lessor and that its estate should be charged with the deficits in operation.

Company. These expenditures must be charged against the property of the Gunnison Company—against the property, the administration and operation of which caused them." See, also, *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 6 Sup. Ct. 709, 29 L. Ed. 963.

In this connection it should be said that we are aware of the cases (*U. S. Trust Co. v. Wabash R. Co.*, 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; *Central Trust Co. v. Wabash R. Co.* [C. C.] 34 Fed. 259; also *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 92, 12 Sup. Ct. 787, 36 L. Ed. 632) in which it is stated to be the duty of a receiver to reduce operating expenses to a minimum where a deficiency results from the operation of a leased road, but we do not regard those cases as passing upon the question whether, in the final accountings, such deficiencies should be borne by the estate of the lessee or that of the lessor.

But there is much more in the case. In the first place we are not required to hold that the Metropolitan estate is liable for actual deficits incurred by the receivers in the operation of the road. As shown in the preliminary statement, there were no deficits from the running of the cars. The deficits arose from the payments of rentals upon Metropolitan leaseholds and interest upon Metropolitan underlying securities—payments necessary to preserve the integrity of the Metropolitan system but not necessary to operate the roads. The City receivers were not required to make these payments because the lease was not binding upon them. Making them for the distinct benefit of the Metropolitan Company by direction of a court of equity in a cause to which the Metropolitan was a party, there would seem little doubt that the court should and would charge them against its estate. And this is even more true with respect to disbursements for betterments and improvements.

Again while we think that the losses during the period in question should properly be charged against the Metropolitan Company even if the receivership had not been extended to it, the fact is, as we have seen, that the City receivers were appointed also receivers of the Metropolitan after one week's operation of the roads. Undoubtedly for this first week the City receivers should be considered as holding for the purpose of determining whether to accept the lease, and the losses for such period should be charged against the Metropolitan estate upon the principles which we have examined. But, as already stated, we are satisfied that after a very short time it was manifest to all concerned that the lease could not be adopted in behalf of the City estate and that the court would have transferred the properties to the Metropolitan receivers exclusively if application had been made. But no such application was made until June, 1908. Prior to that it is evident that the court intended that the dual receivers—regardless of the method of actual operations—"should manage the property merely as operating conservators," leaving all questions as to which trust estate should bear the burden to be determined thereafter. In such circumstances it is equitable that the order putting the Metropolitan receivers in complete charge should be carried back as the equities may require. And the equities clearly require that it should be so carried back that the burden of operation be borne by the Metropolitan estate. The adoption of the lease was out of the question soon after the receivers of the Metropolitan were appointed. The City estate had nothing whatever to gain by continuing operations except some possible tactical advantage based upon possession. The Metropolitan Company had all to gain by continuing operations and all to lose by stopping operations. The expenditures during the dual receivership were for the preservation and improvement of the Metropolitan property and every equitable consideration requires that they should be borne by the Metropolitan and not by the City interests.

The contention presented upon the briefs for the trustees of the Metropolitan bondholders that the Metropolitan estate should not be charged with the losses in question because to do so would displace their mortgage liens, does not require extended consideration. This court has to do only with the decree appealed from, and we find nothing in that decree providing for such displacement. If, however, the conclusions of the special master upon the subject are to be regarded as before us, we may say that we are not convinced that they are incorrect. The disbursements were, as we have seen, necessary to preserve the mortgaged property and to keep the mortgaged railroads in efficient running order so that they could fulfill their obligations to the public and retain their franchises. The mortgage trustees, although obtaining the appointment of their own receivers, did not seek to put them in possession, and we are not satisfied that if they had been the operating receivers from the beginning the expenditures would have been less. Under the circumstances we think that the case comes well within the principle of the decision of the Supreme Court of the United States in *Kneeland v. American Loan, etc., Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, where Mr. Justice Brewer says:

"A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself."

See, also, *Kneeland v. Bass Foundry, etc., Works*, 140 U. S. 592, 11 Sup. Ct. 857, 35 L. Ed. 543. *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, is not regarded as in conflict with the principle stated.

We may add, however, that we do not determine whether the losses in question can be charged against the Metropolitan estate so as to displace the mortgage liens if there are sufficient general assets in such estate to meet them.

For these reasons we hold that the decree appealed from should be modified so as to conform to the report of the special master (190 Fed. 609) and as so modified should be affirmed. And it is so ordered.⁶

⁶ The decree should also be modified in another particular. As pointed out at the commencement of this opinion, the question of the termination of the lease is not material in this proceeding and the paragraph of the decree marked (a) should be stricken out.

II. Appeal Presenting the Question Whether a Certain Claim of the Metropolitan Express Company for Damages for Breach of Contract is Provable Against the Estate of the Metropolitan and City Companies, and Involving a General Inquiry into the Rules Governing the Provability of Claims in Equity Receivership Causes: Called the "Express Company's Appeal."

For opinion below, see 188 Fed. 339.

On March 4, 1901, the Metropolitan Railway Company entered into a written contract with the Metropolitan Express Company, by which it granted to the latter the exclusive right of moving express matter over its street railway system for a period of twenty years, agreeing among other things, to furnish the cars necessary therefor, and in which the Express Company agreed to pay to the Railway Company, as consideration, twenty per cent. of the gross earnings of the business. The contract provided that it should "bind the successors, assigns, lessees and transferees of the parties respectively."

Afterwards, on February 14, 1902, as shown in the statement in the Termination of Lease Proceeding the Metropolitan Railway Company leased and demised all its property, including said contract, to the City Railway Company, which assumed the obligations of the former upon said contract as appears by the following assumption clause in the lease:

"The lessee shall also from time to time pay or cause to be paid all rentals and other sums of money which are or may be or become due or payable under or by reason of any leases and other contracts to which the lessor is a party or to which any of the demised is, or may be subject, and the lessee hereby assumes all the obligations of the lessor under all such leases and contracts * * * provided that the lessee shall not be required to pay the principal of any funded obligations of the lessor or of its subsidiary companies except as hereinafter provided."

On July 15, 1904, the Metropolitan Express Company assigned said contract for its unexpired term to the American Express Company for the stipulated payment of \$10,000 a year and the latter agreed to perform during such term all the obligations of the former under said contract.⁷

The provisions of said contract were duly carried out by the City Company—the lessee—and the American Express Company—the assignee—until September 24, 1907, when receivers of the City Company—and shortly afterwards of the Metropolitan Railway Company—were appointed as stated in the Termination of Lease Proceeding. Thereafter and until February 28, 1908, the receivers continued to fulfill said contract. On that day they notified the American Express Company that they would not adopt the contract, and on March 15, 1908, they discontinued the operation of the express cars.

⁷ While the agreement between the Metropolitan Express Company and the American Express Company covered other contracts than the one in question we assume from the presentation of the case on both sides that that was the only one of substantial value at the commencement of the receivership and, therefore, make the statement in the text. If it is incorrect, a complication may arise which will have to be dealt with in the hearing in damages which we order.

The Metropolitan Express Company when operating under its own management made no profits upon said contract, but the American Express Company from the time of the assignment until its exclusion by the receivers made average net profits of over \$29,000 a year. No question is made but that the American Express Company was of abundant financial responsibility to carry out its agreement with the Metropolitan Express Company to the end of the term thereof.

At the time of the appointment of the receivers of the City Company and also of the appointment of the receivers of the Metropolitan Railway Company both of those corporations admitted their insolvency and prayed for the appointment of the receivers.*

The special master, to whom was referred the claim of the Metropolitan Express Company against the estates of the Metropolitan and City Railway Companies for damages for breach of said contract, rejected it as a contingent demand. The court below confirmed the report of the special master and also held that the proof of damages was insufficient.

The Metropolitan Express Company has appealed to this court.

Other material facts are stated in the opinion.

Wm. H. Page and G. H. Crawford, for appellant.

A. H. Masten, William M. Chadbourne, and Albert F. Jaekel, for Joline et al., receivers.

M. C. Fleming, for Ladd, receiver.

B. S. Catchings, for tort creditors' committee.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [6] The objection that the claim is contingent and therefore not such a claim as is provable against the estate of a corporation in the hands of a court of equity, presents the underlying question in this series of appeals and requires a more complete examination and statement of principles than would be necessary in the consideration of a single cause.

The power of the Court of Chancery of England to appoint receivers was recognized at an early date and the leading principles which first governed its exercise were well settled long before the American Revolution. Vice Chancellor Giffard said of it in *Hopkins v. Worcester, etc., Canal Co.*, 6 Eq. 437, 447: "That is one of the oldest remedies in this court." But according to the early principles as stated in England and followed in this country, the power was purely an incidental one and the exigencies which required its exercise were "to prevent fraud, to save the subject of litigation from material injury or to preserve or rescue it from inevitable destruction." *Williamson v. Wilson*, 1 Bland. Ch. 418.

From the early principles the law of receiverships has in recent years rapidly developed and with constantly widening scope. Indeed in no

* The City Company expressly admitted its insolvency and the Metropolitan Company averred that it was unable to meet its obligations. Both corporations prayed for the appointment of receivers and the special master has found that they were then insolvent. The precise facts are stated in the *Crosstown Company's Appeal*.

other branch of equity jurisprudence has there been such an adaptation of equitable principles to the requirements of commercial advancement. This development has taken place through the action of the chancery courts themselves, and, perhaps to a greater extent, through the extension by statutory enactments of the remedial action to subjects not within the original equitable scope. Especially has this been true in respect of the winding up of corporations and the administration of their assets. Statutes in many states and acts of Parliament in England provide for liquidating the affairs of corporations through receivers and define their powers, duties and liabilities. These statutes generally provide for the presentation and allowance of the claims of creditors and, in some cases, define who are creditors.

Apart from statutes, moreover, the law of receiverships has gone through a curious course of development with respect to corporations. The rule has been uniformly stated in the books and is still insisted upon that, in the absence of statutory authority, a court of equity has no power to appoint a receiver even of an insolvent corporation. It is said that such a court has no inherent power to wind up a corporation and that it cannot accomplish by indirection that which it cannot do directly. And it is perfectly true that the administration of the affairs of a corporation by a receiver and the distribution of its assets while not destroying its corporate existence do leave it a mere shell. Nevertheless exceptions to the rule have been evolved which are, in some aspects, as broad as the rule itself.

One of these exceptions is in the case of creditors' bills. Courts of equity long ago lent their assistance to common law courts to enable particular judgment creditors to reach, through receivers, property beyond the reach of execution. These suits soon broadened in scope and were treated as equitable levies in favor of all judgment creditors entitled to seize the defendant's property—a substitute for separate proceedings. In these suits no distinctions were drawn between corporations and individuals and out of them the practice has grown up and become established of permitting creditors having judgments to apply to courts of equity to take possession of the assets of corporations and undertake through receivers their general administration. And now that which was formerly regarded as the essential thing—the judgment—is unnecessary unless the corporation object. Thus is illustrated anew the vainness of saying what courts of equity *cannot* do.⁹

This evolution of the creditors' bill into the proceeding by which courts of equity undertake the general administration of the estates of corporations has not, however, brought with it any well defined principles with respect to the provability of claims of creditors. Lead-

⁹ Whatever doubts may have existed as to the broad authority of courts of equity stated in the text must now be regarded as settled by the action of the Supreme Court in this very cause. *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. The practice of making such appointments has become particularly well established in the case of quasi public corporations where the interests of the public require continuous and continued operation and where, generally, the bankruptcy act is not available.

ing text-books upon the law of receiverships hardly mention the subject and the authorities are few and far between.¹⁰ It is altogether a mistake to assume that cases like the present can be determined by the application of hard and fast rules. Such rules do not exist. They have yet to be formulated.

Bankruptcy acts and state statutes regulating the provability of claims against insolvent or dissolved corporations are only entitled to consideration in so far as the rules they lay down appeal to the conscience of the chancellor. So, the decisions of the courts construing and applying such acts and statutes are only of weight when they discuss principles of general application.

Equitable consideration must govern and the underlying ones are these: The assets of an insolvent corporation belong to its creditors. Although not, strictly speaking, a trust fund, they partake of the nature of one. The administration of the estate is for their benefit. Its purpose is to make an equitable distribution. Equality is equity. Debts and liabilities, present and future, certain and contingent, stand upon the same *equitable* basis. If delays were unimportant, the settlement of estates would be kept open until contingencies should become certainties. If courts were omniscient, distribution would always be through the resolving of all contingencies and the ascertainment of the present worth of all demands. But courts cannot look with certainty into the future. Delays are important. The settlement of estates cannot be held open to await contingencies. Orderly administration requires that at some reasonably speedy time all claims should be so liquidated as to afford a basis for distribution.

A court of equity, then, in prescribing what claims shall take in the distribution of the estate of a corporation must regard, on the one hand, the substantial right of all creditors to share in their debtor's property, and, on the other, the necessity for expeditious administration and, giving due consideration to both, must make rules which are practicable as well as equitable.

In formulating rules we may, at the outset, stick to beaten paths and divide claims into these three classes:

- (1) Claims which at the commencement of proceedings furnish a present cause of action;
- (2) Claims which at that time are certain but which are not matured;
- (3) Claims which are contingent.

Claims of the first class are obviously provable and require no discussion. Claims of the second class are also clearly provable. The right of a creditor to participate in the assets of an insolvent estate—

¹⁰ The receivership causes which have made the great bulk of receivership law in this country and which, like judgment creditors' suits, constitute exceptions to the limitation of the power of chancery courts over corporations—mortgage foreclosure receiverships—seldom involve the question of the provability of general claims. In such cases the receivers hold the mortgaged premises and the only questions with respect to claimants are whether their demands so take priority as to displace the mortgage lien. The questions relate rather to charges upon the property than to the provability of claims.

a right in rem and not in personam—is not dependent upon the existence of an accrued cause of action at the time of the receivership. Every equitable consideration requires that the assets which belong to creditors should be shared in by those whose demands are not then due but which are fixed in amount and certain to become due at a stated time in the future. Bankruptcy and insolvency statutes permit the proof of claims of this class, and it is manifest that they should be proved in an equity cause.

The third class—contingent claims—requires more extended consideration. The bankruptcy act of 1841 expressly permitted the proof of contingent demands. The act of 1867 likewise permitted the proof of such demands and provided that if the contingency happened before the final dividend, the claimant should receive his share. It also provided for the ascertainment and liquidation of such demands. The English Bankruptcy Act permits the proving of “all debts and liabilities, present or future, certain or contingent” and provides for the ascertainment of “the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies or for any other reason, does not bear a certain value.” The English winding-up statute also allows the proof of contingent claims and provides that a “just estimate” of their value shall be made. On the other hand the present bankruptcy statute in this country permits the proof of “fixed liabilities” but excludes contingent claims.

If we should attempt to formulate equitable rules from these statutes we should probably follow none of them. The early acts and the English statutes indicate a procedure of uncertainties inconsistent with the expeditious settlement of estates. On the other hand the present bankruptcy law, which deals with individuals as well as corporations and has regard to the right of discharge, can hardly be regarded as a guide in a purely equitable matter affecting corporations alone. If we go on in this direction, we shall have to lay out a middle course between the statutes which will be both practicable and equitable.

But it is not worth while to strive for such a course and to attempt to define and distinguish between contingent demands. We shall only attain by a circuitous way an end which we can reach by going directly to it. The real inquiry in getting at a basis for the distribution of an insolvent estate is whether the claims are reduced to dollars and cents. If they are so reduced or can be so reduced by the application of recognized principles they are entitled to share. If they are not they cannot share. And this not at all for any reason affecting their merits nor strictly speaking because they are contingent, but because they are uncertain. So, without laying stress upon the question whether claims are (1) past due, (2) immature, or (3) contingent, the real way we should divide them with respect to the question of provability is into these two classes:

- (1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estates;

(2) Claims which are so uncertain that their worth cannot be so ascertained.

The second class of claims cannot be proved. They may be highly meritorious, but they cannot share in the estate because their amounts cannot be ascertained.

The first class of claims ought to be proved and share in the estate and this whether they are overdue accounts, immature notes, or claims for damages for breach of contract co-inciding with or following the receivership. It is impossible to point to any equitable ground which would justify a court of equity in excluding the holders of any of such claims from sharing in the estate of their debtor.¹¹

One more question remains for consideration in formulating any general equitable rule. A time should be stated with respect to which the status of claims should be fixed. The briefs upon these appeals indicate a general impression among counsel that the date of the appointment of the receivers is the time which controls. Apparently this view is based upon the earlier theory of the courts that a creditors' bill is an equitable levy equivalent to a general execution in favor of creditors who at the time it is filed are in a position to obtain execution or attachment. But, as we have seen, the right to share in corporate assets is, at the present time, not confined to creditors who might themselves have instituted separate proceedings, nor are the assets to be shared in those alone which could be seized upon execution. The present extension of equitable jurisdiction over corporations would be wholly unjustifiable if it were for the benefit of a particular class of creditors. Consequently the time of the appointment of the receiver constitutes no logical or necessary date for determining the provability of demands and it should be fixed as equity, with due regard to convenience, may require.

The commencement of the receivership should properly determine the existence of the corporate engagement. The estate should not be liable upon contracts or agreements entered into by the corporation after the appointment of the receiver. But when the engagement exists, we perceive no equitable reason why that time should determine the provability of demands based upon it. Indeed the equitable considerations are rather the other way. There are cases in which the very fact of the appointment of the receiver breaks the obligation and creates the demand. In such cases it is manifestly inequitable that any technical objection should operate to prevent the proof of the claim. So, in many cases, uncertainties regarding claims may be removed soon after the appointment of the receiver and before any-

¹¹ The language of the Chancellor in *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378, although in reference to proceedings under a winding-up statute, is equally applicable to an equitable cause:

"The receiver is bound in duty and clothed with power to reach out and take in every conceivable asset due or thereafter to accrue to the corporation. A complete collection of assets is contemplated and a full and final distribution of them is made possible. Such being the situation, natural justice demands that those who suffered from breaches of contract should be included in the distribution, even though the breaches and consequent damages follow the insolvency."

thing is done towards making up accounts or distributing assets. Claims of this nature should share in the estate. And the effort of a court of equity should be to have them share. It is not a light thing for a chancery court, acting without statutory direction, to say that a creditor shall lose his demand when he has not been at fault and when the settlement of the estate will not be protracted by allowing it. We find much to approve in the report of the special master (confirmed by the Circuit Court) in *New York Security & Trust Co. v. Lombard Inv. Co.*, 73 Fed. 537:¹²

"No inconvenience or delay will accrue from the operation of the rule embraced in class No. 3 of claims recommended to be allowed, and which we are considering, viz.: That claims, though not matured, or which did not, at the time of the appointment of the receiver, constitute a direct obligation, but which have since matured, or will have matured, or constitute such obligation, before any order of distribution is made, should be allowed. If a series of dividends were to be declared, and the proofs and allowance of claims were to be kept open after the order of distribution, and until the close thereof, the case would be radically different, and such a rule could not be sustained, if for no other reason than that of *ab inconvenienti*."

* * *

"But no inconvenience, delay, or embarrassment to the estate can arise from the application of the rule embraced in the classification referred to. This being the case, and as it is clear that a more perfect equity will be reached by refusing to make any arbitrary distinction between the rights of creditors whose claims matured yesterday or to-day, provided they are sufficiently matured before any order of distribution is made, it is my judgment that the classification made in that behalf is the proper one to be made."

Under the foregoing decision creditors were permitted to prove claims which, although not matured and certain at the time of the appointment of the receivers, became such before any order of distribution. We think this rule very nearly correct, although it probably goes too far in permitting the proof of claims up to the time of distribution. All claims ought to be in before the accounts are made up for distribution, and there should be no opportunity for uncertainty, delay or expense in reopening and recasting them. A narrower rule can be adopted which would obviate any difficulty in this regard and which would be simple, equitable and workable. It is this: Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made

¹² This is almost the only case in which rules have been formulated with respect to the provability of claims against insolvent corporations. Although the Missouri statute is said to have governed, its language is so broad as not to materially affect the weight to be given to the decision in a general equity cause. In that case the special master reported the following classes of claims as those which should be allowed and his action was approved by the court:

"Class No. 1 embraces claims which, at the time of the appointment of the receivers, furnished a present cause of action against the guarantor (the corporation).

"Class No. 2 embraces all direct obligations of the company at the date of said appointment, whether due or to become due at some time in the future.

"Class No. 3 embraces all claims, though not matured, or which did not, at the time of the appointment of the receivers, constitute a direct obligation, but which have since matured, or will have matured, or constitute such obligation, before any order of distribution is made."

certain by recognized methods of computation, should be allowed.¹³ Claims which are not then certain should be disallowed because they afford no basis for making dividends. But there is no equitable reason why claims which are certain when presented and which are presented in time should have been certain at some arbitrary anterior period.

It is true that these conclusions are not entirely in accord with the decisions of some of the state courts in corporation dissolution proceedings, notably those of the New York Court of Appeals. *People v. Metropolitan Surety Co.*, 98 N. E. 412, decided April 2, 1912; *People v. Commercial Alliance Ins. Co.*, 154 N. Y. 95, 47 N. E. 968; *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200. In these cases the rule seems to be established that the status of claims must be "fixed as of the date of the commencement of the action for dissolution" (*People v. Metropolitan Ins. Co.*, *supra*), and the courts lay especial stress upon the principle that the judgment of dissolution "relates back to the commencement of the action." And it may well be that as the death of the corporation takes place by relation at the commencement of the dissolution proceedings that time should fix the status of claims in such proceedings without it following that a court of equity ought to select that time to govern purely equitable causes.

It should be observed, moreover, that our conclusions are not inconsistent with the rule that, in the case of an insolvent estate, interest is not allowed upon claims after the appointment of receivers. *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *Tredegar v. Seaboard Air Line R. Co.*, 183 Fed. 289, 105 C. C. A. 501; *Solomons v. American Building, etc., Ass'n (C. C.)* 116 Fed. 676; *Bowman v. Wilson (C. C.)* 12 Fed. 864. This rule is based upon the principle that any delay in the settlement of the estate for which interest might run is the act of the law and not of the insolvent debtor and it is applicable both to claims which are certain and to those which are uncertain so far as the latter may otherwise be entitled to interest. But a rule based upon the principle of not penalizing for the law's delay furnishes no reason for forfeiting the claim of a creditor which only becomes fixed in the course of such delay.

Having now considered the general principles governing the provability of claims in equity receivership causes, we come to the consideration of the particular questions arising in the present appeal. These are questions of law. The facts stand out for themselves. It is manifest that the Metropolitan Express Company met a serious loss. It transferred its interest in the Metropolitan Railway contract to a responsible corporation which assumed all its obligations and agreed to pay a substantial and certain income for a stated term.

¹³ We fail to see that this rule is open to the objection that it is varying. If the last day fixed for the presentation of claims determine their status, there is no more variation than if the day of the filing of the bill or of the appointment of a receiver determine it. That the rule may not tie the hands of the court as much as some other rule is certainly no objection to it.

The Metropolitan Railway Company and its lessee, the City Company, became insolvent and their railroads went into the hands of receivers. The result was that the Express Company, without any fault on its part or on the part of its assignee, lost the benefit of this contract. The question whether it can prove a substantial claim for this loss depends, (1) upon whether the contract was broken at such a time as to permit the proof of the demand as a certain claim within the principles which we have examined, and (2) upon the sufficiency of the proof of damages.

Obviously at *some* time there was a complete breach of the contract. The contract gave the Express Company the right to move express matter over the Metropolitan roads and it was wholly excluded from the exercise of such right. When did the breach take place?

[7] The rule is well settled that where one party to an executory contract puts it out of his own power to perform it, there is an anticipatory breach which gives the other party an immediate right of action for the damages which he suffers thereby. *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, contains a review of the American and English authorities, of which *Hochster v. De la Tour*, 2 E. & B. 678, is the leading case.

It is possible that the appointment of a receiver of an objecting corporation, although preventing it from carrying out its executory contracts, might be considered to be the act of the law and not such an act of the party as would constitute an anticipatory breach of such contracts within the rule. It is probable, too, that bankruptcy and insolvency do not break contracts when they do not in fact prevent performance. Thus the bankruptcy of a lessee does not terminate the lease and the lessee may be holden upon the rent covenant if he be permitted to continue his occupation. But when bankruptcy and insolvency do put it out of the power of the bankrupt or insolvent to perform his executory contracts, and when he does participate in bringing on the proceedings, they constitute the breach of such contract. How can it be otherwise? The situation is the equivalent either of an out and out repudiation or of a complete disablement and in either case the contract is broken.

In *Re Pettingill* (D. C.) 137 Fed. 143, Judge Lowell said:

"Bankruptcy itself may be treated as a breach of the bankrupt's contracts analogous to that complete repudiation of the contract before the time of performance which was shown in *Hochster v. De la Tour*, 2 E. & B. 678, and in *re Roehm v. Horst*, 178 U. S. 1 [20 Sup. Ct. 780, 44 L. Ed. 953], or to a complete disablement of performance of the contract as in *Frost v. Knight*, 7 Exch. 111."

See, also, *In re Neff*, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349; *In re Swift*, 112 Fed. 315, 50 C. C. A. 264; *In re Stern*, 116 Fed. 604, 54 C. C. A. 60; *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, 10 C. C. A. 393; *Ex parte Stapleton*, L. R. 10 Ch. Div. 586; *In re Fire Ins. Co.*, L. R. 17 Ch. Div. 337.

In the present case the appointment of the receivers for the Metropolitan and City Companies completely disabled those corporations from carrying out the contract with the Metropolitan Express Com-

pany. That contract granted the right to do the "express, freight and delivery business" on the roads of the Metropolitan system. The receivers took possession of the roads and excluded the Express Company and its assignee. Certainly there was absolute "disenablement of performance." The railway companies also practically admitted their insolvency when the receivers were appointed and joined in the prayers for their appointment.

It is clear, then, upon the authorities cited, that the contract in question was broken by the insolvency of the Railway Companies and the appointment of the receivers unless the contention of the appellees be well founded that a receivership cannot operate to break an executory contract because the receivers are allowed a period in which to act upon it.

As we have seen in the Termination of Lease Proceeding, a receiver is entitled to a reasonable time in which to determine whether to adopt or renounce the contracts of the corporation for which he is appointed. During this trial period the operations under the contract may go on and the legal consequences flowing from the fact of the receivership may be suspended in their operation. If the receiver elect to adopt the contract, his adoption relates back to the beginning of the receivership and the contract continues as if nothing had taken place. That which would otherwise have amounted to a breach of contract does not have that effect on account of the receiver's acceptance of it. On the other hand, it necessarily follows that when a receiver rejects a contract, his rejection relates back to the beginning of the receivership and the breach of the contract takes place as of that time. Any other rule would be altogether inequitable and one-sided.¹⁴

The further contention is made by the appellees that even if the receivership proceedings did constitute a breach of the contract, still there was no breach before that time and, consequently, no provable claim.

In view of the principles which we have already fully considered, it is unnecessary now to consider this contention or to draw distinctions between claims which accrued before, arose contemporaneously with, or followed the act of the receiver's appointment. It is sufficient that even if the breach took place after such appointment, the claim of the Express Company, when presented, was fixed and absolute. Being so, it was provable. The only uncertainty was as to the amount of damages; but the mere necessity for liquidating demands never affects their provability.

¹⁴ It should be observed that there is no analogy between a case like the present one and the bankruptcy cases relating to leases of real estate like *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270. In those cases it is held that the estate in lands which passes to a lessee is not divested by his bankruptcy when the trustee does not elect to assume the lease. Under such conditions the bankrupt lessee retains the lease upon the same footing as before. In other words the situation of the leasehold interest is as if nothing had happened. The present case is more like that of the bankruptcy of a lessor whose trustee drives the tenant out of possession and then insists that the lease was never broken.

We come then to the final inquiry which is whether the Metropolitan Express Company, the claimant, has shown that it sustained any substantial damage by reason of the complete breach of the contract in question.

[8] Manifestly the claimant was entitled to recover the value of its contract. Manifestly also the value of its contract was what it would have made by its performance. Gains prevented, when fairly shown, are recoverable as damages for breach of contract. But future gains must be measured by past performance. Consequently profits under a contract for a reasonable period before its breach may be shown to establish gains prevented by its breach. These principles are clearly stated and the necessity for latitude in the reception of proof of damage are pointed out in the opinion of the New York Court of Appeals in *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 209, 4 N. E. 264, 266 (54 Am. Rep. 676):

"It is not true that a loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with a view to future profits and such profits are in the contemplation of the parties and so far as they can be properly proved, they may form the measure of damages. As they are prospective, they must to some extent be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach."

See, also, *Howard v. Stilwell, etc., Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; *Dickinson v. Hart*, 142 N. Y. 183, 36 N. E. 801; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Masterton v. Mayor*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Chapman v. Kirby*, 49 Ill. 211; *Corey v. Thames Iron Works*, L. R. 3 Q. B., 181; *Simpson v. London, etc., R. Co.*, L. R. 1 Q. B., 274.

[9] In the present case it is manifest that the contract was entered into with a view to future profits. That was its object. It looked to the increase and development of the business. Although the claimant did not find the contract profitable when it operated it itself, it is apparent that it contained such elements of prospective value that a responsible corporation was willing to take it off its hands and guarantee a large profit. It appears also that this corporation actually found the contract profitable, for it made nearly \$30,000 a year out of it for the three years prior to the receivership.

It may be that, standing by itself, the terms of the contract with the third person—the American Express Company—would not afford a measure of its value. The assignment might overestimate or underestimate and would not be binding. This contract, however, permitted an assignment and the fact that it was assigned at a substantial profit tended to show that it had a salable value. There was evidence of substantial damage.

It is no reason for denying the claimant damage that some years before the receivership it operated under the contract at a loss. Nor

is there any justification for limiting it to such profits as it might show that it could make under its own management. As already stated, the contract permitted assignment and it was assigned. The assignees made large profits. Prima facie they would have continued at the same rate and it was for the receivers to show that such conclusion did not follow, and that they arose from peculiar facilities of the American Express Company—as distinguished from other possible assignees—not within the contemplation of the parties when they made the agreement and authorized its assignment.

The claimant limits its claim for damages to reimbursement for its loss through the termination of the assignment agreement with the American Express Company and, consequently, the damages assessed cannot exceed such amount.

The decree (188 Fed. 339) is reversed and the case remanded with instructions to allow the claim for nominal damages and for such substantial damages as upon further hearing may be established.¹⁵

III. Appeal Presenting the Question Whether a Certain Claim of National Conduit & Cable Company is Provable Against the Estate of the City Company: Called the "Cable Company's Appeal."

For opinion below, see 188 Fed. 343.

On May 11, 1907, the claimant, the National Conduit & Cable Company, entered into an agreement with the City Company whereby it agreed to manufacture and deliver to the latter three different kinds of lead covered cable aggregating 205,000 feet in length. The City Company had the right to specify between the date of the agreement and July 1, 1908, what lengths of cable it desired.

The City Company, in accordance with the contract, specified for delivery, and there was actually delivered, a considerable amount of the cable, but at the time of the appointment of the receivers for the City Company, and its admitted insolvency, September 24, 1907, there remained unspecified for delivery, 116,490 feet of cable.

The Cable Company was at all times ready to perform said contract on its part. No breach of the contract on the part of the City Company took place prior to the appointment of its receivers. After that no cable was specified for delivery by any person and, on January 17, 1908, the receivers notified the claimant that they would not adopt the contract.

The damages to the claimant by reason of the breach of contract—assuming that there was one—based upon the market price at the commencement of the receivership amounted to \$44,232.20.

The special master to whom the matter was referred rejected the claim as being contingent and his action was approved by the District Court.

The claimant has appealed to this court.

¹⁵ No substantial question is raised in the brief as to there being any difference in the liability of the two estates—that of the City Company and that of the Metropolitan Company—upon the contract in question and that matter is, accordingly, not discussed.

C. G. Galston, for appellant.

M. C. Fleming, for Ladd, receiver.

A. H. Masten, William M. Chadbourne, and Frederick W. Kobbe, for Joline et al., receivers.

B. S. Catchings, for tort creditors' committee.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The principles stated in the "Express Company's Appeal" are decisive of this case. The admitted insolvency of the City Company followed by the appointment of the receivers, constituted a breach of the contract which was not affected by the fact that the receivers did not notify the claimant of their rejection until some months afterwards. When the claimant was called upon to present its claim it was fixed and certain, both with respect to liability and amount.

The decree appealed from (188 Fed. 343) is reversed and the claim of the appellant to the amount of \$44,232.20 is allowed.

IV. Appeal Presenting the Question Whether a Certain Claim in Behalf of the Bondholders of the Second Avenue Railroad Company is Provable against the Estate of the Metropolitan Company: Called the "Second Avenue Bondholders' Appeal."

For opinion below, see 189 Fed. 661.

On January 20, 1898, the Second Avenue Railroad Company mortgaged its property to the Guaranty Trust Company, as trustee, to secure an issue of first consolidated mortgage bonds to the aggregate amount of \$7,000,000. These bonds were payable on January 1, 1948, and bore interest at the rate of 5 per cent. payable semi-annually on the 1st days of August and February in each year. Each of these bonds when issued bore the following indorsement signed by the Metropolitan Company:

"For value received, the Metropolitan Street Railway Company hereby guarantees to the trustees of the within mentioned mortgage for the benefit of the holders hereof the punctual payment of the principal of the within bond and the interest thereon at the time and in the manner specified therein and according to the tenor of the several coupons belonging thereto."

The mortgage securing said bonds contained an acceleration clause providing that in case of continued default in the payment of interest, and at the election and upon the appropriate action of a majority of the bondholders, the entire principal should at once become due and payable. This clause, however, is not of importance in the present case as counsel for the claimants state in their brief that it has been "construed by the Circuit Court, with the assent of all counsel, as relating only to the enforcement of the security of the mortgage and not to the personal liability of the mortgagor or of the Metropolitan Street Railway Company."

On January 28, 1898, the Second Avenue Company leased its entire property to the Metropolitan Company for the unexpired term of its charter and any extensions thereof for the annual rent of 8 (followed by 9) per cent. upon its capital stock. The lease referred to the execution of the aforesaid mortgage to the Guar-

anty Trust Company and contained the following assumption covenant:

"This lease is made subject to all the debts and liabilities of the party of the first part (the Second Avenue Company), except debts due or liabilities incurred to the party of the second part (the Metropolitan Company), and such debts and liabilities, except as aforesaid, and subject to the provisions and conditions of this lease, are hereby assumed and are to be paid by the party of the second part as a part of the consideration hereof, and all bonds that shall be issued by the party of the first part under the mortgage to the Guaranty Trust Company, hereinbefore referred to, when issued and disposed of, as hereinbefore provided, or as provided in said mortgage or in this lease, shall be included among the obligations which the party of the second part assumes and agrees to pay under the provisions of this lease."

The Metropolitan Company went into possession under said lease and it was lived up to by the parties thereto until the appointment of the Metropolitan receivers in October, 1907, as shown in the Termination of Lease Proceeding.

The receivers apparently continued in operation of the leased Second Avenue road from the time of the appointment until November 5, 1908, when they were directed not to adopt said lease, and shortly thereafter they surrendered possession of the leased property to a receiver for the Second Avenue Company appointed by a state court in a foreclosure proceeding.

The interest coupons on said bonds maturing February 1, 1908, were paid by the Metropolitan receivers, but the coupons payable August 1, 1908, and subsequently, have not been paid.

"No decree of foreclosure and sale has been entered in either of the suits to foreclose the Second Avenue mortgage. There is no evidence in this proceeding that the Second Avenue Company is insolvent, or that the property covered by the first consolidated mortgage of the Second Avenue Company is insufficient to pay in full the principal and interest of the bonds secured thereby." (Finding of Special Master.)

The general order for the presentation of claims against the Metropolitan estate provided that all demands should be presented to the special master on or before January 15, 1908. A special order was, however, made granting leave to file the present claim on or before March 1, 1910, and such order—unlike several orders appearing in this series of appeals—was not made *nunc pro tunc* and did not relate back to the time limited in the general order.

This claim, made by a committee in behalf of a large number of Second Avenue bondholders, for the payment of the principal and interest of said bonds based upon the assumption covenant in said lease and the engagement endorsed upon the bonds, was presented within the time limited to the special master who rejected it as a contingent demand and his action was approved by the District Court.

The claimants have appealed to this court.

Julien T. Davies and Brainard Tolles, for appellants.

Arthur H. Masten and W. M. Chadbourne, for Joline et al., receivers.

M. C. Fleming, for Ladd, receiver.

B. S. Catchings, for tort creditors' committee.

Richard Reid Rogers and William M. Coleman, for New York Rys. Co.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). If the estate of the Metropolitan Company be liable to the Second Avenue bondholders it is either:

- (1) Upon the assumption covenant in the lease, or
- (2) Upon the engagement endorsed upon the bonds.

[10] In the lease the Metropolitan Company assumed and agreed to pay the bonds in question and the contention is that the promise being for the benefit of the claimants, they have a right of action thereon although they are not parties to the contract. The consideration of this contention requires an examination of the right of third persons to enforce promises made for their benefit.

In England and in some of the States the rule is adhered to that the only persons who can sue upon a contract are the parties; that a third person for whose benefit a contract is made cannot maintain an action upon it. The reason for the rule is said to be that there is no privity between the contracting party making the promise and the third person and that the consideration does not move directly from the latter. The rule has the merit of simplicity but is calculated to permit injustice. It is founded, too, upon wholly artificial distinctions. There is no real and substantial reason why, if the parties to a contract recognize the interest of a third person in it and desire and intend to give him a right of action upon it, they should not be able to do so. And the prevailing doctrine in this country is contrary to the English rule. It is generally held, subject to qualifications, that a third person may sue upon a promise made to another for his benefit. Sometimes the right is placed by the courts upon provisions in codes giving the "real party in interest" the right to prosecute suits. Sometimes it is based upon the theory of a trust; the promisor being regarded as trustee for the third party. Sometimes it is based upon the theory of agency; the promisee in the contract being considered the agent of the third party who adopts his acts in suing upon the contract. But whatever may be the correct theory, one thing is essential to the right and that is that the third person be the real promisee—that the promise be made to him in fact although not in form. It is not enough that the contract may operate to his benefit. It must appear that the parties intend to recognize him as the primary party in interest and as privity to the promise.

In *Austin v. Seligman* (C. C.) 18 Fed. 522, Judge Wallace said:

"According to good sense and upon principle there is no reason why a person may not maintain an action upon a contract although not a party to it, when the parties to the contract intend that he may do so. The formal or immediate parties to a contract are not always the persons who have the most substantial interest in its performance. Sometimes a third person is exclusively interested in its fulfillment. If the parties choose to treat him as the primary party in interest, they recognize him as a privity in fact to the consideration and promise. And the result of the better-considered decisions is that a third person may enforce a contract made by others for his benefit, whenever it is manifest from the nature or terms

of the agreement that the parties intended to treat him as the person primarily interested." ¹⁶

[11] Let us apply these principles in the present case. Here we have a lease in which the Metropolitan Company assumed the payment, among other things, of the bonds in question. But whether it was intended by the parties that the Metropolitan should carry out its obligation by entering into an express agreement with the bondholders, or whether their rights should depend upon the general provisions of the lease and the somewhat hazy legal principles governing the rights of third persons upon such provisions does not clearly appear from the instrument itself. The parties, however, placed a contemporaneous construction upon it. The Metropolitan Company, apparently with the approval of the Second Avenue Company, indorsed its engagement upon the bonds. The mortgage, the lease and the initial issue of bonds ought to be taken as one transaction and so regarded it seems perfectly clear that the intention of the parties was that the Metropolitan should assume the payment of the bonds by virtue of its engagement endorsed upon them. There is nothing to warrant a finding that the Metropolitan Company intended to enter into two undertakings for the benefit of the Second Avenue bondholders—one general and one special. And to hold it liable upon both would be to ignore the elementary rule that express covenants do away with implied ones. In our opinion, the rights of the bondholders must be enforced upon the bond indorsement and not upon the assumption covenant.

Assuming, however, that the bondholders may base their demand upon the assumption clause, still it does not carry us far. It appears from the authorities that such a covenant, even if absolute in form, will be treated as conditional. Thus in *Farmers' Loan, etc., Co., v. Central Park, etc., R. Co.*, 193 Fed. 963, this

¹⁶ The courts of New York, where the contract in question was entered into and is sought to be enforced, have shown some oscillation of opinion upon the question of the extent to which a third person may sue upon a promise for his benefit. At the present time the law as established in New York cannot be regarded as at all contrary to Judge Wallace's opinion. Indeed the New York courts repeatedly insist that a contract upon which a third party can sue, must have this benefit for its object.

In *Simson v. Brown*, 68 N. Y. 355 (quoted with approval in *Constable v. National S. S. Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903) the Court of Appeals said:

"It is not every promise made by one to another, for the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

Other New York cases upon the subject in addition to *Lawrence v. Fox*, 20 N. Y. 268, which formulated the broad doctrine are: *Embler v. Hartford Steam Boiler Insurance Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; *Durnherr v. Rau*, 135 N. Y. 222, 32 N. E. 49; *Lorillard v. Clyde*, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113; *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

court said in respect of an assumption provision in a lease almost identical with the present one:

"But even assuming with appellant that the lease of 1892 does contain an assumption of the Central Park Company's funded debt and assuming further, that this case is governed wholly by the law of New York as declared by its highest court, there is nothing in the evidence to show that the Metropolitan Company ever assumed any higher obligation than one to hold the Central Park Company harmless from the consequences of foreclosure, the pledged property remaining always the primary fund for the payment of the mortgage. 'The giving of a covenant by the grantee does not work a novation of the mortgage debt. It does not make the debt his own, except in respect to the estate.' *Matter of Wilbur v. Warren*, 104 N. Y. 198 [10 N. E. 263], citing *Butler v. Butler*, 5 Ves. 534."

If, then, the mortgaged property be the primary fund for the payment of the mortgage, it necessarily follows that this assumption covenant, if constituting a promise for the benefit of the mortgage bondholders, was merely a promise to pay any deficiency after exhausting the mortgage security. Granting that the promise would be for the benefit of the bondholders and that it would support a direct action by them, would not change its conditional character. The Metropolitan Company was liable to the bondholders only as it was liable to the Second Avenue Company itself. *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195.

And if the bondholders had a conditional right of action upon the assumption clause, i. e., if they could have enforced the promise to pay any deficiency existing after exhausting the security of the mortgage, their demand was too uncertain when presented—and is too uncertain now—to constitute a provable claim in an equity receivership cause within the principles stated in the Express Company's Appeal. As shown in the statement of facts, no foreclosure decree has ever been entered and there is nothing to show that there ever will be any deficiency after using up the mortgage security. Assuming the assumption covenant to be enforceable, it is entirely uncertain what, if anything will ever be due upon it.

We come now to the engagement endorsed upon the bonds and are relieved from considering it in any other way than as it stands upon its face by the admission of counsel that the operation of the acceleration clause does not affect the liability of the Metropolitan Company. Its obligation is to deal with the bonds upon their maturity in 1948 and the interest for the intervening period.

[12] The engagement of the Metropolitan Company endorsed upon the bonds is in the form of a guaranty. The Second Avenue Company is the maker of the bonds and the Metropolitan Company "guarantees" the punctual payment of the principal and interest thereon "at the time and in the manner specified therein." And if the contract is what it purports to be, it is a collateral undertaking. There cannot be a guaranty—an absolute guaranty of payment or a conditional guaranty of collection—unless there be a principal liability. If there be no debt or default of a third

person, present or prospective, there can be no guaranty.¹⁷ The Metropolitan Company then, as guarantor, is liable for the default of the Second Avenue Company, the maker, upon the bonds. But the principal of the bonds does not become due until 1948, and there cannot be any default for which the Metropolitan Company is answerable until that time. Nor can there be any default for non-payment of interest until it becomes due. If the obligation of the Metropolitan Company be that of a guarantor any claim based thereon for the principal or future interest is, at the present time, both immature and uncertain. It cannot be said with certainty that the Second Avenue Company—the principal—will default upon the bonds in 1948, or upon the future interest. Indeed, as we have seen, the special master has found that there is no evidence to show that the Second Avenue Company is insolvent. The claim for the future as based upon a contract of guaranty is, within the principles stated in the Express Company's Appeal, too uncertain for allowance.

But it is contended by the claimants that although the contract is in form to answer for the default of the Second Avenue Company, yet that its purpose is to benefit directly the Metropolitan Company, and that it should be regarded as the original undertaking of the latter of which the present worth can be ascertained by recognized methods and which can be proved against the Metropolitan estate.

[13] Notwithstanding that the word "guaranty" is used in an engagement, it may be construed to constitute an original and absolute undertaking when it is plain—but only when it is plain—that such was the intention of the parties. The difficulty in this case is that there are no facts or circumstances shown upon the record to give the contract a different aspect from that which it bears upon its face. The finding of facts of the special master and the recitals in the lease and mortgage, are all consistent with the contract being one of guaranty. There is nothing to show that the proceeds of the bonds did not go to pay the debts of the Second Avenue Company or to make improvements upon its property. Undoubtedly the Metropolitan Company benefited by the transaction as the Second Avenue Company was enabled to pay any debts owing to it. Undoubtedly it benefited also by the improvements upon the railroads which it leased. Presumably those were the reasons why it was willing to guarantee the bonds. But the facts presented are wholly insufficient to change that which appears to be a contract of guaranty into an original several or joint obligation.

For these reasons it is clear that the claim for the principal and future interest of the bonds is not provable against the Metropolitan estate because it is altogether uncertain in its nature. This

¹⁷ The principle stated in the text is not affected by the rule that in the case of an absolute guaranty of payment no demand upon, notice to, or proceedings against the principal debtor may be necessary. There must be a principal debtor or there can be no guaranty.

is not true with respect to the interest coupons falling due between August 1, 1908, and March 1, 1910. These coupons had fallen due; the Second Avenue Company had defaulted upon them, and the liability of the Metropolitan Company had become fixed, certain and liquidated before the claimants were required to present their demand. When presented it was, with respect to these coupons, for a definite sum of money which the Metropolitan Company owed and, upon the principles stated in the Express Company's Appeal, was entitled to allowance. And it is particularly equitable that the claim for such coupons should be allowed because for a portion of the period covered by them the Metropolitan receivers were in possession of the leased road. Upon the principles stated in the Crosstown Company's Appeal, the lessee should have its rental during the trial period as a general claim if the receivers fail to pay it. These coupons, while representing interest as between the Second Avenue Company and its bondholders, represented rental so far as the Metropolitan Company was concerned and did not come within the interest rule stated in the Express Company's Appeal. This was recognized by the receivers themselves for they paid one of the coupons falling due after the commencement of the receivership.

It is urged, however, by the Metropolitan receivers that the claimants cannot prove their demands upon these coupons because the guaranty does not run to the bondholders themselves but to the mortgage trustee "for the benefit of the holders"; that the trustee must enforce any rights arising under it.

If this were an action at law or a suit in equity the technical objection of the want of proper parties might have weight although then we should undoubtedly conclude that the doctrine giving third persons the right to enforce promises made for their benefit counts for little if it be inapplicable in a case like this. Here, it is true, the guaranty is to the trustee but it is expressly for the benefit of the bondholder. The trustee is altogether a formal party and there are few jurisdictions where a person cannot sue when he is the beneficiary solely interested in the promise. The rule that the rights and liens of mortgage bondholders must be worked out through the trustee has reference to proceedings to enforce the security rather than to actions in personam to enforce the obligation.

But it is unnecessary in this case to determine the weight which would be attached in an action to the objection of the want of proper parties. The claimants have instituted no suits. As the real and equitable owners of the bonds and coupons they have filed their claims in an equity cause and have asked their share in the fund in the custody of the court. It makes no difference to the estate whether the dividends are paid to a trustee which then distributes to the bondholders or whether direct distribution is made. The only thing to be avoided is paying twice and there is nothing to indicate that the trustee has filed any claims. Perhaps if it had, such action would have excluded the bond-

holders from proving independently. But in the absence of action by the trustee the claimants, in our opinion, may properly prove their demands upon the coupons in question. We cannot accede to the argument that because some of the bondholders have been actionless and the trustee has taken no steps, those who have been diligent should get nothing.

The decree appealed from (189 Fed. 661) is modified so far as to provide for the allowance of the interest coupons belonging to the claimants which fell due between August 1, 1908, and February 1, 1910, inclusive; otherwise it is affirmed.¹⁸

On Petitions for Rehearing and for Modification of Mandate Filed by the Appellants and by the New York Railways Company, Intervener.

Julian T. Davies and Brainard Tolles, for appellants.

Arthur H. Masten, for appellees.

PER CURIAM. Our disposition of this appeal was based upon the situation of the parties as disclosed by the record and briefs. We accepted the statement of the appellants in their brief that the acceleration clause in the mortgage had been construed by the District Court with the assent of all parties as relating only to the enforcement of the mortgage and not to the liability of the mortgagor. And as error cannot be predicated upon a consent ruling, and as no different contention was made upon the hearing, we did not consider that the question of the interpretation of the clause required our examination. So, while we appreciated that the order permitting the proof of the present claim was different in form from certain other orders which appeared in this series of appeals, no explanation of such difference appeared in the record, and no question was raised at any time concerning it. Consequently we deemed that we fulfilled our full duty in applying the legal principles established to the facts as presented.

It is now urged by the appellants that they should be permitted to have a rehearing and take a different position with respect to the effect of the acceleration clause, and by the New York Railways Com-

¹⁸ The special master rejected the claim upon one ground which was broad enough to exclude it altogether—principal and all interest coupons. This ground was the interpretation placed by him upon the following provision of the mortgage:

"For the debt and bonds secured hereby the railroad company is liable in personam, and any deficiency, after exhausting the mortgage security, may be enforced against the railroad company, but not against the directors and stockholders individually," etc.

The special master construed this provision as limiting the obligation of the Second Avenue Company in personam upon the bonds to the payment of the deficiency after exhausting the mortgage security, notwithstanding that the bonds themselves were absolute and unconditional. But we cannot accept this interpretation. The evident purpose of the provision was to state the exemption of directors and stockholders and to make it more acceptable by emphasizing the liability of the corporation. Moreover, to say that a debtor is liable under certain conditions is far from saying that he is not liable under other conditions.

pany, as intervener, that a rehearing should be had and the order permitting the presentation of the claim so amended as in effect to exclude the appellants' demand.

The most that can really be said in favor of these petitions for rehearing is that, if the parties had appreciated in advance the views of this court upon the different legal questions presented upon these appeals, they would probably have acted differently in the District Court, and so have presented a different record. We are not satisfied, however, that this is a good ground for rehearing, or that our conclusions reached upon the case in the manner presented were erroneous, and both petitions for rehearing must be and are denied.

We are, however, impressed with the probability that, if our decision in the Express Company's Appeal had been rendered prior to the hearing upon this claim in the District Court, the appellants would have taken a different position with respect to the construction of the acceleration clause, and it is our purpose to permit them to go back to the District Court for further hearing, if they desire to do so. But if a hearing had been had in the District Court under the conditions stated, it would have been open to the Metropolitan interests to apply for an amendment to the order permitting the presentation of the claim, and the court would have had power to grant it. Consequently, if a further hearing is to be had upon the acceleration clause in the District Court, either at the instance of the appellants or at the instance of the trustee under the mortgage, equity and fairness require that that court should have the right to amend or correct preliminary orders in the same manner as if the hearing were an original one before it.† In view of all the facts and circumstances, however, we are not satisfied that the present result of the appeal is so inequitable or unfair to other creditors that we should permit the District Court to amend the order, and so possibly exclude the appellants from any demand in absence of further action upon their part or upon the part of the trustee.

The mandate may, therefore, be recalled and amended, so as to permit the appellants to apply to the District Court for a hearing with respect to the effect of the acceleration clause, and shall further provide that in case they do so apply, or in case the trustee of the mortgage shall present the same question in any other way, our decision upon this appeal shall not prejudice the right of the District Court, for cause shown, to amend its order permitting the presentation of the claim, and shall also provide that, in case of any change in rulings or orders, the District Court shall have power to carry to a conclusion any proceedings necessary to determine the amount of the claim in view of any such change.

†Reference is made to possible action by the mortgage trustee only because it is suggested in the appellants' memorandum that such trustee may have the right to press a demand for the principal of the bonds independent of the appellants, but it is not intended to pass upon the rights or standing of such trustee in any way.

V. Appeal Presenting the Question Whether Certain Claims of the Central Crosstown Railroad Company are Provable Against the Estates of the Metropolitan and City Companies: Called the "Crosstown Company's Appeal."

For opinions below, see 192 Fed. 135; 194 Fed. 543.

On February 8, 1904, the Central Crosstown Railroad Company leased all its railroads and property to the Metropolitan Company for the term of 999 years from April 1, 1904, for the yearly rental of 15 per cent. upon its \$600,000 capital stock; the agreement to pay all taxes upon its property and the amounts due under any lease or other contract, and the assumption of the interest upon its funded debt. The particularly relevant provisions of the lease are printed in the foot note.¹⁹

Among the obligations of the Crosstown Company of which the Metropolitan Company assumed the performance of was the obligation of the former under its lease from the Christopher Street Company, to pay "all taxes, assessments and charges which have been or may be lawfully imposed" or which the Christopher Street Company might be obligated to pay.

Nearly two years prior to the execution of the Crosstown-Metropolitan lease, on February 14, 1902, the Metropolitan Company had leased its railway system for the term of 999 years to the City Company as shown in the Termination of Lease Proceeding. This lease contained a covenant whereby the City Company agreed to pay, satisfy and discharge all taxes and, as already shown in these appeals, also contained a covenant whereby the City Company assumed the payment of all rentals and other sums of money due

¹⁹ (1) The dividend rental provision of the lease is as follows:

"The lessees shall also pay to the lessor by way of rental for the railroads and property hereby demised and as part consideration for the other benefits to the lessee hereunder accruing fifteen per cent. per annum upon the existing capital stock of the lessor. * * * The rentals herein provided for are based upon the present issued capital stock of the lessor, viz.: \$600,000.
* * *

(2) The interest provision is as follows:

"* * * And the lessee agrees to pay all interest upon the funded debt of the lessor and other fixed charges of the lessor, provided that the lessee shall not be required to pay the principal of any funded obligations of the lessor except as hereinafter provided."

(3) The tax provision is as follows:

"The lessee shall pay, satisfy and discharge all municipal, county, state or government taxes and assessments or other charges of any description whatever, which during the time hereby granted may be imposed upon the property hereby demised or any part thereof. * * *

"The lessee shall not, however, be required hereunder to pay any lien, tax, assessment or charge so long as it shall in good faith contest the legality and validity of the same, unless the payment thereof be necessary to protect the demised property or some part thereof from forfeiture or sale."

(4) The assumption covenant is as follows:

The "lessee shall also, from time to time, pay or cause to be paid all rentals and other sums of money which are or may be or become due and payable under or by reason of any leases or other contracts to which the lessor is a party, or to which any of the demised property is or may be subject. And the lessee hereby assumes all the obligations of the lessor under all such leases and contracts. * * *

or payable under the lease or other contracts of the Metropolitan Company.

As already pointed out, receivers for the City Company were appointed on September 24, 1907, and for the Metropolitan Company on October 1, 1907.

The receivers, upon their appointment, took possession of the Metropolitan system, including the railroad and property included in the lease of the Crosstown Company, and operated the same, assuming the obligations of said lease with the exception of the dividend rentals and franchise taxes, until May 1, 1908, when they notified the Crosstown Company as follows:

"We have come to the conclusion, after due investigation, that the continued operation of your road under existing conditions is unprofitable, and unless the terms of the lease can be modified we shall feel it necessary for the best interests of our receivership to terminate it."

Thereupon an arrangement was made whereby the receivers were to continue the operation of the road and carry out certain provisions of the lease but were not to carry out others.

As shown in the preceding appeals, the bill for the appointment of the receivers of the City Company averred that it was insolvent and the City Company admitted the truth of the allegation and joined in the prayer for the appointment of the receivers. The petition of intervention of the Metropolitan Company averred its inability to meet its obligations and prayed that the receivership should be extended to its properties. On October 25, 1907, the City Company was formally adjudged insolvent and on November 9, 1907, a similar order was made with respect to the Metropolitan Company. Furthermore, as appears in the record in the Metropolitan Stockholders' Appeal, the special master has found that "on September 24, 1907, both the City Company and the Metropolitan Company were insolvent and unable to pay their debts or obligations."

The orders permitting the filing of the claims of the Crosstown Company for the alleged breaches of the Crosstown-Metropolitan lease against the Metropolitan and City estates provided that they might be filed not later than February 28, 1910, "nunc pro tunc as of the last day fixed by this court to file claims." The general orders referred to limited the time for the presentation of claims against the City estate to December 10, 1907, and against the Metropolitan estate to January 15, 1908.

The claims presented by the Crosstown Company against the two estates had four demands:

- (1) Accrued dividend rentals under the lease;
- (2) Future damages for breach of the lease;
- (3) Payments for special franchise taxes;
- (4) Interest on note.

The special master to whom the matter was referred disallowed all the demands with the exception of a part of the claim for franchise taxes and his action was approved by the court below.

The claimant has appealed to this court.

Other material facts are stated in the opinion.²⁰

J. T. Mason, for appellant.

A. H. Masten and Ellis W. Leavenworth, for Joline et al., receivers.

M. C. Fleming, for Ladd, receiver.

Julien T. Davies and Brainard Tolles, for Second Ave. Ry. Co.

B. S. Catchings, for tort creditors' committee.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The consideration of the questions arising upon this appeal requires a review of some of the propositions which we have found established in examining the preceding appeals. Thus, we have seen that, as a general rule, insolvency accompanied by a receivership and inability to perform constitutes a breach of executory contracts. It has also been noted that bankruptcy or a receivership does not terminate a lease. Manifestly this is true because a default under a lease does not, in the absence of unusual limitations, bring it to an end unless followed by some action on the part of the lessor. Furthermore, bankruptcy or insolvency, standing alone, does not make default under an ordinary lease. When an individual lessee goes into bankruptcy and his trustee declines to adopt the lease, the lessee himself, performing the covenants, may continue to occupy. In such a case there is no inability of performance. But when an insolvent railway corporation goes into the hands of receivers and, after experimentally operating a leased road, they reject the lease, their action relates back to the commencement of the receivership and the lease would seem, for all practical purposes, to be broken as of that time. In such a case there is actually total inability of performance on the part of the shell of the lessee corporation. And if this be not a complete anticipatory breach at the commencement of the receivership, it would seem that a complete breach should be held to take place at the time when the actual default follows.

[14] These inquiries, however, belong to the law of contracts and we are not now required to press them to a conclusion. It is sufficient at this time to hold that when receivers of an insolvent lessee corporation operate a leased road for an experimental period without paying the stipulated rental and then renounce the lease, the lessor's demand for the unpaid rental during such period constitutes a general claim provable against the lessee's estate. And it makes no difference whether the claim be considered as based upon a breach of the lease relating back to the commencement of the receivership, or as founded upon equitable considerations requiring a court if it suspend a lease to experiment with it not to go further and deprive the lessor of the ordinarily tenuous right to share in the estate of an insolvent railway after its mortgages are paid.

²⁰ While claims are made against both the Metropolitan and City estates, we shall, as a matter of convenience, in discussing the general principles treat the demands as made against the Metropolitan alone, reserving for separate consideration at the close of the opinion the liability of the City estate.

[15] Applying these principles to the present appeal, it is manifest that the dividend rental due October 1, 1907, constituted a provable claim. It accrued while the receivers were in possession and was liquidated, fixed and certain before the expiration of the time limited for the presentation of claims. But the dividend rental due April 1, 1908, stands in a somewhat different position. As shown in the statement of facts the order permitting the claimant to present its claim was entered nunc pro tunc as of January 15, 1908. It is doubtful, upon the general principles stated in the Express Company's Appeal, whether the April rental was so certain before the expiration of the time limited as to permit the proof of a demand for it. The only uncertainty, however, was as to the length of time the receivers would take for their experimental operation. If they had been ordered in advance to operate until May 1, 1908, the claim would have been certain. As, therefore, the uncertainty arose from the action of the receivers, we think that the estate should not be permitted to take advantage of it and that the application in this case of the rule stated in the Express Company's Appeal should be modified to the extent of permitting the proof of the demand for the April, 1908, rental. But we think that no modification of the rule itself is required. We cannot conceive that a court of equity attempting in the future to follow it will decline to extend the time for the presentation of claims beyond the period of experimental operation in case it is inexpedient to order such operation for a stated period.

The period of experimental operation by the receivers terminated on May 1, 1908. After that time the receivers operated under an express agreement with the claimant. It may well be that the claimant by entering into such agreement did not waive its claims against the estate. The difficulty, however, with any demand for future damages is that in January, 1908, when the time limited for the presentation of claims against the Metropolitan estate expired, it was wholly impossible to determine the amount of damages which the claimant would sustain if the receivers renounced the lease and it was treated as broken. It was impossible then to say whether any provisional arrangement could be made for future operation by the receivers, and if it had been possible to foresee the terms of the provisional arrangement only one step would have been taken. It would have been impossible to look into the future and say what would be the result upon the conclusion of such arrangement and the surrender of the road. Who could foretell the results of operation by the owner, the growth of the city, improvements in motive power, or reductions in cost? Who could foresee whether a lease could be made to another railroad company or the terms thereof? The whole matter of future damages was and still is a matter of conjecture and guess work. The claim for such damages was properly disallowed because it was uncertain in amount and there was no method of making it certain.

[16] The special franchise tax which fell due in the year 1907, and before the expiration of the time limited for the presentation of

claims against the Metropolitan estate was provable against it. The amount of such tax was fixed. Taxes exemplify that which is certain. It is true that the lease provided that the Metropolitan should not be obliged to pay taxes so long as it contested their validity and that certiorari proceedings were carried on by the receivers to review this assessment. But these proceedings were settled and upon the principle already stated that delays caused by the receivers themselves should not prejudice creditors, the settlement should relate back to the time when the tax became a charge upon the property.²¹

The claim for future special franchise taxes—looking forward from the time which fixed the status of the Metropolitan claims, January, 1908—was, upon the principles already stated, too uncertain for allowance. This is also true of the claim for interest on the note accruing after July, 1909. These payments were required as a part of the rental and the rules which exclude a demand for future damages for nonpayment of rental exclude the claim for them.

The final inquiry is whether the City estate is liable for the demands which we have held to be provable against the Metropolitan estate.

If this inquiry were given a wide scope, it might be a complex one. It is not entirely clear to us that the transfer of the Crosstown-Metropolitan lease to the City Company by virtue of the operation of the Metropolitan-City lease, did not amount to an assignment of the term because one lease was to run two years longer than the other. Leases like these for 999 years are almost in perpetuity. They would extend to a time as remote in the future as the reign of Alfred the Great is distant in the past. To distinguish between an assignment of the term and a sub-lease upon the ground that the period between 2899 and 2901 is not covered, is to draw a very refined distinction. Furthermore, passing from privity of estate to privity of contract, the question whether the covenants in the Metropolitan City lease should be construed to be rent covenants which are limited to the duration of the lease or whether they survive it, is entitled to serious consideration. All these questions should be considered upon a complete record and when it is necessary to pass upon them. It is sufficient to dispose of this appeal to say that we are satisfied that the City estate was liable for the demands of the nature of those which we have allowed against the Metropolitan estate either through privity of estate or privity of contract up to the time of the termination of the Metropolitan-City lease and that, as pointed out in the Metropolitan Stockholders' Appeal, it is quite impossible to determine that such lease was terminated—as distinguished from being defaulted upon—prior to the time which fixed the status of the claim.

The decree appealed from (194 Fed. 543) is modified by allowing against the Metropolitan and City estates the claim for the dividend rentals due October, 1907, and April, 1908, and that for the 1907 franchise tax; and as so modified is affirmed.

²¹ In making up the amount of the claim for allowance, the estate is, of course, entitled to the benefit of any reduction in the tax obtained by the claimant.

VI. Appeal Presenting the Question Whether the Stockholders of the Metropolitan Company Have a Valid Claim Against the Estate of the City Company for the Dividends Stipulated in the Lease: Called the "Metropolitan Stockholders' Appeal."

The lease from the Metropolitan Company to the City Company described in the Termination of Lease Proceeding was executed by the board of directors of the respective corporations with the approval of the requisite number of stockholders and contained the following provisions particularly relevant upon this appeal:

"IV. The lessee shall also pay to the lessor by way of rental for the railroads and property hereby demised and, as part consideration for the other benefits to the lessee hereunder accruing an amount equal to seven per cent. per annum upon the existing capital stock of the lessor and upon such additional capital stock of the lessor as may hereafter be issued with the written consent of the lessee as hereinafter provided. Such rental shall be paid in equal quarterly installments upon the fifteenth day of January, April, July and October of each year, beginning with the fifteenth day of July, 1902. It is the intention of the parties hereto that all of said rental shall be applied to the payment of dividends at the rate of seven per cent. per annum, payable quarterly, upon said \$52,000,000 of capital stock of the lessor and upon any additional stock that may be issued with the consent of the lessee as herein provided. The lessee may at its option pay to any stockholder of the lessor the proportionate part of any quarterly installment of such rental which would be payable upon the stock held by such stockholder, and upon the written request of the lessor the lessee shall pay any such quarterly installment of rental hereunder to the stockholder of the lessor as named in a certified list thereof to be supplied by the lessor. The lessee hereby guarantees to every present and future holder of said \$52,000,000 of stock of the lessor and of any additional stock of the lessor which may be issued with the consent of the lessee as herein provided, that dividends upon such stock at the rate of seven per cent. per annum shall be paid during the term of this lease in equal quarterly installments upon the days of the year aforesaid, and the lessee consents that the lessor shall issue to the holders of such stock, stock certificates which shall recite such guaranty. The lessee shall, however, be deemed to have complied with its guaranty as to any quarterly installment of said dividend if it shall pay the amount thereof to the lessor."

"XXI. In case the lessee shall fail at any time to pay the rent provided for in this indenture of lease or any part thereof, as the same shall accrue, or shall fail at any time to keep and perform any of the agreements or covenants contained in this indenture of lease, and any such default in the payment of rent or in the performance of the covenants hereof shall continue for the period of twelve months after written demand and notice from the lessor to the lessee, then and in any such case at the option of the lessor, the estate hereby demised shall cease and determine, and all right, title and interest of the lessee in the railroads and premises hereby demised and the leases hereby assigned, shall absolutely cease and determine and the lessor shall therefore become and be entitled to re-enter into and upon the railroads and premises hereby demised, and from thenceforth to have, hold, possess and enjoy the same, and every part thereof, as of first and former estate therein, anything to the contrary herein contained notwithstanding, which right shall not be affected by any waiver of a prior default by implication or agreement and no re-entry by the lessor shall impair the claims of the lessor for any rentals and other payments hereunder which shall be due and unpaid. The right of re-entry for default shall not, however, extend to any of the property hereby transferred absolutely to the lessee."

The appointment of the receivers of the City Company on September 24, 1907, and of the Metropolitan Company on October 1, 1907, their method of operating the leased property, their failure to adopt

the lease, and the appointment of a separate receiver for the City estate, are fully described in the Termination of Lease Proceeding.

The City Company, in pursuance of paragraph IV of the lease above quoted, paid, either to the Metropolitan Company or to its stockholders, the stipulated dividend rental up to July 15, 1907. Nothing has been paid since that time.

The claimants as a committee hold 14,470 shares of the Metropolitan capital stock and make a claim against the City estate based upon the obligations assumed by the City Company in said paragraph IV with respect to the payment of dividends upon such stock.

The order permitting the claimants to file this claim was entered December 21, 1910, and provided that it might be filed within 20 days thereafter "nunc pro tunc as of the 10th day of December, 1907."

The special master, to whom the claim was referred, rejected it as contingent and his action was confirmed by the District Court.

The claimants have appealed to this court.

Other material facts are stated in the opinion.

Graham Sumner, for appellants.

M. C. Fleming, for Ladd, receiver.

B. S. Catchings, for tort creditors' committee.

Julien T. Davies and Brainard Tolles, for Guaranty Trust Co.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [17] The doctrine giving to third persons the right to enforce contracts made for their benefit, examined at length in the Second Avenue Bondholders' Appeal, is as applicable to railroad leases as to other agreements. It is conceded by the appellees that a distinct provision in a lease that the lessee shall pay directly to the stockholders of the lessor corporation as rental specified dividends upon their shares inures to their benefit and gives them individual rights of action against the lessee.²²

The inquiry, then, is whether the provisions of this lease call for the application of these principles. The guaranty in the fourth paragraph is to "every present and future holder of" Metropolitan stock "that dividends at the rate of seven per cent. per annum shall be paid during the term of this lease," and it is stipulated that the stock certificates may bear the guaranty. The promise is made to the stockholders. They are the real promisees. Whether the guaranty be regarded as an original or a collateral undertaking upon the part of the City Company, it seems very clear that, unless modified by other provisions, it affords the Metropolitan stockholders a right of action.²³

²² For cases of leases providing for the payment of rentals in the form of dividends, see *Aetna Ins. Co. v. Albany, etc., R. Co.* (C. C.) 156 Fed. 132; *McLeary v. Erie Tel., etc., Co.*, 38 Misc. Rep. 3, 76 N. Y. Supp. 712. See, also, *Central, etc., R. Co. v. Farmers' Loan, etc., Co.* (C. C.) 112 Fed. 81. Compare cases cited in following note.

²³ The appellees make the contention that the agreement contained in the fourth paragraph of the lease runs only to the Metropolitan corporation and not to its stockholders; *Beveridge v. New York Elevated R. Co.*, 112 N. Y. 24, 19 N. E. 489, 2 L. R. A. 648; *Flagg v. Manhattan R. Co.* (C. C.) 10 Fed.

The appellees contend, however, that other provisions of the lease do serve to modify the guaranty and are inconsistent with its running to the stockholders. In particular it is said that the provision that the lessee shall be deemed to have complied with the guaranty as to any quarterly instalment of the dividend if it shall pay the amount thereof to the lessor nullifies it as a stockholder's guaranty. We think, however, this provision gave the lessee the option of making any quarterly payment either to the corporation or to the stockholders but that it did not relieve it of liability upon the guaranty unless it did pay to the corporation.

Let us consider the whole of paragraph IV. It (1) provided for the payment of a rental equal to 7 per cent. upon the Metropolitan's stock; (2) expressed the intention that all of the rental should be applied for the payment of dividends; (3) gave the City Company the option of paying directly to the Metropolitan stockholders; (4) guaranteed to the stockholders that dividends at the stipulated rate should be paid "during the term of this lease"; (5) provided that payments to the Metropolitan Company should be deemed to comply with the guaranty to the stockholders.

The evident purpose of these different clauses was to provide a rental sufficient to make a dividend of 7 per cent. upon the Metropolitan stock and to make sure that the Metropolitan stockholders should get it. The City Company had the option of paying to the Metropolitan corporation or to its stockholders. If it paid to the stockholders the demand of the corporation was satisfied. If it paid to the corporation the stockholders had no claim under the provision in their behalf. But if it failed to pay to either the corporation or to the stockholders then the latter had, upon the principles already examined, a right of action.

But if we assume that the stockholders had a direct right of action against the City estate, we are not carried far toward a substantial award to them. If the agreement of the City Company with the stockholders were an original one to pay them regardless of the default of their corporation, still that which they were to receive was

430, and *People v. Metropolitan R. Co.*, 26 Hun (N. Y.) 82, being cited in support thereof.

In the cases cited the lessee in a railroad lease "guaranteed" to the lessor "an annual dividend of ten per cent. on its capital stock," that is to say that it should pay to the lessor annually a sum specified which was 10 per cent. on its capital stock. It was *held* that the so-called guaranty was one with the lessor as such and not with its individual stockholders and that such stockholders could not maintain an action upon it.

In the present case, as pointed out in the text, the guaranty is not to the lessor corporation but "to every present and future holder of said stock." The promise is made to the stockholders. They are the persons for whose benefit it was intended. The case comes within the principles discussed in the Second Avenue Bondholders' Appeal and also is well within the language of the *Beveridge Case* itself:

"Within the principles of adjudged cases in this court, where the plaintiff seeks to base his right to maintain his action against a third party upon a contract made between that party and another, it must be one made or intended for his benefit. Such beneficial intent must be clearly found in the agreement."

nothing more or less than rental. The City Company did not agree to pay anything other than rental either to the Metropolitan Company or to its stockholders. And upon the principle stated in the Express Company's Appeal and in the Crosstown Company's Appeal, the claim for future rentals or for future damage for failure to pay rentals, was too uncertain for allowance.²⁴

[18] Let us look at the case from another viewpoint and consider the obligation of the City Company to the Metropolitan stockholders as not being an original engagement to pay rentals but as a guaranty—a collateral undertaking—that their corporation should distribute the stipulated rate. Then the important question is as to the duration of the obligation. The guaranty provision runs "during the term of this lease." Does this mean, "during the term for which the lease was made" or "during the existence of the lease"? In our opinion the latter meaning is the correct one. The former interpretation would make the City Company liable to the Metropolitan stockholders for nearly a thousand years after their corporation may have retaken the leased property and used it in other ways. An intention to hold a lessor for future payments after it has ceased to use and enjoy the thing leased—in the nature of a forfeiture—must be made very plain to be found. We do not find it plainly shown here. On the contrary, reading the different provisions of the lease together, we think it clear that the words, "term of the lease" should be construed as meaning, "existence of the lease."

We come then to the inquiry, how long *did* the Metropolitan-City lease exist? When did it terminate?

In the Express Company's Appeal, we held that the confessed insolvency of the City Company followed by its receivership constituted a breach of its contracts. In the Crosstown Company's Appeal, we pointed out that while the rule underlying such conclusion might not be altogether applicable to leases, yet that corporate railroad leases differed from leases in general. But as we further indicated the breach of a lease does not terminate it. Re-entry or other action upon the part of the lessor is necessary unless expressly waived. And, as shown in the statement of facts, this lease stipulated that a default should continue for 12 months before the lease could be terminated. What effect such provision would have in the case of complete inability to perform need not be considered here. It is sufficient for the purpose of this appeal to say that there is nothing in the record to show that this lease terminated before December 10, 1907, the time as of which the claim was filed. At that time it was problematical when the lease would terminate and altogether uncertain what the situation would be upon its termination. The claim for future damages for breach of the guaranty—viewing the agreement as one—was too uncertain for allowance.

²⁴ As the order permitting the filing of this claim was entered *nunc pro tunc* as of December 10, 1907, its status must be fixed as of that date and the question of certainty or uncertainty must be determined by looking into the future as of that time.

Treating the claim in question then as being either an original undertaking or a guaranty, the claimants' demand with respect to the future was not fixed and certain when presented and was properly disallowed. This is not true, however, regarding the dividend rental payable October 15, 1907. That portion of the claimants' demand was, when presented, certain both in liability and amount and should have been allowed.

The decree appealed from is modified so as to allow the demand of these claimants for their proportionate share of the dividend due October 15, 1907; otherwise it is affirmed.

On Petition for Rehearing.

Simpson, Thacher & Bartlett and Graham Sumner, for appellants.
Richard Reid Rogers (William M. Coleman, of counsel), for appellees.

PER CURIAM. The petition for a rehearing must be denied. The decision upon the Crosstown Company's Appeal was fully considered in its relation to the present appeal, and the conclusion reached that the exceptional facts and circumstances which in that case justified a modification of the rule stated in the Express Company's Appeal did not exist in this case. As pointed out in our opinion in the Termination of Lease Proceeding, the period of real experimental operation by the City receivers continued but a very short time after the receivership.

VII. Appeal Presenting the Questions (1) Whether Certain Claims of the Metropolitan Company Against the City Company Based upon the Provisions of the Metropolitan-City Lease are Provable Against the City Estate; (2) Whether the Claims, if Provable, can be Enforced Against Such Estate to the Prejudice of its Tort and Contract Creditors: Called the "Validity of Lease Proceeding."²⁵

The lease of February 14, 1902, from the Metropolitan Company to the City Company, described in the Termination of Lease Proceeding, contained the following provision which has been referred to in the foregoing appeals:

"II. The lessee shall pay, satisfy and discharge all municipal, county or government taxes and assessments, or other charges of any description what-

²⁵ While the name will be retained for convenience it is a misnomer to designate this case in its present state the "Validity of Lease Proceeding." The validity, at its inception, of the lease from the Metropolitan Company to the City Company is admitted by the appellants and there is nothing in the record to show that it became invalid afterwards. The contention is that the Metropolitan Company after the execution of the lease so controlled the City Company as to make it inequitable that the Metropolitan receivers should enforce demands based upon the lease to the prejudice of the general creditors of the City Company. But, as will appear in the opinion, this is a question of priority among creditors and not of the validity of the lease.

ever which during the term hereby granted may be imposed upon the property, hereby demised, or any part thereof, or upon any additions thereto and extensions thereof, or upon the lessor or its franchise or business by reason of the property and franchises hereby demised or by reason of any increase thereof or additions thereto or resulting from the use and operation by the lessee of the property hereby demised, or of any extension thereof or additions thereto, or from the construction of other lines in connection therewith; the intention of the parties being that the rents hereinafter agreed to be paid by the lessee shall not be in anywise impaired or diminished by any assessment, tax or charge upon the demised property real or personal, or upon any additions thereto, or extensions thereof, or upon the lessor or lessee by reason thereof. The lessee shall not, however, be required hereunder to pay any lien, tax, assessment or charge so long as it shall in good faith contest the legality and validity of the same, unless the payment thereof be necessary to protect the demised property or some part thereof from forfeiture or sale."

The receivers of the Metropolitan Company seek to enforce this provision of the lease against the estate of the City Company and the type of the charge which they have selected and which has received the consideration of the special master and of the court below, is a demand for the repayment of taxes assessed in the years 1904, 1905 and 1906 against the Ninety-Sixth Street power house of the Metropolitan Company. It appears that certiorari proceedings were taken in each year to review each assessment and that these proceedings were pending in September and October, 1907, when the receivers for the City Company and for the Metropolitan Company were appointed. These certiorari proceedings continued until February, 1909, when final judgments were rendered which reduced the assessments to a considerable extent. Thereupon the Metropolitan receivers paid the assessments and now make a claim based thereon against the City estate.

The objections to this claim made in behalf of the City estate are:

- (1) That it is a contingent claim and not provable;
- (2) That the Metropolitan Company and its receivers are concluded by an agreed statement of accounts from asserting the claim against the City estate;
- (3) That the Metropolitan Company so conducted itself that its receivers are not in a position to enforce claims based upon said lease against the City estate to the prejudice of its tort and contract creditors.

The special master, whose report was confirmed by the District Court, held that the claim in question was valid and enforceable and then said:

"Nothing herein contained is an adjudication as to the effect of the facts found herein or established in this proceeding on the question of the marshaling and priority of the claims of creditors of New York City Railway Company; nor shall this determination conclude any creditor of New York City Railway Company from establishing that, or be a determination of any question as to whether they are entitled to priority of payment of their claims out of the estate of New York City Railway Company over any other claims."

Appeals have been taken to this court in behalf of the City interests.

B. S. Catchings, for appellants.

Arthur H. Masten, W. M. Chadbourne, and Albert F. Jaeckel, for Joline et al., receivers.

Bronson Winthrop and C. T. Payne, for Farmers' Loan & Trust Co.

Julien T. Davies and Brainard Tolles, for Guaranty Trust Co.

R. R. Rogers, for New York Railways Co.

Morgan J. O'Brien, C. E. Rushmore, and G. N. Hamlin, for contract creditors' committee.

M. C. Fleming, for Ladd, receiver.

Before COXE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The objection to the claim for the amount paid for taxes that it is contingent, is disposed of by the decision in the Crosstown Company's Appeal. Indeed it is not necessary to go so far as in that case, for the present claim comes squarely within the rule laid down in the Express Company's Appeal. The taxes were assessed while the City Company was operating the leased property and it was bound to pay them. Assuming that the certiorari proceedings suspended the enforcement of the demand of the municipality and assuming that the amount of the demand was uncertain until the termination of those proceedings, still it was made certain upon their termination. Then, at least, the demand became fixed and it does not appear that at that time any order had been made shutting off the presentation of claims of this nature.²⁸

The claim in question is a valid one and if enforceable should be allowed against the City estate. Whether it is enforceable and if so whether it has priority over other demands are questions now to be examined.

[19] With respect to the question of enforceability it is contended in the first place that the receivers of the Metropolitan Company are estopped from urging that the City estate is indebted to them on account of the taxes paid because after the assessment thereof, in May, 1907, the two corporations settled their mutual accounts and the Metropolitan Company, by a vote of its directors, acknowledged that it had "no indebtedness for which the New York City Company is responsible."

In respect of this contention it is sufficient to say that we are satisfied that the finding of the special master is correct that the settlement in question had no relation to demands of the nature of these taxes, and that the vote regarding the existence of indebtedness referred to the heavy payments required by the lease for the floating debt and improvements, and had no reference to current charges.

In the second place, while the validity of the lease is not assailed and while no facts are presented upon which a court could hold it invalid, it is urged in behalf of the contract creditors of the City Company that while the lease at its inception may have been en-

²⁸ There is nothing in the record to indicate that the early general order requiring the presentation of claims had any relation to demands between the parties to the receivership cause. Indeed the order of February 11, 1911, referring the subject matter of the present claim to the special master was in effect an order allowing the presentation of the claim at that time.

forceable, yet that the Metropolitan Company and its stockholders soon obtained control over the City Company and used its earnings and assets to continue the payment of Metropolitan dividend rental and bond interest notwithstanding that the railway system was operated at a constantly increasing loss, that deficits were created, and that charges of the nature of these taxes were left unpaid and unprovided for. And it is contended that, in such circumstances, any claim of the receivers of the Metropolitan Company under the lease for such charges ought equitably to be subordinated to the payment of the claims of material, labor and supply creditors of the City Company. The contentions made in behalf of the tort creditors are broader than those of the contract creditors, but we perceive no reasons urged in their behalf upon which the court could declare the lease non-enforceable nor the claims based thereon illegitimate, and must regard such contentions as being in effect that equity requires that the Metropolitan receivers should not be permitted to recover any demands based upon the lease until the claims of the tort creditors are satisfied.

The contentions, then, in behalf of the City tort and contract creditors are for priority in payment over the Metropolitan claims in the distribution of the assets of the City Company. Were this question presented upon this appeal, we should be required to enter into an extended examination of the facts discussed upon the briefs. But we do not see that the question is presented. On the contrary, as shown in the statement of facts, the special master expressly found that all questions of priority of payments out of the estate of the City Company were outside this proceeding and the court confirmed his report. It is not for us to enter into the consideration of questions not before the court below, especially in view of the fact that the reservation in the report fully protects the creditors of the City Company in raising the question of priority in other proceedings.

The decree appealed from is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. July 18, 1912.)

No. 239.

STREET RAILROADS (§ 55*)—RIGHTS OF PURCHASER AT FORECLOSURE SALE—
APPORTIONMENT OF CHARGES BETWEEN PURCHASER AND RECEIVERS.

Various fixed charges due from the mortgagor of a street railroad system at stated periods, such as taxes, rents, and interest on bonds payable by the terms of leases, which became payable after the property, which had been operated by receivers, had been sold in foreclosure proceedings and turned over to the purchaser, *held* not apportionable as to time between purchaser and receivers, so as to require payment by the receivers of the part accruing before the property was turned over; the purchaser taking subject to such as were liens, and certain others being, under the terms of the decree, payable from the proceeds of the sale.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 134; Dec. Dig. § 55.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company and others. From an order of the District Court (195 Fed. 614), the receivers of the Metropolitan Street Railway Company and the New York Railways Company appeal. Modified and affirmed.

See, also, 198 Fed. 783.

Richard R. Rogers (Albert J. Kenyon, of counsel), for appellant New York Rys. Co.

Masten & Nichols (Arthur H. Masten, Ellis W. Leavenworth, and Frederick W. Kobbe, of counsel), for appellant receivers.

Benj. S. Catchings, for tort creditors.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. December 29, 1911, the properties of the Metropolitan Street Railway Company were sold in foreclosure proceedings in the Circuit Court under the company's general and collateral trust mortgage and its refunding mortgage, and the New York Railways Company is the assignee of the purchaser. December 31, 1911, possession was delivered to it. The Railways Company has thus obtained title to the properties formerly owned by the Metropolitan Street Railway Company and is the assignee of the leases of the properties leased to it. There were various sums payable by the Metropolitan Street Railway Company at fixed periods in connection with these properties, such as rent and taxes and interest on bonds, arising out of obligations prior to the mortgages foreclosed. The present dispute is between the receivers of the Metropolitan Street Railway Company and the New York Railways Company in respect to the amount of these liabilities to be paid by the parties respectively. Generally speaking, the receivers contend that the Railways Company must pay them in full; whereas the Railways Company contends that they should be apportioned, the receivers paying so much of them as accrued up to January 1, 1912, when the Railways Company entered into possession.

Such periodical payments are due by the party liable in full at the date fixed and not before. They are, in the absence of agreement, not apportionable in respect to time at common law. 22 Cyc. 1468; *Marshall v. Mosely*, 21 N. Y. 280; *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261. Section 2720 of the New York Code of Civil Procedure makes them apportionable in favor of parties interested in receiving a share of them; but even then they are collectible in full of the party liable to pay only by the party entitled at common law, who is then accountable to the parties entitled to a pro rata share under the statute. So far as these periodical liabilities are, or become, a lien upon the premises, the purchaser at foreclosure sale takes subject to them, but without personal liability. So far as they are covenants of the Metropolitan Company as lessee, the purchaser is personally bound because of privity of estate with the Metropolitan

Company. The record does not show which liabilities depend upon covenants of the Metropolitan Company as lessee, but that can be made clear in future proceedings.

The items in question are as follows:

(1) Interest on bonds of the Lexington Avenue & Pavonia Ferry Railroad Company.

(2) Interest on bonds of the Columbus & Ninth Avenue Railroad Company.

(3) Interest on bond of Oren Root, Jr., secured by mortgage constituting a first lien on property situated on Thirty-Third and Thirty-Fourth streets, between Park and Lexington avenues, and on Madison avenue between Eighty-Fifth and Eighty-Sixth streets.

(4) Interest on bonds of the South Ferry Railroad Company.

(5) Interest on receivers' certificates issued to replace certificates originally issued in the sum of \$3,500,000.

(6) Interest on receivers' certificates issued to raise funds to pay taxes.

(7) Sums stipulated to be paid the city for the privilege of the use of certain streets by the Broadway Surface Railway Company.

(8) Sums stipulated to be paid the city for the use of certain streets by the Houston, West Street & Pavonia Ferry Railroad Company.

(9) State tax of 1 per cent. on gross earnings of the Metropolitan Street Railway Company under section 185 of the Tax Law (Consol. Laws 1909, c. 60) for year ending June 30, 1912, payable August 1, 1912.

(10) Percentage of gross earnings payable to the city under terms of various franchise agreements of the Metropolitan Street Railway Company and its subsidiary companies for the year ending September 30, 1912, payable November 1, 1912. Sections 95 and 112 of the Railroad Law.

(11) State tax on real and personal property, under chapter 862, Laws of 1911, for the year beginning October 1, 1911.

(12) Federal excise taxes under chapter 6, Laws of 1909, payable June 30, 1912, for the year ending June 1, 1912.

Items (1), (2), (3), and (4) constituted liens superior to the liens of the mortgages which were foreclosed, and the court below was clearly right in holding that the purchaser took the premises subject to these liens, and that the receivers were not liable for interest accruing before January 1, 1912. (5) by the express terms of the decree is to be paid out of the proceeds of sale. Article II and article VII read as follows:

"Art. II. * * * Ordered, adjudged, and decreed that the principal and interest of said receivers' certificates and of all others hereafter issued in place and in lieu thereof, except to the extent that such certificates may be paid by the receivers under the order of the court, be in the first instance paid out of the proceeds of sale hereby directed to be made, but with the rights and privileges of claiming exoneration, contribution, or repayment or other equitable relief more specifically conferred by the seventh article hereof."

"VII. That the fund arising from the sale of the properties above directed to be sold be applied as follows, namely: * * * (2) To the payment of the principal and interest of the receivers' certificates hereinbefore specific-

ally described in the second article hereof, except as in said article provided. * * *

We think the court below was right in holding that the receivers were not liable to pay so much of the interest as accrued prior to January 1, 1912.

(6) is expressly made by the decree a lien upon the premises sold, article VIII providing as follows:

"VIII. That the property hereby directed to be sold shall be sold subject to all taxes and assessments and to the lien of any receivers' certificates that may have been or may be issued for the purpose of extinguishing the lien of any such taxes and assessments, and to liens prior to the aforesaid mortgage to the complainant, existing in favor of any person or persons, corporation or corporations not a party to this cause, except such liens as are herein specifically directed to be paid out of the proceeds of sale, or which are reserved for future adjudication under subdivision 3 of article VII hereof."

We think the court below was right in holding that the receivers are not bound to pay interest accruing before January 1, 1912.

(7) and (8) relate to sums payable to the city by lines leased to the Metropolitan Street Railway Company for the privilege of using streets. The court below treated these as rents and apportioned them. But we think that these payments, even if rents, are not apportionable. They are, in our opinion, taxes, or stipulated payments in the nature of taxes, and should not have been apportioned; and there being nothing to show that they are entitled to a lien, the Railways Company takes the premises free of them. At all events, no question of apportionment arises.

(9) Article VIII, *supra*, contemplates taxes which are at the time of sale, or which afterwards become, a lien. There is no assumption by the purchaser of taxes owed by the Metropolitan Street Railway Company which are not a lien. It takes the premises "subject to all taxes and assessments"; i. e., which are liens. These taxes are made a lien by section 197 of the Tax Law, and although we have held under the similar federal law (chapter 6, Laws 1909), that they are not payable by receivers, the Court of Appeals of the state of New York has held that a similar tax under section 182 of the New York Tax Law is payable by the receivers and remains a lien upon the premises after sale in foreclosure. *New York Terminal Co. v. Gaus*, 204 N. Y. 512, 98 N. E. 11. We feel obliged to follow this decision, and to hold that the purchaser took the premises subject to the tax. The receivers are not liable for the amount accruing before January 1, 1912.

(10) There is nothing to show whether there is a lien for this percentage of gross earnings upon the premises. If not, the Railways Company takes free of them. If there is, it takes subject to a lien for the whole amount. There is no apportionment.

(11) The court below ordered the receivers to pay so much of this item as was payable under leases. Chapter 868 of the Laws of 1911 does not confer a lien, and therefore the Railways Company takes the premises free of the tax. There is no apportionment.

The decree is affirmed, except as to items (7), (8), (10), and (11), in respect to which apportionment is denied.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. July 18, 1912.)

No. 238.

STREET RAILROADS (§ 55*)—FORECLOSURE SALE—LIABILITY OF PURCHASER UNDER DECREE—TORT CLAIMS AGAINST RECEIVERS.

The measure of the rights of a purchaser of property sold at foreclosure sale is the decree under which the sale was made; and where the decree directing the sale of street railroad property, which had been operated by receivers, provided that as a part of the consideration for the property, and in addition to the price bid, the purchaser should "assume liability for all claims in tort, whether in suit or presented or not, arising during the period of operation of said railway system by receivers, * * * which shall not have been paid or discharged by said receivers at the time of said sale," the purchaser is absolutely bound to the payment of such claims, without recourse on the receivers.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 134; Dec. Dig. § 55.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company and the Metropolitan Street Railway Company. From an order denying its application for an order on receivers of the Metropolitan Street Railway Company, the New York Railways Company appeals. Affirmed.

For opinion below, see 194 Fed. 546. See, also, 198 Fed. 783.

Richard R. Rogers (Albert J. Kenyon, of counsel), for appellant.

Masten & Nichols (Arthur H. Masten, Ellis W. Leavenworth, and Frederick W. Kobbe, of counsel), for Joline and another, receivers.

Dexter, Osborn & Fleming (Mathew C. Fleming, of counsel), for Ladd, receiver.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. December 29, 1911, the property of the Metropolitan Street Railway Company was sold in foreclosure proceedings in the Circuit Court under the company's general and collateral trust mortgage and refunding mortgage, and possession delivered on the 31st. On the latter day there were pending 889 actions against the receivers arising out of injuries sustained during their operation of the road, and other actions are likely to be brought thereafter until the three-year statute of limitations has run, with the extensions in favor of persons under disability, such as infancy, insanity, or imprisonment for crime. New York Code of Civil Procedure, §§ 393 and 396. The New York Railways Company, which is the assignee of the purchaser at the sale, filed its petition praying the court to require the receivers to set aside out of the moneys in their hands a fund of \$500,000 for settling and discharging such tort claims. The theory is that these personal injuries are operating

expenses incurred by the receivers, which ought in the first instance to be paid by them; the purchaser being liable for any deficit.

There is obvious equity in this proposition, and if any one had been present when the decree was settled to represent the purchaser, whoever it might be, the court would no doubt have given it serious consideration. But the measure of the purchaser's rights is the decree actually entered (*Central Trust Co. v. Wabash Railway Co.* [C. C.] 30 Fed. 332, 336), and we agree with the court below that it is conclusive against the petitioner. The decree originally entered in the Circuit Court provided in article X as follows:

"That it shall be a condition of sale of the lines of railway, leasehold estates, and parcels of land separately enumerated and directed to be sold by article IV of this decree that the purchaser shall, as a part of the consideration for such sale and in addition to the price bid, assume all pending contracts in respect to the property of the Metropolitan Street Railway Company, whether leasehold or otherwise, theretofore made by the receivers of the New York City Railway Company or the receivers of the Metropolitan Street Railway Company, and that the said purchaser or purchasers, its, his, or their successors and assigns shall perform all such contracts and shall pay, satisfy, and discharge any unpaid indebtedness and obligations or liability, whether in contract or in tort, which shall have been duly contracted or incurred by the receivers, * * * before the delivery of possession of the property sold, and which shall not have been paid by the said receivers, or which shall not be paid out of the proceeds of sale as hereinbefore provided, and shall indemnify and save harmless said receivers and each of them from any liability resulting therefrom."

Upon appeal to this court the foregoing article became article IX, and was amended to read as follows:

"That it shall be a condition of sale of the lines of railway, leasehold estates, and parcels of land separately enumerated and directed to be sold by article IV of this decree that the purchaser shall, as a part of the consideration for such sale and in addition to the price bid, assume all pending uncompleted and not fully executed contracts in respect to the property of the Metropolitan Street Railway Company, whether leasehold or otherwise, theretofore made by the receivers of the New York City Railway Company or the receivers of the Metropolitan Street Railway Company for the operation, maintenance, and betterment of the railway system operated by the said receivers as a going concern, and shall also assume liability for all claims in tort, whether in suit or presented or not, arising during the period of operation of said railway system by receivers appointed by this court, which shall not have been paid or discharged by said receivers at the time of said sale. * * * No purchaser shall be held personally liable under this article of the decree for any unpaid indebtedness of the receivers, or for any work done or materials furnished under any unfinished contract, except such as shall have been done or furnished after the delivery of possession of the property sold to such purchaser and with his consent. * * *"

It will be noted that a very clear distinction was made by the amendment of the decree in this court between contract and tort claims. In the case of contracts it would be easy to ascertain the amount due by the receivers on the day of sale for work done or labor and materials supplied during the receivership. Therefore the purchaser's liability was to be only for what should be done or furnished with its consent thereafter. On the other hand, the liability for torts not yet determined, and the amount, if any, of such liability, could not be so ascertained. Therefore the purchaser was put

under the absolute obligation to pay such claims. The purpose of the court was evidently to prevent the delay in winding up the receivership that would otherwise occur.

The order is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
CENTRAL TRUST CO. OF NEW YORK v. THIRD AVENUE R. CO. et al.
(Circuit Court of Appeals, Second Circuit. July 18, 1912.)

Nos. 241, 242.

INTERNAL REVENUE (§ 9*)—CORPORATION TAXES—BUSINESS CONDUCTED BY RECEIVERS.

The special excise tax imposed by Tariff Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), "with respect to carrying on or doing business by" corporations, joint-stock companies, etc., is one upon doing business in a corporate capacity, and receivers of an insolvent corporation, duly appointed by a court of equity, which corporation was not doing business when the act was passed, and has done no business since, are not within the act, nor required to make returns and pay taxes on the income realized by them while acting as officers of the court and under its direction.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

Appeals from the District Court of the United States for the Southern District of New York.

Suits by the Pennsylvania Steel Company and another against the New York City Railway Company and others and by the Central Trust Company of New York against the Third Avenue Railroad Company and others. From orders (193 Fed. 286) denying its applications for orders directing receivers for defendants to make returns under corporation tax law, the United States appeals. Affirmed.

See, also, 198 Fed. 783.

An order entered February 7, 1912, denied the motion, made by the United States, for an order directing the receivers of the various railway corporations operating in the city of New York to make a true and accurate return of net income for the years 1909 and 1910, for each of the said corporations, respectively, to the collector of internal revenue, pursuant to the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. 112). The questions in each of these actions are identical and, to save unnecessary repetition, may be considered in the case of the Metropolitan Street Railway Company.

Henry A. Wise, U. S. Atty., and Addison S. Pratt and John N. Boyle, Asst. U. S. Attys.

Evarts, Choate & Sherman and Herbert J. Bickford, for Whitridge, receiver.

Masten & Nichols (Arthur H. Masten and Ellis W. Leavenworth, of counsel), for Joline and Robinson, receivers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The facts are undisputed. The question is one of law, and may be epitomized as follows: Are receivers of an insolvent corporation, duly appointed by a court of equity, which corporation was not engaged in business when the taxing act was passed and has done no business since, required to make returns and pay taxes upon the income realized by them while acting as officers of the court and under its direction?

Section 38, so far as it is applicable to the present controversy, provides that every corporation organized for profit and having a capital stock represented by shares, shall be subject to pay annually a special excise tax, with respect to the carrying on or doing business by such corporation, equivalent to one per centum upon the entire net income, over and above five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject to the tax hereby imposed.

The act further provides that a true and accurate return under oath or affirmation of its president, vice president, or other principal officer, and its treasurer or assistant treasurer, shall be made by the corporation to the collector for the district in which such corporation has its principal place of business, setting forth the amount of its paid-up capital stock, the amount of its bonded and other indebtedness, the gross amount of its income received during the year from all sources, the amount received by way of dividends, the total amount of all ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and the total amount of all losses actually sustained during the year. The act also provides for an accurate return of the interest paid during the year on the bonded and other indebtedness of the corporation, the amount paid by it for taxes and its net income after making the deductions authorized by the act.

The act in question, levying, as it does, a tax upon the citizen, must be strictly construed; it cannot be enlarged by construction to cover matters not clearly within its purport. The question is not what Congress might have done or should have done, but what it actually did do. When this is ascertained the duty of the court is accomplished. We are of the opinion that the act is inapplicable to receivers for the following reasons:

First.—The taxation of business done and income received by receivers is not contemplated by the act, receivers are not mentioned. This omission cannot be attributed to inadvertence. The lawmakers unquestionably understood the situation; they knew that corporations frequently become bankrupt and are placed in the hands of receivers and yet no provision in the act relates to this contingency. It is not improbable that the intention was to avoid the decision of the Supreme Court in the *Pollock Case* by confining the tax strictly to the doing of business in a corporate capacity.

Whatever the reason may have been, the fact remains that the doing of business by receivers in their representative capacity, as officers of the court, is not taxed by the act and no provision is made therein for the ascertainment and collection of such a tax.

Second.—There can be no doubt that the special excise tax provided for by the act is imposed as a tax upon doing business in a corporate capacity. In other words, if an enterprise be carried on through the instrumentality of a corporation, it must pay for the privilege. We so understand the decision of the Supreme Court upholding the act in question in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. The court says:

"The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof. * * * When imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described. * * * It may be described generally as a tax upon doing of business in a corporate capacity. * * * The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. As was said in the *Thomas Case*, 192 U. S. 363 [24 Sup. Ct. 305, 48 L. Ed. 481] *supra*, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

If the business be carried on by an individual or a partnership, no tax is imposed. It is only when the parties interested seek the advantages and protection which a corporation, or a joint stock association, affords that the tax is payable. This proposition was decided in *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428. The court says:

"The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of the reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909."

Third.—The act, in all its provisions, clearly contemplates that the tax is to be paid by a corporation which is actually engaged in business as an actively operating concern. It nowhere intimates that the tax can be collected unless the corporation is carrying on the business.

The net income upon which the tax is levied is to be ascertained by deducting from the gross income of the corporation expenses, losses and interest on the corporation's bonded or other indebtedness and amounts actually paid by it for taxes and received by it as dividends upon stock of other corporations which are subject to taxation under the law. The return required by the act is to be verified by the president, vice president, or other principal officer, and the treasurer or assistant treasurer of the corporation, and must contain a statement of the corporation's financial condition in all particulars required by law. If the return is found to be incor-

rect, the act provides for further information by an examination of any officer or employé. The corporation is to be notified of the amount for which it is liable and if it fails to make a return or makes a false or fraudulent return, it shall be liable to a penalty. It cannot be held that an act which nowhere mentions receivers and which in every paragraph deals with corporations and joint-stock companies actually engaged in business, can, by construction, be made to cover the business, temporarily undertaken, of conserving the property of such a corporation for the benefit of its creditors and the public.

Fourth.—It is manifest that the functions of the Metropolitan Street Railway Company, as a corporation, were superseded when all its property was placed in the hands of receivers by a court of equity, in order that it might be saved for the benefit of all its creditors. It could no longer act in its corporate capacity, it could no longer operate the railroad; it lost, for the time at least, all dominion over its property. Its officers could not make the return required by the act for the obvious reason that the corporation had carried on no business during the years 1909 and 1910 and, therefore, had received no income from any source. The receivers could not make the return for the reason that they were neither the corporation nor the representatives thereof. During their administration the Metropolitan Company has not been carrying on corporate business and has received no income in that capacity. They were in possession as officers of the court and were subject to its orders. Whatever corporate functions the company possessed were in abeyance during the period that the court held the property for the benefit of all the creditors.

Assuming that a net income could arise in such circumstances, and assuming further that Congress could constitutionally levy "a special excise tax with respect to carrying on the business of such corporation," we are clearly of the opinion that it has failed to do so under the present act.

Fifth.—We have been presented by the United States attorney with an elaborate and learned brief showing great research and citing many cases involving the construction of state statutes, most of them arising in the state courts of New York, Pennsylvania, New Jersey and Massachusetts. We agree, however, with the court below in thinking that:

"When it is conceded, as it must be under *Flint v. Stone Tracy Co.*, 220 U. S. 107,¹ that this tax is not imposed upon the property nor upon the franchises under which the railroad is operated in the different streets and avenues, most of the cases cited by the government became inapplicable."

We are, of course, bound by the law as enunciated by the Supreme Court and we think that the decisions of that tribunal and of the other federal courts cited by counsel sustain the conclusions reached.

The orders appealed from are affirmed.

¹ 21 Sup. Ct. 342, 55 L. Ed. 339, Ann. Cas. 1912B, 1312.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. July 18, 1912.)

No. 235.

1. CORPORATIONS (§ 568*)—RECEIVERS—SETTLEMENT OF SUITS—APPORTIONMENT OF PROCEEDS.

A final judgment at law was recovered by the receiver of a street railroad against a corporation, a certain part of which was collected on an appeal bond. Ancillary proceedings were then instituted against stockholders of the defendant, which was insolvent. The receiver also brought a suit in equity on different claims against the same corporation and others on different claims. Pending such suit and the ancillary proceedings a settlement was made, by which the receiver was paid a lump sum in full satisfaction of both causes of action, without any agreement as to its apportionment between them. *Held* that, in the absence of persuasive proof of equities requiring a different application, and in view of the uncertainty of collection in either case, the sum should be apportioned ratably between them, taking the amount due on the judgment, after crediting the sum collected, with interest to the date of settlement, and the amount of the claim involved in the equity suit, with interest to the same date.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2288, 2289; Dec. Dig. § 568.*]

2. INTEREST (§ 19*)—ALLOWANCE ON UNLIQUIDATED DEMANDS—DISCRETION OF COURT OF EQUITY.

In equity, the allowance of interest on unliquidated demands, especially in a case of wrongful diversion of funds, is a matter of discretion.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

3. CORPORATIONS (§ 568*)—LEASE—CONTRACTS FOR IMPROVEMENTS BY LESSEE—EFFECT OF INSOLVENCY.

By contracts between lessor and lessee street railroad companies and a securities company, the latter agreed, for a consideration received from the lessor, to furnish a sum of money to the lessee, to be by it expended in making permanent improvements on the leased property. When a part only had been furnished, both lessor and lessee became insolvent, and their property was placed in the hands of receivers. The lessee's receiver brought an action against the securities company to recover the remainder due under the contract, and was paid a sum in settlement. *Held* that, after deducting the cost of such of the contemplated improvements as had been made by the lessee and its receiver, the remainder of the fund should be paid over to the lessor's receivers, and, the property having been sold in foreclosure proceedings and there being no mortgage liens thereon, that it should be applied by them to the payment of general creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2288, 2289; Dec. Dig. § 568.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Pennsylvania Steel Company and another against the New York City Railway Company, the Metropolitan Street Railway Company, and others. From an order (196 Fed. 661) apportioning a fund in the hands of the receiver of the New York City Railway Company, appeals were taken by Adrian H.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Joline and Douglas Robinson, receivers of the Metropolitan Company, John D. Crimmins and others, as a committee of contract creditors, Charles Benner and others, as a committee of tort creditors, the Pennsylvania Steel Company and another, the Farmers' Loan & Trust Company, and the Guaranty Trust Company of New York. Modified and affirmed.

See, also, 198 Fed. 783.

Dexter, Osborn & Fleming (Theodore W. Morris, Jr., of counsel), for Ladd, receiver.

Geller, Rolston & Horan (Bronson Winthrop and Charles T. Payne, of counsel), for Farmers' Loan & Trust Co.

Benj. S. Catchings, for tort creditors.

Davies, Auerbach, Cornell & Barry (Brainerd Tolles and Julien T. Davies, of counsel), for Metropolitan St. Ry. Co.

Richard R. Rogers, for New York Rys. Co.

Byrne & Cutcheon (James Byrne and C. M. Travis, of counsel), for Pennsylvania Steel Co.

G. N. Hamlin, Morgan J. O'Brien, and Charles E. Rushmore, for contract creditors.

Masten & Nichols (Arthur H. Masten and William M. Chadbourne, of counsel), for Joline and others, receivers.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. [1] The question in this proceeding is how certain moneys and notes in the hands of the receivers of the New York City Railway Company, paid to them in settlement of a judgment in an action at law recovered against the Metropolitan Securities Company and of a suit in equity by the receivers of the City Company against the Securities Company and individual defendants, who were directors of both the City Company and the Securities Company, are to be apportioned between the two accounts. The judgment in the action at law was for the unpaid balance of a sum of \$8,000,000 owed by the Securities Company to the City Company under a contract dated May 22, 1907. The action in equity was to recover the amount of an alleged wrongful diversion of the capital of the City Company to the treasury of the Securities Company. The settlement of both claims being for a lump sum in cash and notes, \$5,500,000 cash and four collateral improvement 5 per cent. notes of the Metropolitan Street Railway Company for \$1,000,000 each, it remained to determine in what proportion that fund should be applied to the claims respectively. The special master and the court below determined that the cash and notes should be apportioned ratably between the judgment in the action at law (after deducting the amount of security on appeal) and the claim in the equity action. We approve of this conclusion as being as fair a method as any that has been suggested or that has occurred to us.

[2] It is objected that no interest should have been allowed upon the claim in the equity suit, because it was unliquidated. We

follow in this circuit the rulings of the Court of Appeals of New York, allowing no interest on unliquidated claims. *Stephens v. Phoenix Bridge Co.*, 139 Fed. 248, 71 C. C. A. 374. In equity, however, interest, especially in a case of wrongful diversion like this, is a matter of discretion (*Lilienthal v. Cartwright*, 173 Fed. 580, 97 C. C. A. 530), and we are unwilling to interfere with that discretion as exercised by the court below.

[3] The liability of the Securities Company to the City Company we have heretofore held to have been absolute, saying:

"It was clearly the intent of the parties to the May, 1907, agreements to provide a fund for paying the debts of the Metropolitan Railway Company and for necessary future construction, aggregating about \$8,000,000, which sum the Securities Company undertook to furnish to the City Company absolutely and without condition." *Metropolitan Securities Co. v. Ladd*, 173 Fed. 269, 272, 97 C. C. A. 435, 438.

It makes no difference how the Securities Company used the eight collateral notes of the Metropolitan Company for \$1,000,000, or how it raised the money to pay the City Company, or that the notes subsequently became or now are worthless. It remains true that they, with the accompanying collateral, were the consideration of the Securities Company's liability to pay \$8,000,000 to the City Company. The City Company was, under article XV of the lease, bound to apply the funds so collected or to be collected of the Securities Company to permanent betterments upon the Metropolitan Company's property. Article XV, as well as the recitals in the resolution adopted by the boards of the Metropolitan Company and of the City Company May 22, 1907, and the provisions of the agreement between those companies of the same date, show that these moneys were to be so applied. The Metropolitan Company was to give its notes with collateral to the Securities Company in consideration of \$8,000,000 to be paid by that company to the City Company as and when called for, and to be applied by the City Company in payment for permanent betterments of the Metropolitan Company's property. We think a court of equity, if applied to, would have prevented the City Company from using the moneys for any other purpose whatever. It follows that so much of the money and notes received by the receivers of the City Company in settlement as is apportionable to the judgment in the action at law (after deducting the expenses of realizing the same) must be applied for the benefit of the Metropolitan Company. The court below, however, rightly held that the receivers of the City Company were first entitled to deduct whatever they or the City Company had paid out on account of this fund of \$8,000,000 for permanent betterments of the Metropolitan Company's property, and for any balance not paid out of the cash they were entitled to hold their share of the notes, so far as needed to reimburse them, the notes and any balance of cash not needed for that purpose to be turned over to the receivers of the Metropolitan Company. On the other hand, the share of the notes apportioned to the equity suit may be proved by the

receivers of the City Company against the estate of the Metropolitan Company.

The contract requiring the application of this fund to the improvement of the Metropolitan Company's property was made for the protection of that company as lessor, as well as for the protection of the City Company as lessee. Inasmuch as neither of these companies has now any interest whatever in the premises, it would be out of the question to apply the balance of the fund, if any, to the improvement of the property for the benefit of the purchaser at the foreclosure sale. And it would be equally out of the question to permit the City Company to keep such balance, if any, as part of its estate.

So much of the fund as may come into the hands of the receivers of the Metropolitan Company must be applied either to the payment of the bondholders under that company's mortgages or to the payment of its creditors generally. We have heretofore held that the mortgages do not cover such property as this (*Farmers' Loan & Trust Co. v. Waterbury* [C. C. A.] 193 Fed. 44), and as no lien has been imposed upon the premises in connection with these moneys, it is fair that they should be treated as assets for the benefit of general creditors.

The disposition of the case that we think right may be more clearly stated by consideration of the three questions which the court below submitted to the special master and the answers which the court below finally approved. They are as follows:

"Question 1. In what proportion should the net proceeds of the settlement of the action at law brought by the receiver of New York City Railway Company against Metropolitan Securities Company, and the suit in equity brought by the receiver of New York City Railway Company against Metropolitan Securities Company and its directors, be apportioned between the said action at law and the said suit in equity?

"Answer. (a) The cash and the property (upon being reduced to cash) originally received by William W. Ladd, as receiver of New York City Railway Company, as security upon writ of error in the so-called action at law hereinbefore described, should, with all accretions by way of interest actually received thereon, be applied, as of September 1, 1909, pro tanto to the satisfaction and payment of the judgment obtained in said action at law.

"(b) From the cash received upon the settlement (\$5,500,000), with all accretions by way of interest actually received thereon, there will be deducted the amount of all disbursements, counsel fees, and other expenses made or incurred by the receivers in connection with the prosecution and settlement of the claims involved in the action at law and in the suit in equity.

"(c) The net proceeds of such cash remaining shall be apportioned between the action at law and the suit in equity, in accordance with the following formulæ. Let A represent the amount due as of July 8, 1910, in the action at law, as indicated in finding XXXI. Let B represent the amount, as of July 8, 1910, claimed in the suit in equity, viz., \$4,027,578.60. Let C represent the cash paid on settlement, \$5,500,000 plus the accretions of interest thereon actually received and minus the payment made in compliance with paragraph (b) supra. The formulæ will then be:

A+B : A :: C : Distributive Share of the Action at Law.

A+B : B :: C : Distributive Share of the Suit in Equity.

"(d) The four 5 per cent. collateral improvement notes of the Metropolitan Street Railway Company, described in the finding of fact XXXV, shall be apportioned in a like ratio."

This answer is approved.

"Question 2. To what part, if any, of the proceeds of said action at law are the Metropolitan Street Railway Company or its receivers entitled?"

"Answer. The receivers of the Metropolitan Company are entitled to receive the distributive share of said action at law, ascertained as aforesaid, and said William W. Ladd, as receiver of the City Company, holds said share for the benefit of the receivers of the Metropolitan Company, subject, however, to the following deductions:

"(1) The receiver of the City Company is entitled to reimbursement from said share for the difference between the sum of \$3,036,000 received by said City Company from said Securities Company as aforesaid before September 24, 1907, and the sum of the expenditures of \$2,834,483.81, \$336,000, and \$100,000, respectively made by said City Company as found in the findings of fact in this proceeding aggregating \$3,270,483.81; said difference amounting to \$234,483.81.

"(2) The receiver of the City Company is also entitled to reimbursement from said share for the expenditures made upon the Twenty-Third Street loop and the First Avenue line of said Metropolitan system, described in the foregoing findings of fact, and for all such other expenditures made and obligations incurred by the City Company prior to the appointment of receivers on September 24, 1907, for the purposes described in article XV of the lease made by the Metropolitan Company to the City Company, dated February 14, 1902, as shall hereafter be found due upon an accounting to be had upon further order of the court, and

"(3) For all such further expenditures and obligations which may be similarly found to have been made or incurred for purposes described in said article XV of said lease, as were made or incurred directly or indirectly through redemption of receivers' certificates, by the receivers of the City Company from or against the estate of (and may be held to be chargeable against the estate of) that company, prior to the time as of which the said lease is to be deemed to have been no longer in effect so far as concerns properties demised by it taken into possession by the court through its receivers on September 24, 1907.

"(4) In the event of the Court of Appeals sustaining the holding of this court that the lease aforesaid became inoperative in October 1, 1907, then there shall be deducted from such share the amount of all money and the value of all property belonging to the City Company which came into the possession of the receivers of the Metropolitan Company or for which the estate of the Metropolitan Company may be held accountable to the estate of the City Company."

This answer is approved, except that subdivisions (3) and (4) are to be reserved for disposition in future proceedings.

"Question 3. Is the receiver of New York City Railway Company entitled to use, and, if so, to what extent, four certain 5 per cent. improvement notes of Metropolitan Street Railway Company, of the face value of one million dollars (\$1,000,000) each, and now in his possession, as a set-off or counterclaim in respect to the claim of the Metropolitan Street Railway Company, or its receivers, to such part of said proceeds?"

"Answer. If the receiver of the City Company shall ultimately secure and retain from the distributive share of the action at law the various items enumerated as deductions in the answer to question 2, he shall not be entitled to use the proportion assigned to the suit in equity of the four 5 per cent. collateral improvement notes of the Metropolitan Company, described in the aforesaid findings of fact, as a set-off or counterclaim to the claim of the Metropolitan Company or its receivers for the distributive share apportioned to the action at law. If, however, the receiver of the City Company shall not ultimately secure and retain such deductions, the said distributive share of said notes apportioned to the suit in equity may be by him used as such set-off or counterclaim. Said notes were not surrendered to the receiver of the City Company for cancellation only."

This answer is approved; the deductions mentioned being those contained in subdivisions (1) and (2) of that question.

The decree appealed from is modified, by reserving for disposition in future proceedings the matters hereinbefore so indicated, and, as so modified, is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
(nine cases).

(Circuit Court of Appeals, Second Circuit. July 18, 1912.)

Nos. 233-242.

Appeals from the Circuit Court of the United States for the Southern District of New York.

Suits in equity by the Pennsylvania Steel Company and another against the New York City Railway Company, the Metropolitan Street Railway Company, and others, and by the Central Trust Company of New York against the Third Avenue Railroad Company and others. Various appeals from decrees and orders of the circuit court involve the following questions: (1) Termination of lease; (2) validity of lease; (3) apportionment proceedings; (4) Hemphill committee claim; (5) Central Crosstown Company claim; (6) New York City Railway advance for tort damages; (7) prorating fixed charges; (8) Metropolitan stockholders' dividend claim; (9) corporation income tax. In the matter of costs.

See, also, 198 Fed. 721, 772, 774, 778.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We are informed that the receivers of the New York City Railway Company and of the Metropolitan Street Railway Company have united in paying for the printing and certification of the records in these cases, each party paying one-half. In view of this fact, we are of the opinion that no costs should be awarded in this court. If, however, any of the successful parties desire to submit special reasons why costs should be awarded to them, they may present their views in a brief printed memorandum within 10 days after the date of filing our opinions.

UNION PAC. R. CO. v. WHITNEY.

(Circuit Court of Appeals, Eighth Circuit. August 17, 1912.)

No. 3,590.

1. APPEAL AND ERROR (§ 184*)—AVOIDANCE—MODE OF TRIAL—WAIVER.

Where plaintiff, in an action at law, replied that a release set up by defendant as a defense was invalid because of plaintiff's incapacity to execute it at the time it was executed, and the reply was not assailed in any manner, or objection made in the circuit court to the mode of trial, defendant waived the right to claim that, as the release was at most only voidable, it was binding on plaintiff until he was relieved therefrom by a court of equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1150, 1179-1183; Dec. Dig. § 184.*]

2. APPEAL AND ERROR (§ 183*)—REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where the trial court had jurisdiction of the subject-matter of the action, an objection to the form of the action or theory of the cause, not urged at the trial, would not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1161-1165; Dec. Dig. § 183.*]

3. RELEASE (§ 24*)—INVALIDITY—VACATION—LAW OR EQUITY.

Where, in reply to a defense setting up a release in bar, plaintiff alleged that at the time the release was executed he was mentally incapable of making it, such objection raised the issue of its legal existence, and was therefore available in the action at law without first proceeding to have the release set aside in equity.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41-46; Dec. Dig. § 24.*]

4. RELEASE (§ 59*)—VACATION—MENTAL INCAPACITY—INSTRUCTIONS.

Where plaintiff pleaded mental incapacity in avoidance of a release pleaded in bar; an instruction that the release was of the highest significance, and if it was entered into with an understanding of the rights of the parties either party was at liberty to deny its force and effect, or to say he did not understand it, but, "when it appears that either party was in a situation as to his physical condition, or as to his state of mind, which makes it probable that he acted without an understanding of the act with which he is charged, the instrument itself may be disregarded," was proper.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 115; Dec. Dig. § 59.*]

5. DAMAGES (§ 173*)—DAMAGE—MATERIALITY—POST OFFICE REGULATIONS.

In an action for permanent injuries to a postal clerk, he testified that he received \$800 a year from the government and, in addition, about \$75 a month as a musician and carpenter, when not on duty; that he made a trip every three days, and was off duty for three days—his time being so arranged as to enable him to play in an orchestra in the evening, whether he was on duty or not. *Held*, that a section of the post office regulations, providing that the compensation of postal clerks is for daily service, whether on or off duty, that their entire time is subject to the control of the Post Office Department, and that lay-off periods were granted for rest and study, and should not be utilized for engaging in other business, and evidence that the usual requirements would prevent any railway mail clerk from engaging in other occupations, was properly excluded as immaterial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 173.*]

6. CARRIERS (§ 321*)—INJURY TO PASSENGERS—POSTAL CLERKS—CARE REQUIRED.

Plaintiff, a postal clerk, was injured while on his run by the falling of a beam or support for cots, placed in the car by defendant railroad company for the use of the clerks, the fall of which was alleged to have been caused by defendant's failure to furnish and maintain suitable supports for the cots. The car on which plaintiff was employed ran through from Council Bluffs to Ogden; plaintiff's run beginning at Cheyenne, where the car arrived about 1 o'clock a. m., having started from Council Bluffs about 7 o'clock the previous morning. *Held*, that it was defendant's continuous duty to furnish and keep the car in a reasonably safe condition for the use of the postal clerks while they were employed therein, without reference to whether it was rendered defective by postal clerks employed on the run before the car arrived at the place where plaintiff was to take up his work therein, or by employes of defendant, or others not in defendant's employ; and hence an instruction, that if the car was rendered unsafe by the negligence of some one other than a railroad employe, "after the car started on its run," defendant would not be liable, did not impose on defendant as great a duty as it was bound to bear, and was therefore not error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.*]

Liabilities to employes of others carried under contract with carrier, see note to *Clough v. Grand Trunk Western Ry. Co.*, 85 C. C. A. 5.]

7. RELEASE (§ 58*)—RATIFICATION—REPUDIATION—TIME.

Plaintiff was injured by defendant's alleged negligence May 3, 1907, and on the next day, while suffering from his injuries and under the influence of drugs, was induced to settle with defendant for \$66 and executed a release. On November 4, 1909, before commencing suit, plaintiff offered to return the money, with interest, which offer was refused, and the tender kept good by depositing the amount with the clerk for defendant's use. *Held*, that plaintiff's delay in rescinding the release was not so great as to bar his right as a matter of law; but the question whether the offer to return was seasonably made was for the jury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.*]

Smith, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the District of Wyoming.

Action by George W. Whitney against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Lacey (Herbert V. Lacey, on the brief), for plaintiff in error.

H. V. S. Groesbeck (Cassius M. Eby, on the brief), for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. George W. Whitney, the defendant in error, who will be called the plaintiff, recovered judgment in the Circuit Court against the Union Pacific Railroad Company, which will be called the defendant, for personal injuries to himself, alleged to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—50

have been caused by the negligence of the Railroad Company, to reverse which the defendant prosecutes this writ of error.

The plaintiff was employed as a United States postal or mail clerk in a mail car in use upon defendant's road in Wyoming for carrying the United States mails, and was, on May 3, 1907, injured by the falling of a beam or support for beds or cots placed in the car by the defendant for the use of the postal clerks employed therein, which beam struck the plaintiff on the back of the head while he was engaged in the performance of his duties in the car, causing the injuries of which he complains. The negligence of the defendant, which is alleged to have caused the injury to the plaintiff, is in failing to exercise reasonable care to furnish suitable supports and appliances for maintaining the beds or cots in their position in the car when not in use by the postal clerks, and a reasonably safe place in which the plaintiff might work in the performance of the duties required of him as such postal clerk.

The defendant by answer admits that the plaintiff was employed as a postal clerk in a mail car upon one of its trains, and that he was injured by the falling of a beam or support for beds or cots placed by it in said car for the use of the plaintiff and his associate clerks as alleged, but denies all negligence upon its part in the construction of the car, the placing of the cots or beds therein, and the appliances for maintaining them in proper position, and avers that the falling of the bed or cot, and the injury to the plaintiff by reason thereof, was because of his own neglect and that of his associate clerks, and that it had no control over the taking down and replacing of the cots by them.

As a further and fourth defense, it alleged that on May 4, 1907, the day after the alleged injury to the plaintiff, it paid to him, and the plaintiff accepted from it, \$66 in full satisfaction and discharge of the causes of action alleged in plaintiff's petition; and as a fifth defense it alleged that on said May 4th, in consideration of said sum of \$66, the plaintiff executed and delivered to the defendant a release in writing, releasing it from all claims or causes of action whatsoever growing out of, or that might thereafter arise because of, the accident and injury to the plaintiff alleged in the petition. To this answer the plaintiff replied, denying the alleged negligence upon his part and reaffirming the allegations of his petition.

As to the alleged payment of \$66 in satisfaction and release of the injuries complained of by him, he says:

"That he admits, upon information and belief only, that the release set forth in said answer was signed by him at the time stated therein; but he avers, in connection with the allegations of said defense, that at the time stated he was, as set forth in his petition, unconscious and ill and in a state of torpor, suffering great pain and misery, and was not in his right mind, and that his mental faculties were so impaired by reason of the injuries he had received and the administration of drugs and medicines to him that he was not rational, and did not and could not rationally form any intention with relation to the acts charged in said defenses, and that said release was not and is not, therefore, his act or deed, and was and is null and void by reason of the fraud inhering in the execution of the release under the facts herein stated."

He further says that on November 4, 1909, he tendered back to the defendant the said sum of \$66, with interest, which was refused by the defendant, and he now and here tenders back to the defendant the said sum of \$66, with interest, and deposits said sum with the clerk of the court for the use of defendant.

What the arrangement was between the government and the defendant for equipping and furnishing the mail car for the carriage of the mails and the postal clerks while performing their duties therein does not appear. The case was tried, however, upon the theory that it was the duty of the defendant to equip and furnish a car with suitable supports and appliances for maintaining the cots in their proper position therein; also that plaintiff was a passenger upon the train at the time of his injury, and entitled to the rights of a passenger against the defendant as a common carrier of passengers. Whether or not the plaintiff, at the time he was injured, stood in the relation of a passenger to the defendant, and was entitled to the rights of a passenger as against it, we need not determine. See *Chicago & N. W. Ry. Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421, and note.

In argument counsel for defendant have grouped the assignments of error into four classes, viz., (1) those in which it is claimed that the court adopted an incorrect rule as to the measure of damages; (2) those in which it adopted an incorrect rule as to the liability of the defendant; (3) those in which the court permitted the plaintiff to call in question, in an action at law, the release which he had given to the defendant for the injuries of which he complains; (4) that in which the court refused to hold that the retention by the plaintiff of the fruits of the settlement constituted an irrevocable ratification of the settlement and release.

[1] The principal contention of the defendant is that it was error to permit the plaintiff to avoid in this action the release pleaded by it, because of his alleged mental incapacity to make the same; that the release was not void, but at most only voidable, and until set aside was valid and binding upon the plaintiff, and only a court of equity could relieve him from its effect. The reply, setting forth the facts upon which the plaintiff relied to avoid the release, was not assailed by the defendant in any manner, nor was objection made in the Circuit Court to the mode of trial. The defendant must therefore be held to have waived this question of procedure. *Union Pacific Ry. Co. v. Harris*, 63 Fed. 800, 12 C. C. A. 598.

[2] In that case a like question was urged for the reversal of the judgment, of which this court said:

"The defendant did not demur to the plaintiff's replication upon the ground that a court of law could not try the issues it presented. These issues were tried to the jury without objection; and it is now too late to object for the first time in the appellate court to that mode of trial. The objection that an action should have been brought at law, instead of in equity, or vice versa, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. * * * If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the appellate court. The general prin-

ciple is now well established that an appellate court will not entertain an objection to the form of the action, when the objection was not interposed in apt time in the trial court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one; and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial court will be deemed waived."

This rule, however, must be taken with the qualification that the court has jurisdiction of the subject-matter of the controversy. *Reynes v. Dumont*, 130 U. S. 354-395, 9 Sup. Ct. 486, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505-514, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Insley v. United States*, 150 U. S. 512-515, 14 Sup. Ct. 158, 37 L. Ed. 1163. The Harris Case was affirmed by the Supreme Court in *Union Pacific Ry. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003, without noticing the question of the mode of trial, though it appeared upon the face of the record.

It is true that at the close of the evidence the defendant moved for a directed verdict in its favor, but stated no ground upon which it based such motion, and the attention of the court was not called to this question. To sustain its contention now urged would be to reverse the judgment upon a question not presented to nor decided by the Circuit Court, which this court has more than once held that it will not do. *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133-140, 52 C. C. A. 95; *Hatcher v. Northwestern National Insurance Co.*, 184 Fed. 23-25, 106 C. C. A. 225.

[3] But if the objection had been timely raised in the Circuit Court we are of opinion that it would have been unavailing; for, if plaintiff was mentally incapable of making the release at the time it was signed, this, like fraud inhering in the execution of the instrument, goes to the question of its legal existence; and this may be shown in actions at law upon the instrument, as well as in equity. *Hartshorn v. Day*, 19 How. 211-223, 15 L. Ed. 605; *George v. Tate*, 102 U. S. 564-570, 26 L. Ed. 232; *Pacific Mutual Life Ins. Co. v. Webb*, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752.

The distinction between the nonexistence of a deed or other instrument in writing, which the alleged maker never executed, nor intended to execute, because of his mental incapacity to do so, or which he was induced by fraud or trickery to execute, not intending to do so, and those where he knowingly signed the instrument, but was induced to do so by the fraud or misrepresentation of material facts by the party procuring the same, is clear and well recognized. In the former case the nonexecution of the instrument may be shown in an action thereon at law, as well as in equity; in the latter the instrument can only be avoided or set aside by a direct suit in equity. But see *Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121, where it is held, in a carefully considered opinion by the Court of Appeals for the Sixth circuit, that the instrument in either case may be avoided in an action thereon at law. That opinion, however, so far as it holds that the instrument may be avoided at law for the misrepresentation of material facts inducing its execution, was disapproved by this court in *Pacific Mutual Life Ins. Co. v. Webb*, above. The objection of the

defendant to the judgment upon the ground of the mode of trial must therefore be denied.

[4] The testimony of the plaintiff in regard to his mental condition at the time the release was signed was, under the pleadings, properly admitted in rebuttal, and was such as to require its submission to the jury. Upon that the court charged the jury as follows:

"The defendant pleads and offers in evidence a settlement by the execution of a receipt and release for all liability; the consideration being \$66. A release of the character of the one offered in evidence is generally of the highest significance; for the rule is that when it appears that the situation and circumstances of the parties were such, when the release was executed, that it was entered into with an understanding of the rights of the parties respectively, and that the intent (was) to include all matters of difference between them, and there seems to be no reason to believe that any mistake was made in respect to it, then neither party is at liberty to deny the force and effect of what is therein contained. He is not at liberty to say that he did not understand it. *On the other hand, when it appears that either party was in a situation as to his physical condition, or as to his state of mind, which makes it probable that he acted without an understanding of the act with which he is charged, the instrument itself may be disregarded.* In this instance the testimony tends to show that the plaintiff was injured on May 3d; and on May 4th, while he was in bed, apparently ill, he was approached by the agent of the defendant company, and after some conversation signed the receipt and release which has been admitted in evidence. *It becomes a question, therefore, for you to determine from the evidence whether he was in a condition to know what he was doing. If he did, he is bound by it, and your verdict must be for the defendant. If he did not, and you say from the evidence that his faculties were in such a state that he could not comprehend what he was doing, and the force and effect of the paper which he signed, you may say he is not to be charged with it.* Upon this question the testimony is conflicting, and you must determine it from a consideration of all of the evidence given in relation thereto."

The defendant complains particularly of that portion of the charge which reads in this way:

"On the other hand, when it appears that either party was in a situation as to his health, physical condition, or as to his state of mind which makes it probable that he acted without deliberation, and without an understanding of the act with which he was charged, the instrument itself may be disregarded."

But this is copied almost verbatim from the charge in the Harris Case; and to hold that the court erred in giving it, in connection with other parts of the charge, would be to hold that the Supreme Court erred in approving the charge in the Harris Case. The charge of the court as a whole fairly submitted to the jury the question of the quantum of proof necessary to show the plaintiff's mental incapacity that would relieve him from the release pleaded by the defendant.

[5] There was testimony tending to show that plaintiff's injury was permanent; and upon the trial he testified in his own behalf, without objection, that he was receiving a salary of \$800 a year from the government as a postal clerk, and, in addition, about \$75 a month from other sources as a musician, and as a carpenter, when not upon duty; that he made a trip every three days, and

was off duty for three days; that he started upon his run about 1 o'clock in the morning, and was thus enabled to play in an orchestra in the evening before starting, as well as when off duty; that postal clerks receive an increase in salary July 1st of the year; that he was in line of promotion, and if he had not been laid off he would at the time of the trial, have been in a class whose salary was \$1,300, a year. The defendant offered in evidence section 1472 of the Regulations of the Post Office Department, relating to railway mail clerks, as follows:

Section 1472:

"The compensation paid to railway postal clerks is for daily service, whether they are on duty or not, and therefore their entire time is subject to the control of the Post Office Department. Lay-off periods are granted for rest and study, and must not be utilized by clerks for the purpose of engaging in other business."

And it offered to prove by the chief clerk of the railway mail service in the division in which plaintiff was employed:

"That, in addition to about one hour and a half a day for study, the usual requirement of rest would prevent any railway mail clerk from engaging in other occupations, and would especially prevent playing in an orchestra until 12 o'clock at night, or anything of that kind."

Upon objection by the plaintiff, this rule and testimony were excluded by the court. The defendant saved an exception, and requested an instruction that the rule was admissible as bearing upon plaintiff's earnings as affecting the measure of his recovery, which was denied. We are of opinion that this rule and the testimony offered were wholly immaterial upon this question. The salary and other earnings the plaintiff was receiving at the time of his injury were admissible as bearing upon his earning capacity or ability to earn money; and the fact, if it was a fact, that under the terms of his employment with the government he was forbidden to engage in any other employment would not lessen his capacity or ability to earn money. The government might have insisted upon his observance of the rule of the department while he was in its service, but that was a matter between him and the government; and the existence of the rule, or its requirements, would not lessen his earning capacity or ability in other lines of employment, should he for any reason leave the government service and engage therein. The evidence that the plaintiff was in the line of promotion was not objected to by the defendant, and is not complained of. Had it been objected to, it might, perhaps, have been excluded as being too remote or speculative. *Richmond & Danville R. Co. v. Elliott*, 149 U. S. 266-269, 13 Sup. Ct. 837, 37 L. Ed. 728; *Brown v. C., R. I. & P. Ry. Co.*, 64 Iowa, 652, 21 N. W. 193; *Chase v. B., C. R. & N. R. Co.*, 76 Iowa, 675, 39 N. W. 196. The jury was not instructed that it might consider that plaintiff was in line of promotion, or the probable increase of his salary if he remained in the employ of the government, as affecting the measure of his recovery. It was not error, therefore, to exclude the rule and the proffered testimony, or to refuse the requested in-

struction. After excluding the rule, there was nothing upon which to base the requested instruction.

[6] The defendant requested the court to charge the jury that:

"In this case it is incumbent on the plaintiff to show by a preponderance of the evidence that the construction of the support for the bunks was negligently faulty in some respect; and if you find from the evidence that the support and appliance as furnished by the defendant were in all respects sufficient, and it is further left to conjecture as to who it was that left the support out of its proper place or removed the cotter pin, and that the accident occurred by reason of such leaving the bar out of its place or such removal of the cotter pin, then your verdict will be for the defendant."

Which request the court denied. As bearing upon this question, the court charged the jury that the burden was upon the plaintiff to prove by a preponderance of the evidence the negligence of the defendant as charged in the petition, and that the plaintiff was injured solely because thereof; also as follows:

"If, upon the other hand, you find from the evidence that the appliances, namely, the bar and its fastenings, were entirely sufficient for the purposes for which they were calculated to be used, and properly secured, and that the bar in this case did not fall because of any negligence on the part of any of the railway employés, * * * the defendant would not be liable.

"If you should find from the evidence that the appliance or bar was sufficient, and the manner in which it was secured to the car was sufficient, and that it was kept in that condition when in charge of the employés of the railway company, but that it was rendered unsafe by the negligence or carelessness of some one other than a railroad employé, *after the car started on its run*, it could not then be held liable. In other words, it is liable for its own negligence and the negligence of its employés only, but not for the negligence of other persons, for injury caused by an appliance that the defendant and its employés had left in a safe condition, but was rendered unsafe by the negligence of a postal clerk, or other person not in the employ of the railroad company, who had access to the car *during the time it was on the road*."

To that portion of the charge in italics, the defendant excepted, and contends that it makes the defendant liable for defects in or the unsafe condition of the appliances arising without its fault, after it had put them in a proper condition, while the car was at Council Bluffs before it started on the run, and also those arising after it had started, or while it was on the road. It appears from the testimony that the mail car started from Council Bluffs about 2 o'clock in the afternoon, and was to run through to Ogden; that mail clerks, other than plaintiff and his fellow clerks, entered the car at Council Bluffs about 7 o'clock in the morning before the car started, and commenced working therein; that the plaintiff's run began at Cheyenne, where he and his associates entered the car about 1 o'clock in the morning, and the accident to him occurred about 6 o'clock on that morning somewhere near Rawlins, Wyo.; and it is contended in behalf of the defendant, if we correctly understand its counsel, that if the appliances for the support of the bunks were rendered unsafe by postal clerks, or some one other than an employé of the defendant, while the car was in the yards at Council Bluffs, and before it started upon its run, this would relieve the defendant from liability; but under the instructions the

defendant would be relieved from liability only in the event that the defect in or unsafe condition of the appliances were caused by a postal clerk, or some one other than an employé of the defendant, after it had put them in a safe condition, and the car had started on its run. The thought of the court obviously was that it was the duty of the defendant to exercise reasonable care to see that the appliances were in proper condition when the car was placed at the disposal of the mail clerks, and that any defect in, or unsafe condition thereof, arising before that time would render the company liable for an injury resulting to a clerk because thereof; but that if the appliances became defective or unsafe by the act of a postal clerk, or some one not an employé of the defendant, after the car had started from Council Bluffs, or was on the road, that would relieve the company from liability for such defect; and this is the thought of the instruction.

The instruction as given is fully as favorable to the defendant as it had a right to demand. If it was the duty of the defendant to furnish and keep the car in a reasonably safe condition for the use of the postal clerks while they were employed therein, this was a continuing duty; and the plaintiff should not be held responsible for what the postal clerks, or employés of the defendant, or those not its employés, did while the car was in the yards at Council Bluffs, or while on the run from Council Bluffs to Cheyenne, where the plaintiff and his associates entered the car for their run. At most, he would only be responsible for his own acts, or those of his associate clerks employed with him, or others having access to the car, after he entered the same at Cheyenne. The instruction as given relieves the defendant from liability for the acts of postal clerks and others not employés of defendant, who entered the car while it was in the yards at Council Bluffs, or was on the run from Council Bluffs to Cheyenne, thus making the plaintiff responsible for the acts of postal clerks, or others not employés of the defendant, after the car left Council Bluffs, and before the plaintiff entered it at Cheyenne, as well as afterwards. This, we think, was as favorable to the defendant as it could rightly demand, and it has no valid ground of complaint to the charge as given, or to the refusal of the instruction requested by it.

[7] The defendant also requested the court to charge that:

"In this case the uncontradicted evidence shows that the plaintiff had knowledge of the settlement made between him and the defendant as early as May, 1908. He did not offer to set aside or rescind the release made by him upon the settlement until November 4, 1909. This was too late. He could not thus retain the fruits of the settlement and at the expiration of the time stated attempt to set it aside. The settlement is therefore binding upon him, and you will find for the defendant."

The question of the ratification of the settlement and release by reason of the delay of the plaintiff in offering to return to the defendant the \$66 received as the consideration therefor, admitting, without deciding, that under section 4401, Compiled Statutes of Wyoming 1910, it was properly pleaded, is one of fact. *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420.

The release was procured by a claim agent of the defendant the day following the injury, when the plaintiff was in bed suffering from the injury and stupefied by drugs administered to him to relieve his pain, and when the full effect of the injury was not, and obviously could not then have been, known to either the plaintiff or the claim agent. On November 4, 1909, before the commencement of the suit, the plaintiff offered to return to the defendant the \$66, with interest thereon from the time he received it, which offer was refused, and the tender has been kept good by depositing the amount with the clerk of the court for the use of the defendant. The defendant has not changed its position nor condition in any respect whatever because of the plaintiff's failure to sooner return to it the month's salary, and it is apparent that it would have refused the offer, had it been made in May, 1908, or even earlier; for it obviously intended to retain the release thus procured by its energetic claim agent to defeat the recovery of anything more for the injuries sustained by plaintiff. Whether or not the offer to return the \$66 was seasonably made was a question for the jury. The court did not err, therefore, in refusing the request.

The questions of defendant's negligence, and the contributory negligence of the plaintiff, are settled by the verdict of the jury.

Some other questions are urged by the defendant against the judgment, which we have carefully considered, and it must suffice to say that they afford no ground for its reversal.

The judgment is affirmed.

SMITH, Circuit Judge (dissenting). I concur in all of the foregoing opinion, except as to the exclusion of section 1472 of the Postal Laws and Regulations.

The claimant was not a regular postal clerk. He testified:

"I began work for the government before I took the examination, some time in September or October, and I took the examination the 8th of November. Q. Of what year? A. 1906. Q. Yes. A. And I was running to Green River on what is known as the 'holper' run. Q. And what name applies to that position besides helper? A. Substitute mail clerk. Q. Is the name 'probationer' also used? A. Yes, sir."

The accident happened on May 3, 1907. The regulation 1472 forbade clerks engaging in any other business. It had no application to substitutes or other than full clerks. Claude Glenn testified:

"Q. If he had not been laid off, state whether or not he would have received promotions in the regular line? A. I think he would."

Mr. William E. Hindrichs testified:

"Q. State whether or not he was in the regular line of promotion under the rules of the Post Office Department? A. He was; yes, sir."

After the injury the claimant returned to work, and drew from November 20, 1908, until the 1st of July, 1910, at the rate of \$1,000 a year, and drew at the rate of \$1,100 until he quit the service. During this time he had ceased to be a substitute, and held rank as a full railway mail clerk. In Richmond & Danville Railroad Company v.

Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728, it appeared that Elliott was working in the capacity of a coupler and switchman, and had been so working for between four and five years. He was getting \$1.50 per day. He was asked:

"What were your prospects of advancement, if any, in your employment on the railroad, and of obtaining higher wages?"

He stated that he thought that by staying with the company he would be promoted; that there was a "system by which you go in there as coupler or train hand, or in the yard, and if a man falls out you stand a chance of taking his place"; that the average yard conductor obtained a salary of from \$60 to \$75 a month. The court said:

"It did not appear that there was any rule on the part of the Central Company for an increase of salary after a certain length of time, or that promotion should follow whenever a vacancy occurred in a higher grade of service. The most that was claimed was that when a vacancy took place a subordinate who had been faithful in his employment, and had served a long while, had a chance of receiving preferment. But that is altogether too problematical and uncertain to be presented to a jury in connection with proof of the wages paid to those in such superior employment. Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, but upon the judgment, or even whim, of those in control."

In *Brown, Administratrix, v. C., R. I. & P.*, 64 Iowa, 652, 21 N. W. 193, cited by the majority, it was held that where a fireman was killed it was not admissible to show that firemen, when they had sufficient experience, and had acquired the requisite skill, were sometimes employed as engineers. In *Chase v. B., C. R. & N.*, 76 Iowa, 675, 39 N. W. 196, cited in the majority opinion, the plaintiff was a switchman. He was allowed to show that there was a line of promotion in the business in which he was engaged when injured; that the grade next to the one held by plaintiff was switch thrower, without increase of pay; that the next grade was that of yardmaster, with a salary of \$100 per month; and that the next was that of trainmaster, with a further increase of salary. The court said:

"It would be contrary to well-established and approved rules of law to permit the injured person to show in aggravation of damages that promotions are made, and wages increased, in the business in which he was engaged when injured, without at least showing that he was in the direct line of promotion."

The railway mail service is under the classified civil service, and promotions and advancements in such a service are sufficiently certain to warrant the introduction of such evidence. None of the cases cited in the majority opinion seem persuasive to me that when a person is admitted to the civil service in the railway mail branch it is not admissible, in a suit by him for permanent physical disabilities, to show the well-known advancing rate of compensation to such employés; but in this case there was evidence that the claimant was actually earning \$800 a year from the government as a substitute helper, and about \$900 a year from other work as a musician and carpenter. When he left the service, he was a regular railway mail clerk, had

for a long time earned \$1,000 a year, and was then earning \$1,100 a year. No authority has been or can be cited, in my judgment, holding that this is remote or speculative.

The company then offered to show that his damages should not be estimated upon an assumption of an earning capacity of \$1,100 a year, which he was receiving when he quit the government service, or \$1,300, which he would have received if he had remained in the service, and, in addition, the \$900 he was earning as a musician and carpenter, but that as soon as he received his appointment as a regular postal clerk he must give up his outside employment. The court properly told the jury that if he was entitled to recover the rule was compensatory, and they should consider "a permanent impairment of his ability to labor, if any, and generally any reduction in his power to labor and earn money and pursue the course of life which he might otherwise have done." This instruction was correct; but in telling the jury they might consider the reduction of the plaintiff's power to earn money they should not have been given evidence that at the time of the accident he was a substitute mail clerk, to whom the rule against outside labor had no relation whatever, and that he earned \$900 a year from such outside labor, and that when he quit the government service he was getting \$1,100, and exclude evidence that by his advances he was forbidden to earn any part of the \$900 from outside labor, clearly leaving the impression he could then have earned \$2,000 a year but for his injuries, and would have been earning \$2,200 at the time of the trial, when he could have earned but \$1,100 at the one time and \$1,300 at the other. It seems to me perfectly clear that it was admissible to show the rule forbidding outside employment as affecting the reduction of his power to earn money from the accident. I therefore feel compelled to dissent upon that portion of the opinion

RANKIN v. TYGARD et al.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1912.)

Nos. 3,607, 3,608.

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 251*)—NATIONAL BANKS—OFFICERS—TERM.

Subject to the free exercise by its board of directors of its power to remove him at its pleasure at any time, a national bank may, by its articles of incorporation and by-laws, fix the term of office of its president, or of any other ministerial officer, and the term so fixed becomes his legal term of office, although during that term he is subject to recall by the board under section 5136, U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3455).

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 940-943; Dec. Dig. § 251.*]

2. PRINCIPAL AND SURETY (§ 71*)—NATIONAL BANKS—OFFICERS—TERM—LIABILITIES ON BONDS.

When a term has been so fixed, sureties on the bond to answer for the breaches of duty of a president during his legal term are not liable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for his breaches under a subsequent appointment after the expiration of his term current when their bond was given.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 117-119; Dec. Dig. § 71.*]

3. BANKS AND BANKING (§ 251*)—NATIONAL BANKS—OFFICERS—RESTRICTING CHOICE TO MEMBERS OF BOARD.

The board of directors of a national bank may by a by-law restrict their choice of a president to its own members, even if others are eligible under the national banking law.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 940-943; Dec. Dig. § 251.*]

4. BANKS AND BANKING (§ 251*)—NATIONAL BANKS—OFFICERS—REMOVAL.

A national bank provided by its articles of association and by-laws that its board of directors should elect one of its members president of the association who should hold his office, unless sooner removed by a two-thirds vote of all the members of the board, for the term for which he was elected a director.

Held, if the restriction of the power of removal to a two-thirds vote was ultra vires and void under section 5136, United States Revised Statutes (U. S. Comp. St. 1901, p. 3455), the other terms of the provision were valid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 940-943; Dec. Dig. § 251.*]

5. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY.

Where a part of a law is void and a part is valid and the void part is readily separable from the valid part, the latter may be sustained and the former disregarded, unless the void part is so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the legislative body that enacted it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-60, 195; Dec. Dig. § 64.*]

6. BANKS AND BANKING (§ 262*)—NATIONAL BANKS—PRESIDENT—BREACH OF DUTY.

Where a president of a national bank in actual management of its daily business made a note for \$3,000, without authority, in the name of the H. Company by himself, its treasurer, placed it among the bills receivable of the bank, credited the H. Company with \$3,000, and paid \$2,000 of it to the H. Company and \$250 to another party, the proximate cause of the conversion of the funds of the bank was his act as its president, and not his individual act, or his act as treasurer of the H. Company, and that act was a breach of his duty lawfully to administer the office of president and faithfully to account for the moneys and funds of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001-1006; Dec. Dig. § 262.*]

7. BANKS AND BANKING (§ 262*)—NATIONAL BANKS—PRESIDENT—AUTHORITY.

Where the board of directors of a national bank has by resolution expressly authorized, or for a reasonable length of time permitted the president of the bank to participate in the actual management of its daily business affairs, his authority to discount commercial paper and to do other acts within the scope of the authority of its other ministerial officers is ample.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001-1006; Dec. Dig. § 262.*]

8. PRINCIPAL AND SURETY (§ 101*)—BANKS AND BANKING—NATIONAL BANKS—OFFICERS—RELEASE OF SURETIES.

An immaterial alteration of the contract of sureties without their knowledge after they have signed, an alteration which neither changes the legal identity of the contract nor the liabilities of the parties to it, does not release the sureties.

After a bond to indemnify a national bank against the delinquencies of its president, which recited in its first line that he was the principal, had been signed by the president over the word "principal" and by the first surety below that word, and over the word "securities," the principal inserted the name of the surety before the word "principal" in the first line of the bond. While it was in that condition, two other sureties signed below the signature of the first surety and above the word "securities," and thereafter the name of the first surety was erased where it had been inserted in the first line of the bond before the word "principal."

Held, these alterations were immaterial, and did not release the sureties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

9. ALTERATION OF INSTRUMENTS (§ 27*)—MATERIALITY—PRESUMPTION AND BURDEN OF PROOF.

The legal presumption is that an alteration apparent on the face of a written instrument was made before its execution, and is therefore immaterial, and the burden is not on the party who offers the instrument in evidence to explain the alteration, but it is on him who assails the instrument to prove that the alteration was made after its execution, and that it is material.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230-247; Dec. Dig. § 27.*]

10. BANKS AND BANKING (§ 262*)—NATIONAL BANKS—LIABILITIES ON BONDS.
A bond to a bank was conditioned to take effect commencing on the date of its approval by proper authority.

Held, its approval by all the directors of the bank, though not by a majority thereof at a meeting of the board, its receipt, and preservation by an officer of the bank was sufficient to put it in operation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001-1006; Dec. Dig. § 262.*]

11. ELECTION OF REMEDIES (§§ 5, 11*)—FINALITY OF ELECTION—MISTAKE AS TO REMEDIES.

Where a wrong has been inflicted, and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one.

His prosecution of the wrong remedy to a judgment of defeat will not, in the absence of facts creating an equitable estoppel, bar him from subsequently pursuing the right remedy to victory.

It was no defense to the action on the bond on the theory that the principal had made a note of \$3,000, without authority from the H. Company that the receiver sued the H. Company on the note on the theory that the principal had authority to make it. He could lawfully pursue each remedy until the loss of the bank was restored.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 6, 14; Dec. Dig. §§ 5, 11.*]

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action by George C. Rankin, receiver of the Bates National Bank of Butler, Mo., against F. J. Tygard and others. From the judgment, both parties bring error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edmund H. McVey, of Kansas City (John A. Eaton, of Kansas City, on the briefs), for receiver.

Frank Hagerman, of Kansas City (Thomas J. Smith, of Butler, and T. B. Wallace, of Kansas City, on the briefs), for Tygard and others.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

SANBORN, Circuit Judge. On July 22, 1905, F. J. Tygard, as principal, and John C. Hayes, J. M. Catterlin, and Thomas J. Smith, as sureties, gave to the Bates National Bank of Butler, Mo., a bond in the sum of \$10,000 conditioned that Tygard, who was the president of that bank, should faithfully discharge the duties of his office "during the legal term of said office," and that he should account for all funds which should come to his hands as such president. Tygard was elected president on January 10, 1905, and again on January 15, 1906, in accordance with the provisions of the articles of association and by-laws of the bank to the effect that the members of the board of directors should be elected annually on the second Tuesday in January in each year, that this board should elect one of its members president of the bank, who should hold his office, unless he should be disqualified or sooner removed by a two-thirds vote of the members of the board, for the term for which he was elected a director. The by-laws provided that the directors should, as soon as qualified, select from their number a president who should hold his office for one year and until his successor was elected and qualified, provided that the board, for good cause, might remove him by a two-thirds vote of all the directors. The receiver of the bank, which had become insolvent, sued Tygard and the sureties on his bond for a breach thereof which occurred in December, 1905, and for numerous breaches which occurred subsequent to January 16, 1906, and recovered upon the former, but failed to recover upon the latter causes of action because the court held that they did not occur during the term of Tygard's office which was current when the bond was given. The receiver specified this ruling as error, and sued out his writ to correct it. The sureties insisted that they were not liable on the bond for any amount whatever, assigned many errors in the trial, and brought their writ for a reversal of the judgment against them.

[1, 2] The contention of the receiver is that there can be no legal term of office of the president of a national bank because he is subject to removal at any time at the pleasure of the board of directors. They base this position upon the provisions of section 5136, U. S. Revised Statutes (U. S. Comp. Stat. 1901, p. 3455), to the effect that a national banking association has the power: "Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others

to fill their places. Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed." Act June 3, 1864, 13 Stat. c. 106, p. 101, § 8; Revised St. U. S. § 5136, p. 993 (U. S. Comp. Stat. 1901, pp. 3455, 3456). The argument of counsel for the receiver is: The board of directors of a national bank has the inalienable power to remove the president of the bank without cause at any time. It cannot contract to keep him in office for any time certain. It cannot renounce or agree not to exercise its power of removal at pleasure. Therefore it cannot contract that, subject to the free exercise of this power of removal at will, it will not continue him in office beyond a specified time without another appointment, nor that subject to the right to exercise its power of removal at pleasure it will continue him until that time. The premises of this argument, however, do not compel its conclusion. An election or appointment to an official position for a fixed term is, it is true, inconsistent with a removal during the term without cause in the absence of a precedent reservation of the right to make such a removal during the term. But an election or appointment to the office for a specified term subject to the precedent expressed condition that the elective or appointive power may remove at will at any time during the term is consistent with such a removal without cause and it is as much an election or appointment for a legal term as an election or appointment without such a reservation. It is an election or appointment for a fixed term subject to recall and the legal term is the time the person elected or appointed will hold his office if the power to recall is not exercised. *Fresno Enterprise Co. v. Allen*, 67 Cal. 505, 509, 8 Pac. 59.

[3] It is said that the articles of association and the by-laws of this bank are ineffectual in this regard because they provide that the president shall be a member of the board and shall hold his office for a year unless sooner removed by a two-thirds vote of the members of the board. Conceding, but not admitting, that the act of Congress does not require, it certainly does not prohibit, the board from choosing one of its members president of the association, nor from adopting articles and by-laws to that effect.

[4] Hence the only provision of these articles or by-laws that can be in any way inconsistent with any of the terms of the national banking law is the implied restriction of the power of the board to remove the officer at pleasure, which requires a two-thirds instead of a majority vote of its members to accomplish that end. But, if this restriction is not valid, it is simply *ultra vires*, and hence void. It is easily separable from the other provisions of the articles and by-laws.

[5] They are, so far as they are not inconsistent with the acts of Congress, the law of the bank and under the familiar rule that, where a part of a law is void and a part valid and the void part

is readily separable from the valid part, the latter may be sustained and the former disregarded, unless the void part is so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the legislative body which enacted it, the restriction of the power of removal to a two-thirds vote of the members, if void, does not destroy or weaken the effect of the remaining provisions of the article and by-laws and they must stand. The contention of counsel for the receiver therefore cannot prevail, and under the act of Congress and the articles of association and by-laws of the bank the legal term of its president current on July 22, 1905, when the bond was given, was from January 10, 1905, when he was elected, until January 15, 1906, when he was again elected, and the sureties upon the bond were not liable for his breaches subsequent to that date.

The decision and opinion of this court in *Westervelt v. Mohrenstecher*, 76 Fed. 118, 121, 22 C. C. A. 93, 96, 34 L. R. A. 477, cited in opposition to this view, has been carefully considered, but they are not in conflict with it. The sureties upon the bond of a cashier of a national bank, who had bound themselves to answer for his breaches of duty "for and during all the time he shall hold the office of cashier of the said bank," were held liable for his defaults in that case as long as he remained cashier, although he was re-elected thrice during that time. But the sureties in this case did not agree to answer for the defaults of Tygard as long as he should hold the office of president. They expressly restricted their liability to his breaches of duty as president during the "legal term of said office." Their bond was a simple contract between them and the bank, and the question here is, What was the sense and meaning of the words "the legal term of said office" upon which the minds of these parties met when they made this agreement? And when the facts are considered that the bank had the power to prescribe the time during which Tygard should hold his office under its appointment, subject to its right to recall him at its pleasure, that it had by its articles and by-laws fixed this time at one year from January, 1905, and until his successor was elected and qualified, and that the sureties offered and the bank accepted their bond under these provisions, there is no less doubt that the minds of both parties to this bond, when they made it, met upon the intention that the liability of the sureties thereon should be limited to a time antecedent to Tygard's subsequent appointment in January, 1906, than there was in *Westervelt's* case that the sureties on Mohrenstecher's bond intended to agree to answer for his defaults as long as he should continue to be the cashier of the bank.

The court also held in *Westervelt's Case* that the board of directors of a national bank could not, by declaring the term of office of an officer of that bank to be annual and by electing such an officer for an annual term, divest itself of its power to remove him from his office at pleasure. But that decision is not inconsistent with the conclusion in this case that such a board of directors may,

fix the term of an officer of its bank subject to its unrestricted power to remove him at pleasure during that term, and that the term so fixed becomes the legal term of his office notwithstanding his liability to recall before its expiration. In the former case, it is held that the board may not deprive itself of its power to remove at any time. In the latter case it is held that it may fix a limit of the time within which the officer may hold his office subject to removal at pleasure without another election.

Counsel have indulged in an exhaustive review of the course of legislation with reference to the appointment of the president and other ministerial officers of a national bank and in an interesting debate of the questions whether or not he must be one of the members of the board of directors and whether the office of president of the bank under section 5136, U. S. Revised Statutes, is the same as that of president of the board under section 5150, or is another office. But the fact is that, if the president of the board may be other than a member of the board under the national banking law, there is no prohibition in that law of a limitation of its choice by the board itself to its own members, and the fact that in this case the board so limited itself by its by-laws has rendered the discussion and decisions of these questions immaterial in this case, and they are here dismissed. There was no error in the ruling of the court below that the current term of office of Tygard, the president of the bank, on July 22, 1905, when the bond was given, expired on January 15, 1906, when he was again elected president pursuant to the law, the articles of association, and the by-laws, and that the sureties were not liable for his subsequent breaches of duty.

[6] The condition of the bond in suit is that:

"If the said F. J. Tygard shall in all things faithfully perform the duties of his said office * * * and shall well and truly administer the said office of president of the Bates National Bank according to law, and well and faithfully account for all moneys and funds which shall come to his hands as such president according to law, then this obligation to be void and of no effect, otherwise to remain in full force and effect."

On December 22, 1905, Tygard was the treasurer of the Masonic Home, a charitable organization, in the state of Missouri. He made a promissory note for \$3,000, whereby the Masonic Home purported to promise to pay that amount to the bank, signed the note with the name of the Home by F. J. Tygard, treasurer, placed it among the bills receivable of the bank, and placed to the credit of the Home on the books of the bank \$3,000, \$2,000 of which he subsequently paid over to the Home and \$250 to some other party. He had no authority to make this note on behalf of the Home, and an action by the receiver to recover of the Home failed. No part of this \$3,000 has been paid back to the bank or to the receiver. It is upon this cause of action that the judgment against the sureties is founded. They insist that they are not liable for Tygard's wrongful act here because the taking of this money from the bank and its diversion to third parties in return for the unauthorized note of the Home was not a breach

of any of his duties as president and because it was his individual act, or his act as treasurer of the Home, and not his act as president of the bank, which was the proximate cause of the loss of this money by the bank. But two of the duties of a president are well and truly to administer the office of president of the bank according to law, and well and faithfully to account for the moneys and funds which come into his hands as president. His diversion of these funds of the bank to third parties was a breach of each of these duties. It was a failure to administer his office according to law for he could not lawfully, by substituting, or discounting, or pretending to discount, a note which he knew to be unauthorized for the funds of the bank, convert those funds to the use of third parties or of himself, and his failure to repay the amount he thus converted was a failure to account for funds of the bank which came to and were diverted by his hands. Nor was it his individual act, or his act as treasurer of the Home, which withdrew these funds from the bank. He had neither power nor opportunity individually or as treasurer of the Home to exchange the funds of the bank for this note. But, as president of the bank, he had access to and control of its moneys and the power to dispose of them. It was by the use of this opportunity and this authority that he withdrew these moneys from the bank, and his wrongful act and breach of duty as the president of the bank were the proximate and efficient cause of its loss of these funds.

Much is said in the brief of the failure of the receiver to allege in his petition what the duties of the president were which he failed to discharge. But the receiver clearly set forth in his petition the conversion of this fund by the president of the bank by the use of this unauthorized note which he made in the name of the home. He averred that that act was a breach of the duty of Tygard as president of the bank and of the obligations of this bond. The law so clearly declares the duty of the president of a bank to abstain from a conversion of its funds to his own use, or to the use of others, and to account for those moneys which come to his hands, that an application of the maxim that every one is presumed to know the law is peculiarly just and appropriate here. It was unnecessary to plead the law, and the petition was sufficient. It is argued that the president had no authority to discount commercial paper, and therefore his act here was not an act as president of the bank. If the concession were made that he had no such authority, it would not detract from the force of the argument made or the conclusion already reached, that his conversion of the funds of the bank by the use of the worthless note and his failure to account for them was his act as such president.

[7] But the facts found by the court below, "that said Tygard, by virtue of his office, by virtue of the action of the board of directors of the Bates National Bank and by virtue of a long course of dealing of said Tygard, recognized and acquiesced in on the part of the board of directors of said bank, was authorized and permitted as its president to take a daily and constant part in the management and transaction of the affairs of said bank by virtue of the fact that he was its chief officer," leave no doubt of his authority to discount commercial

paper for the bank and to do any other lawful act within the power of any of its ministerial officers. The board of directors of a national bank has the power under section 5136, U. S. Revised Statutes, to authorize the president of the bank to discount commercial paper and to do any other act within the power of the cashier or of any other officer of the bank. and where it has by resolution expressly authorized, or by acquiescence for a reasonable length of time permitted, him to participate in the actual management of its daily business affairs, his authority to discount commercial paper and to do other acts in its behalf within the scope of the authority of its ministerial officers is established. *United States National Bank v. First National Bank*, 79 Fed. 296, 299, 24 C. C. A. 597; *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 424, 48 C. C. A. 482; *Auten v. United States Nat. Bank*, 174 U. S. 125, 148, 19 Sup. Ct. 628, 43 L. Ed. 920.

[8] The court below found that the bond in suit was signed about July 22, 1905, that:

"At the time it was signed by Jno. C. Hayes, the first surety signing the same, his name did not appear on the first line of said bond immediately after the name of F. J. Tygard and immediately preceding the words 'as principal,' that immediately after said Hayes signed said bond that name was written there by Tygard, and so remained unerased until the sureties Catterlin and Smith had signed the same. Said name of Jno. C. Hayes so written on the first line of the bond was thereafter erased at a time not shown by the facts in this case."

It is assigned as error that these facts disclose such an alteration of the bond after the sureties signed it as released them from all obligation thereunder. Numerous authorities may be found, and some have been cited, to the effect that any alteration without the knowledge of the obligors of a bond, or other contract, after it is signed, whether material or immaterial, releases them. But the reason of the matter and the great weight of authority sustain the established modern rule that a material alteration releases, but an immaterial alteration, one which neither changes the legal identity of the contract nor the liabilities of the obligors, is not effective, and does not release them. *Mersman v. Werges*, 112 U. S. 139, 142, 5 Sup. Ct. 65, 28 L. Ed. 641; *First National Bank v. Weidenbeck*, 97 Fed. 896, 898, 38 C. C. A. 131, 133; *Rudesill v. Jefferson County Court*, 85 Ill. 446, 448, 449; *Shuck v. State*, 136 Ind. 63, 35 N. E. 993, 995; *Herrick v. Baldwin*, 17 Minn. 209, 212 (Gil. 183), 10 Am. Rep. 161; *Arnold v. Jones*, 2 R. I. 345, 352; *Crawford v. Dexter*, 5 Sawy. 201, 6 Fed. Cas. No. 3,368, pp. 775, 776; 2 Cyc. p. 217. The first part of the bond read in this way: "We the undersigned, F. J. Tygard, Jno. C. Hayes as principal, and Jno. C. Hayes, J. M. Catterlin and Thos. J. Smith, as securities, acknowledge ourselves to be indebted," etc., in the sum of \$10,000. The bond then declares that its condition is such that:

"Whereas, the said F. J. Tygard, principal, has been duly elected to the office of president of said Bates National Bank. * * * Now, therefore, if the said F. J. Tygard shall in all things faithfully perform the duties of his said office" etc. the bond "shall be void, otherwise in force." And the

bond closes thus: "In testimony whereof, we have hereunto set our respective hands this 22nd day of July, 1905.

"F. J. Tygard, Principal.

"John C. Hayes,

"J. M. Catterlin,

"Thomas J. Smith, Securities."

When Hayes signed the bond, Tygard's name was evidently written into the first line of the bond as principal, and he had signed at the end of the bond above the word "principal." Hayes signed below that word and over the word "securities" as one of the latter. The subsequent insertion of his name in the first line of the bond before the word "principal," its erasure, and insertion in the next line as one of the securities could not have affected his liability. He became a surety when he signed, and he remained a surety to the end. When Catterlin and Smith signed, Hayes' name had been inserted and remained before the word "principal" in the first line of the bond, but that insertion did not make him a principal and the body of the bond, which clearly showed that Tygard, and Tygard alone, was the party against whose defaults they were agreeing to indemnify the bank and the only principal, and the location of the signature of Hayes after the word "principal" render it impossible that they could have been misled or deceived into the belief that he had signed, or was bound as a principal. They could not have failed to know that he was a surety and not a principal, and the subsequent erasure of his name as the latter in no way changed the liabilities which they or he assumed when they respectively signed the bond. The alterations neither changed the legal identity of the contract, nor affected the liability of the parties to it, and the sureties were not released thereby.

[9] Complaint is made that the court received the bond in evidence when offered by the receiver before any explanation of the alteration, which appeared on its face, had been made. But the only alteration apparent on its face was the erasure of the name John C. Hayes where it had been inserted, before the word "principal"; and, while there is a conflict of authority on this question (*Smith v. United States*, 2 Wall. 219, 233, 17 L. Ed. 788), the weight of reason and of authority is that the legal presumption is that an alteration apparent on the face of an instrument in writing was made before its execution, and is therefore immaterial, and the burden is not on the party who offers the instrument in evidence to explain the alteration, but it is on him who assails the instrument to prove that the alteration was made after its execution and that it is material (*Little v. Herndon*, 10 Wall. 26, 31, 19 L. Ed. 878; *Hanrick v. Patrick*, 119 U. S. 156, 172, 7 Sup. Ct. 147, 30 L. Ed. 396; 2 Cyc. p. 240; *Burnett v. McCluey*, 78 Mo. 676).

[10] The condition of the bond was that Tygard should faithfully discharge the duties of his office during the legal term of said office "commencing on the date of the approval of this bond by the proper authority." The bill of exceptions declares that the receiver introduced evidence tending to show:

"That said bond was signed, executed, and delivered for safe keeping under the order of the board of directors of said bank to John B. Newberry, the vice president of said bank and a director thereof, about the time of the date

of said bond, and that said Newberry had deposited the same in a private safety box of the Bates National Bank, where the same remained until an inventory was taken of the assets of the bank at the time the same was turned over to the receiver."

The court below found that the bond was approved by the directors of the bank prior to the 22d day of December, 1905, but that the evidence was not clear whether the approval was made at the regular board meeting or at a called meeting of the board at which a quorum was present, or whether it was done informally, when two or more of them on different times met, and it refused to declare the law to be that, if the bond was never approved by a majority of the board of directors at a meeting, then the plaintiff could not recover. This ruling is specified as error, and counsel insist that the bond never became effective because it was never approved by the proper authority. That neither a minority nor a majority of a board of directors can, without a regular or called meeting of the board, adopt resolutions or perform acts on behalf of the board that will bind the directors not present or assenting, or the corporation, may be conceded. But acts of the board not evidenced by any record may be presumed from a subsequent course of action or acquiescence, which presupposes them, and the acceptance and approval of the bond of an officer by the board of directors of a bank may be presumed and found from proof of its receipt and preservation by the officers of the bank during the service of the officer, although there is no record of any such acceptance or approval in the minutes of the board. *United States Bank v. Dandridge*, 12 Wheat. 64, 73, 6 L. Ed. 552; *Pryse v. Farmers' Bank (Ky.)* 33 S. W. 532, 533; *Fiala v. Ainsworth*, 63 Neb. 1, 6, 88 N. W. 135, 93 Am. St. Rep. 420; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335. In the case last cited the charter of the bank required the cashier to give bond with two sureties, to the satisfaction of the board of directors, for the faithful discharge of his duties. The board by a recorded vote approved two persons as sureties upon a bond to be subsequently executed. The court held that the finding in the possession of the president of a bond signed by these sureties executed subsequent to this vote of the board was sufficient evidence that the bond was satisfactory to the board of directors, although there was no other evidence that the board by resolution or vote declared it to be so. In the case at bar a jury was waived, and the court found that this bond was approved by the directors prior to December 22, 1905. This finding is conclusive upon this court (*Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457), and every reasonable intendment may be indulged to support it. The finding is that it was approved, not by a majority of the directors, but by the directors, and it is a reasonable interpretation of this finding that it means that the bond was approved by all the directors. Such a bond when presented to the officers of a bank is an offer to that corporation by the obligors to indemnify it against the defaults of the principal. This bond was by its terms to take effect on its approval by proper au-

thority. Its receipt and safe-keeping by the officers of the bank was persuasive evidence of the acceptance by the bank of the offer which the bond tendered and hence of its approval, and we are unwilling to hold that its approval by all the directors, though not made by a majority of the board of directors at a meeting thereof, was not an approval by proper authority.

[11] It is specified as error that the court refused to hold that the receiver was barred from maintaining this action on the bond because he had brought an action against the Masonic Home on the note for \$3,000 made by Tygard in its name, and for money had and received by the Home, and because it had good causes of action against the Home therefor. But there was no error in this ruling, although the action on the note, which necessarily asserted the authority of Tygard to make it, was inconsistent with the theory of the action on the bond, which is that he had no such authority. Where a wrong has been perpetrated and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one, and, in the absence of facts creating an equitable estoppel, his prosecution of the wrong remedy to a judgment of defeat will not estop him from subsequently pursuing the right one to victory. *Bierce v. Hutchins*, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. Ed. 828; *Thomas v. Sugarman*, 218 U. S. 129, 133, 30 Sup. Ct. 650, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250; *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 398, 399, 20 C. C. A. 468, 472, 473, 33 L. R. A. 739; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 420, 73 C. C. A. 515, 520; *Harrill v. Davis*, 168 Fed. 187, 195, 94 C. C. A. 47, 55, 22 L. R. A. (N. S.) 1153; *In re Stewart* (D. C.) 178 Fed. 463, 468; *Nauman Co. v. Bradshaw*, 193 Fed. 350, 354, 113 C. C. A. 274. The contract of the defendants was to indemnify the bank against any loss it might sustain from the failure of their principal to discharge faithfully the duties of his office and until those losses are repaid it is no defense for them that the bank, or its receiver, has or pursues other remedies to relieve from them. *Westervelt v. Mohrenstecher*, 76 Fed. 118, 120, 124, 22 C. C. A. 93, 95, 99, 34 L. R. A. 477; *Vulcanite Co. v. Caduc*, 144 Mass. 85, 10 N. E. 483; *Bank v. Birch*, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211; *Emery v. Baltz*, 94 N. Y. 408; *White v. Smith*, 33 Pa. 186, 75 Am. Dec. 589.

It is assigned as error that the court below received in evidence the books of account of the Masonic Home. Conceding, without stopping to discuss the proposition, that this was an erroneous ruling, it did not prejudice, and could not have prejudiced, the sureties in this action. The only effect of the account books was to show Tygard's indebtedness to the Home, and that was immaterial because his lack of authority to make the note and his conversion of the money obtained upon it charged him and the sureties with liability on the bond whether he was indebted to the Home or not. Error without prejudice is no ground for reversal.

The judgment below must be affirmed, and it is so ordered.

RAMSDEN v. KEENE FIVE CENTS SAVINGS BANK.

SAME v. CHESHIRE PROVIDENT INST.

(Circuit Court of Appeals, Eighth Circuit. July 17, 1912.)

Nos. 3,643, 3,644.

1. MORTGAGES (§ 559*)—FORECLOSURE SALE—PURCHASE OF PROPERTY BY MORTGAGEE—ENFORCEMENT OF DEFICIENCY JUDGMENT.

Where a mortgagee buys in the mortgaged property at the foreclosure sale, fairly conducted, for less than the mortgage debt, and takes judgment for the deficiency, the mortgagor is not entitled to have a profit subsequently made by the mortgagee on the purchase credited on the deficiency judgment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600-1608; Dec. Dig. § 559.*]

2. CORPORATIONS (§ 225*)—ACTION TO ENFORCE DOUBLE LIABILITY OF STOCKHOLDER—INTEREST.

In an action against a stockholder in an insolvent Kansas corporation to enforce his statutory double liability, interest is recoverable only from the commencement of the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 864, 865, 867-869, 871-873; Dec. Dig. § 225.*]

3. CORPORATIONS (§ 249*)—ACTION TO ENFORCE DOUBLE LIABILITY OF STOCKHOLDER—EQUITABLE DEFENSES—LIMITATION.

In an action to enforce the constitutional and statutory double liability of a stockholder in an insolvent Kansas corporation, an equitable defense existing in favor of the stockholder, in the nature of a set-off, is not affected by the statute of limitations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1002-1010, 1012, 2273; Dec. Dig. § 249.*]

Appeal from the Circuit Court of the United States for the District of Kansas.

Suit in equity by the Keene Five Cents Savings Bank and by the Cheshire Provident Institution against Frederick Herbert Ramsden. Decrees for complainants, and defendant appeals. Affirmed.

John A. Eaton (J. T. Lafferty, on the brief), for appellant.
Frank Hagerman, for appellees.

Before SANBORN, Circuit Judge, and WILLARD, District Judge.

WILLARD, District Judge. After the decision of this court in the three cases, Anglo-American Land, Mortgage & Agency Co. v. Lombard Investment Company, Ramsden v. Cheshire Provident Institution, and Ramsden v. Keene Five Cents Savings Bank, all reported in 132 Fed. 721, 68 C. C. A. 89, under the name of Anglo-American Land, M. & A. Co. v. Lombard, the three cases were remanded to the Circuit Court for the District of Kansas. Thereupon the Keene Five Cents Savings Bank filed a bill in equity to restrain Ramsden from prosecuting his action at law, and to procure a set-off of certain claims which it held against the Lombard Investment Company, which it had presented as defenses in the action

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at law, and which this court held could only be made available in equity. The Cheshire Provident Institution also filed a bill for the same purpose. Answers and replications were filed, testimony was taken, and a decree was entered in each case in favor of the complainant, allowing the set-offs. The defendant, Ramsden, has appealed in both cases.

The facts, so far as they appear in 132 Fed. 721, 68 C. C. A. 89, need not be restated. In addition to those facts, it appears that the Keene Bank held the notes and mortgages of certain individuals, the payment of which had been guaranteed by the Lombard Investment Company. It foreclosed these mortgages, bid in the property secured thereby at foreclosure sale for a sum less than the amount due, and now seeks to offset against its liability as a stockholder the deficiency arising upon such sale; that is to say, the difference between the amount then due on the mortgages and the amount of its bid. This bank also holds debenture bonds issued by the Lombard Investment Company, containing its unconditional promise to pay them, and it seeks to offset these also as to the balance now due thereon. The Cheshire Bank is similarly situated, holding both guaranteed notes and mortgages and debentures.

The right of a stockholder in a Kansas corporation, when sued on his liability as such stockholder, to set up as an equitable defense claims which he has against the corporation, is settled by the decisions of the Supreme Court of Kansas. Those decisions are binding upon this court. *Pierce v. Security Company*, 60 Kan. 164, 55 Pac. 853. This court said in the case in 132 Fed. 721, at page 731, 68 C. C. A. 89, at page 99:

"Under this legislation, it is the practice in the courts of Kansas to permit stockholders in actions like this to avail themselves of any equitable set-off which they may have, in like manner as they may interpose a defense available at common law."

[1] The precise claim of Ramsden with reference to the mortgages and notes is this: Since the foreclosure sales the banks have sold the property bid in by them for sums much larger than the amounts of the respective bids, the deficiencies existing at the time of the sales have been paid, and therefore there is nothing now due the banks from the Lombard Investment Company. The claim will more clearly appear if we refer to a specific case as an illustration, and for that purpose we take what is known in the record as the Scanlon mortgages. This presents the case as favorably for the appellant as any. On March 7, 1889, William J. Scanlon executed and delivered to the Lombard Investment Company nine mortgages for an aggregate amount of \$64,200. Each one of these mortgages was a lien upon a separate and specific tract of land in Dodge county, Wis., and the nine tracts thus mortgaged constitute one parcel of land called the "Horicon Marsh." It was then used as a shooting park, but since, by draining, has become valuable as agricultural land. Three of these mortgages designated as "o-32642," "o-32643," and "o-32644," with the notes secured thereby were, prior to any foreclosure proceedings sold by the Lombard Investment Com-

pany to the Keene Bank, and the payment of the notes secured thereby guaranteed by the Investment Company. Two of these mortgages were for \$5,000 each and the other was for \$4,200. Of the other six mortgages five of them were held by the trustee as security for certain debentures issued by the Lombard Investment Company, and the other one, as it seems, though this from the record is not clear, was owned by one Knowles. Default was made in the payment of the interest which became due October 1, 1890. A suit was commenced by Knowles in the Circuit Court of the United States for one of the districts in Wisconsin to foreclose his mortgage. To this suit the owners of the other mortgages were made defendants, among them the Keene Bank. These owners, including the Keene Bank, filed cross-complaints, asking for the foreclosure of their mortgages. A final decree was entered upon the cross-complaint of the Keene Bank on January 10, 1893, adjudging that the amount then due to the Keene Bank was \$16,979.12. Such proceedings were afterwards had that the land covered by the Keene mortgages was sold by the United States marshal on April 12, 1894, which sale was confirmed on June 23, 1894. At the sale the Keene Bank bid in the property for \$4,590. The deficiency resulting from the sale was \$12,387.12. The other tracts covered by the other mortgages were bid in by Hagerman as trustee for the debenture holders, at sums the amount of which does not appear in the record. Afterwards, in June, 1895, the whole tract was sold for \$85,000. Of this sum the Keene Bank received \$16,859, which was less than the amount due on its notes and mortgages. The sum which the Keene Bank claims the right to off set is the aforesaid deficiency of \$12,387.12. Ramsden claims that it has no right to off set that amount, because, though the resale did not pay the debt in full, yet it practically discharged it.

His counsel says:

"The evidence covered by the above references shows conclusively that the whole plan in dealing with securities was not to rely upon a judicial sale, but to follow the property after the debenture sale, and thereupon realize additional sums to be credited upon the indebtedness. In cases of foreclosure upon all of the loans upon which said appellees' set-offs or defenses are sought to be predicated, this was the course pursued. * * * The whole scheme was for the purpose of enabling the Lombard Company to pay its obligations by a resort to the securities after formal judicial sales. The facts constitute a trust in favor of the Lombard Company. * * * In the cases of the guaranteed loans, sales of the property pledged or mortgaged to secure the loans were made through and by the Lombard Company or its receivers, and in each case for the benefit of the appellees, who became the purchasers of the property for the purpose of holding it for resale and making a resale to fully, or, so far as possible, pay the obligations resting upon the Lombard Company as guarantor. The direct object, as shown by the undisputed evidence, was to insure and procure the payment of the balance of the indebtedness remaining after the foreclosure and sale of the property pledged or mortgaged."

What evidence is there to support the claim that when the bid was made in April, 1894, there was an agreement between the Lombard Investment Company or its receiver and the Keene Bank that the Keene Bank should buy the property, should hold it, and resell it for the benefit of the Lombard Investment Company after the

Keene Bank had been paid in full? It is true that the evidence shows an agreement between the Keene Bank as the owner of three tracts of the land and the owners of the other six tracts, that they would handle the separate tracts as one parcel and would sell them together; but there is no evidence that at or prior to the time of the bid there was any agreement of any kind, express or implied, between the Lombard Investment Company or its receiver and the Keene Bank that the Lombard Investment Company should have any interest in the land after the sale. The fact that J. L. Lombard, a former officer of the Lombard Investment Company, was the agent of the Keene Bank to conduct the foreclosure, and was present at the sale, has no tendency to prove any such agreement. The evidence shows that he was employed by the Keene Bank and reported directly to it. The further fact that prior to the receivership the Lombard Investment Company was in the habit of foreclosing defaulted mortgages for its customers to whom it had sold them has no tendency to prove that, after the receivership and at the time this bid was made, any agreement such as the appellant mentioned was entered into. There was never any fiduciary relation existing between the Keene Bank and the Lombard Company. The sale was a public, judicial one. There is no evidence to show that it was not fairly conducted. Any one, including the Lombard Investment Company or the receiver, was at liberty to bid at the sale to protect his interest if he was so advised. The lands covered by the mortgages involved in this suit were situated in different states. It is probably true that in most of those states the law gave the mortgagor a period after the sale in which to redeem. In making bids the Keene Bank was bound to take this into consideration, and knew that, if a sum much less than the value of the property was bid, a redemption could be made, and the property entirely lost to it. In fact, there is nothing in the case to show that the sum which it bid at the sale was not what the land was then worth, except the fact that a year or more afterwards it was sold for a sum considerably larger. But the evidence shows that during that time the owners spent money, the exact amount of which does not appear, in draining and improving the property, and that the Keene Bank bore its proportionate share of this expense.

It would introduce a new doctrine in the law to hold that, under circumstances such as appear in this case, a mortgagor could resist the collection of a deficiency judgment years after it was entered, on the ground that the land had increased in value since the bid. This, however, seems to be the claim of the appellant, for it introduced evidence at the trial in cases where there had been no resale, to prove what the land is now worth.

The facts relating to the debentures differ somewhat from those relating to the guaranteed mortgages. The debentures were secured by stocks, bonds, mortgages, and other collateral belonging to the Lombard Investment Company, and in them the company had an equity of redemption. This equity of redemption was sold in judicial proceedings and purchased by Stillman, Crapo, and

Hipple, and the sale to them was confirmed on January 28, 1896. After that date, the Lombard Investment Company had no interest of any kind in these securities. Later the interest acquired by Stillman and his companions was conveyed to the Lombard Liquidation Company, which was the owner of the equity of redemption in these securities at the time Hagerman, the trustee for the debenture holders, brought a suit to foreclose such equity and to sell the securities. A final decree in that suit was entered on May 22, 1902. It adjudged that, unless the sum found due upon the debenture bonds was paid by the Lombard Liquidation Company within five days, the securities should be sold by a commissioner at public auction upon terms stated in the decree. The Lombard Liquidation Company did not redeem, and on July 1, 1902, the securities were sold at public auction as provided by the decree to Henry C. Flower. This sale was confirmed on July 3, 1902.

The Lombard Liquidation Company had been organized some years before, for the purpose of buying all the assets of the Lombard Investment Company. Its equity of redemption in the debenture securities, as has been seen, was entirely lost. It appears, however, that, under some arrangement between Flower and the Liquidation Company, it afterwards acted as trustee for such debenture holders as saw fit to join in a plan proposed for realizing upon the securities. The Keene Bank and the Cheshire Bank surrendered their debentures to the Liquidation Company, receiving from it certificates showing its interest in the securities. Upon these securities sums were afterwards paid by the Liquidation Company as the securities bought by Flower were sold. For example, on the certificate held by the Cheshire Bank for series H there was paid on July 27, 1903, \$430, and on February 11, 1904, \$430. It is these amounts which Ramsden says should be applied in reduction of the set-offs.

But the case as to the debentures stands in the same way as does the case as to the guaranteed mortgages. The Lombard Investment Company was completely foreclosed of any interest in these securities on January 28, 1896. The Lombard Liquidation Company was organized by creditors for the purpose of handling the securities. There is no evidence that the Lombard Investment Company was in any way interested in the Lombard Liquidation Company or that it was entitled to any sum from the securities after the creditors had been paid in full. It is almost impossible to believe that a contract such as appellant claims existed would be made, for the Lombard Investment Company was in hopeless bankruptcy and paid less than 1½ per cent. to its creditors. It follows that there was no trust or fiduciary relation of any kind between the Lombard Liquidation Company and the Lombard Investment Company.

The appellant says that the claims of the two banks are presented to a court of equity, and that it is inequitable not to reduce them by the amounts shown to have been received by the banks. These additional sums were realized from acts done by the banks with which neither Ramsden nor the Lombard Investment Company had anything to do. There was no relation of any kind between the Invest-

ment Company and the banks after the sales, and no agreement with reference to the profits which might be made upon the property bought at foreclosure sale. What the causes were which produced these profits does not appear. In the Scanlon Case they may have been due to the work which the owners did after the sale in draining and improving the land. When considering this branch of the case, it is proper to say that Ramsden's father was the principal officer of the company in England, charged with the sale there of its securities. Ramsden after the receivership, and for what amount does not appear, bought the claims which are now the basis of his suit at law, from persons who were the original creditors of the Lombard Investment Company, a position which Ramsden himself, so far as appears, never occupied. The claims so assigned were based upon guaranteed loans and debentures, and were proved before the master in the receivership suit.

[2] Under the decision of the Kansas Supreme Court, in determining the liability of the banks upon their stock, interest should be computed only from the commencement of Ramsden's suit at law. *Pine v. Western National Bank*, 63 Kan. 462, 65 Pac. 690. The suggestion of the appellant that certain evidence was erroneously admitted is answered by saying that there was a subsequent waiver by him of the exceptions then taken.

It is contended that there was no proof in this case of the liability of the Lombard Investment Company upon the debentures and guaranteed notes. An examination of the answers, however, shows that this fact was expressly admitted, the only issue raised being as to the ownership of the securities by the banks at the time these bills were filed. As to that ownership, there was abundant evidence.

[3] Appellant also contends that the claims of the banks are barred by the statutes of limitation. To this contention there are several answers, but it is necessary to mention only one. In *Pierce v. Security Co.*, 60 Kan. 164, 165, 55 Pac. 853, the court said:

"The claim of the stockholder is not a set-off in its technical legal sense, but it is an equitable defense which he is entitled to make."

While the statutes of limitation run against causes of action, they do not run against defenses. In the case of *Williamis v. Neely*, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232, this court held that a claim set up in a bill similar to those presented here by the Keene Bank and the Cheshire Bank was not affected by statutes of limitation because it constituted an equitable defense.

Nor can the defense of laches be sustained against these bills. All of the claims held by the two banks were proved before the master in the receivership suit probably prior to 1896. All of the guaranteed loans and all of the debentures were presented as defenses in the action at law which Ramsden commenced in 1898. The statement to the contrary by the appellant in his brief is not sustained by the evidence. Whether they were all pleaded in that action cannot be ascertained, because the said pleadings are not found in this record. Appellant says that the Keene Bank has injected into this suit three debentures, Nos. 1,543, 1,549, and 1,550, ag-

gregating the sum of \$11,000 which it claims that that bank did not hold at the trial of the action at law. This statement is shown to be untrue for the testimony of Litchfield given at that trial names the bonds above numbered as being then held and owned by the Keene Bank.

It is not necessary to go into a computation to show that the amount due the banks upon their respective claims is greater than the amount of their respective liabilities, for the appellant says in his brief:

"If the payments are to be credited upon the alleged set-offs, then the computation submitted herein by appellant is correct. If, however, the rule adopted by the Circuit Court is to be followed, then without question practically all of the debenture bonds (although many of them are paid), and all of the deficiency judgments (although many of them are also paid), would more than equal the liability of appellees as stockholders in the insolvent Lombard Investment Company."

In each case the decree of the court below is affirmed with costs.

STRANG v. EDSON.†

(Circuit Court of Appeals, Eighth Circuit. July 8, 1912.)

No. 3,446.

1. RECEIVERS (§ 103*)—MANAGEMENT AND DISPOSITION OF PROPERTY—ACCOUNTABILITY TO COURT—ANCILLARY MATTERS.

Defendant, as receiver of a suburban railroad company, was authorized to issue receivers' certificates for money with which to equip the road with a new motive power, on condition that the owner of all of the stock of a land company owning lands along the line, who was also owner of practically all of the stock of the railroad company, should assign the land company stock to the receiver, with power to vote the same, to be held as additional security for the receivers' certificates. The assignment was made, and the receiver elected himself president of the land company, and took full charge of its affairs. *Held*, that he held such position for the purposes of the receivership only, and subject to the supervising power of the court, and was bound to act in all matters for the protection and enhancement of the value of the stock as security; that his action in permitting valuable options for the purchase of other land held by the company to be exercised by a member of his family for his own private gain was a violation of his duty, and the transaction might be set aside by the court; but that, where the owner of the stock, with knowledge of the facts, made no objection for a year afterward, and not until it was demonstrated that the purchase was profitable, he ratified the transaction, and could not then attack its validity.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 190; Dec. Dig. § 103.*]

2. CORPORATIONS (§ 211*)—STOCKHOLDER'S SUIT—CONDITIONS PRECEDENT.

To entitle a stockholder to maintain a suit for the benefit of the corporation or other stockholders, he must by his pleadings make a sufficient showing of unsuccessful effort to induce the officers of the corporation to bring suit in the name of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-825; Dec. Dig. § 211.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 17, 1912.

Appeal from the Circuit Court of the United States for the District of Kansas.

Petition in equity by William B. Strang against J. A. Edson, as receiver. Petition dismissed, and petitioner appeals. Modified and affirmed.

Justin D. Bowersock (Lester W. Hall, on the brief), for appellant. Samuel W. Moore, for appellee.

Before HOOK, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. [1] On the 4th of June, 1908, William B. Strang, appellant, filed a bill against the Missouri & Kansas Interurban Railway Company (an interurban line running out of Kansas City), praying, among other things, for the appointment of a receiver. On the same day the railway company filed an answer, consenting to the appointment of a receiver, and by consent of parties J. A. Edson was appointed receiver of all the property and assets of the railway company. Prior to the appointment of the receiver the road had been operated by the use of gas-electric motor cars, which were not successful, and it became necessary to equip the road with an overhead trolley system. An application was made to the court for authority to borrow money for that purpose and to provide for the payment of certain pressing indebtedness. By an order entered on the 6th of July, 1908, the receiver was authorized to borrow such sums of money as might be necessary for the purposes specified in the order, not exceeding \$350,000, and to issue receiver's certificates therefor. The order, in addition to authorizing the receiver to substitute an overhead trolley system for the equipment then in use and to pay certain indebtedness specified in the order, contained the following provision:

"This order shall become effective upon delivery to the receiver of all of the issued and outstanding capital stock of the Strang Land Company, indorsed in blank, to be held by the receiver with full power to vote thereon as further and additional security for the payment of each and all of the receiver's certificates that may be issued hereunder."

The appellant, at the time the suit was brought, was the record owner of all but four shares of the capital stock of the railway company, and the owner of all of the capital stock of the Strang Land Company, a corporation owning certain lands along or near the line of railway. At the time of these proceedings the Strang Land Company, in addition to the lands then owned by it, also held options on certain other lands near the line of road, and among the options so held by it was an option to purchase 380 acres of land from Charles O. Proctor. The lands covered by this option included three 40-acre tracts at \$150 per acre and three 40-acre tracts at \$175 per acre. As directed by the order authorizing the issuance of receiver's certificates, appellant indorsed and delivered to the receiver all of the stock of the Strang Land Company. Upon the advice of counsel the receiver was elected president of the land company and assumed control of its operations. The abstracts of

title were placed in his custody, and he gave directions that no land should be disposed of without first submitting the transaction to him for approval. The option on the Proctor lands was due to expire November 10, 1908. There was, however, as the record shows, an extension carrying it to a later date. The land company took all of the Proctor lands under this option, except one 40-acre tract at \$150 per acre and one 40-acre tract at \$175 per acre, which were purchased from Proctor by Mrs. Edson, wife of the receiver. This purchase by Mrs. Edson was made, with the knowledge and consent of the receiver, in October, 1908, and prior to the expiration of the option at the option price, and without the payment of any consideration to the land company, whose stock the receiver held as further security for the receiver's certificates authorized by the order of July 6th. We think the evidence clearly shows that at the time Mrs. Edson purchased these two 40-acre tracts they had a value substantially in excess of the option price of the land.

While it is quite true, as appears by the record, the receiver had some difficulty in raising the money for the first payment on this Proctor option, yet it is not, we think, sufficiently clear that the difficulty was insuperable, and in the absence of an order of the court, or the express consent of the owner of the stock, we think the receiver was bound to use the utmost diligence to have the option further extended, if he did not have the money to take it up at the time it expired. That this could have been done is evidenced by the fact that it was done with respect to the other lands covered by the option. By the order of the court the receiver was given, not only complete control of the stock, but also the power to vote it, thus giving him full control over the corporation and all its assets. While it is quite true that at law the stockholders have no title to the corporation assets, yet in equity it must be held that the beneficial interest is in them.

It is suggested that what was done by Edson was done by him as president of the land company, and not as receiver of the railway company, and therefore the court, having supervisory power over him as receiver only, had none over him as president of the land company. This would, perhaps, be true, if he had been elected president only for the more convenient handling of the property and business of the land company in connection with the railway, and the stock had been voluntarily turned over to him by the owner. But that is not the case here. The stock of the land company was placed in Edson's hands as receiver with the power to vote it by an order of the court, the court having in view solely the security of the receiver's certificates; and the power to vote the stock conferred by the order meant, and could only mean, to vote it in such a way and for such purposes as might be considered essential to the objects of the receivership, and to preserve and enhance the value of the stock which he held as further security for the receiver's certificates. It certainly did not mean that he could vote or use the stock for private or individual gain. He could not, in other words, holding all of the stock, as he did, under the order of the court, have himself elected president of the company, and then

draw a line of separation, so far as responsibility is concerned, between himself as receiver upon the one hand, and as president of the land company upon the other. He was the latter only for the purpose of the former; and it cannot be true that, if he reduced the value of the stock which he held as security for the receiver's certificates by disposing of the property of the land company, he could avoid responsibility as receiver. His relation to the entire transaction was a trust relation, and it was his duty to preserve and enhance the value of the stock, rather than diminish it by disposing of a portion of the property.

The case is one where the court will not and ought not to nicely balance and weigh conflicting proof; the transaction not only affected the land company as a corporation, but necessarily affected to some extent the security back of the receiver's certificates; moreover, it affected the good name of the court of equity which appointed the receiver. In such cases courts of equity will ever be jealous not to allow transactions to stand, where there is the slightest doubt of the utmost good faith, after full information as to every detail thereof by all parties concerned. *McCourt v. Singers-Bigger*, 145 Fed. 103, 76 C. C. A. 73, 7 Ann. Cas. 287. No fraud in fact need be shown. The general rule, said the Supreme Court in *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076—

"stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. * * * It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."

And in the same case the court added:

"We scarcely need add that a purchase by a trustee of his *cestui que trust*, *sui juris*, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee, will be sustained in a court of equity. But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price, or any inequality in the bargain. *Coles v. Trecothick*, 9 Ves. 246; *Fox v. Mackreth*, 2 Bro. Ch. 400; *Gibson v. Jeyes*, 6 Ves. 277; *Whichcote v. Lawrence*, 3 Ves. 740; *Campbell v. Walker*, 5 Id. 678; *Ayliffe v. Murray*, 2 Atk. 59. And therefore, if a trustee, though strictly honest, should buy for himself an estate from his *cestui que trust*, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself."

It is contended on behalf of the receiver that Strang, the owner of the stock, consented to the purchase by Mrs. Edson of the two 40-acre tracts in question before the purchase was made. We find no direct proof of that fact in the record. The proof relied upon

by the receiver rests upon inference of knowledge on Strang's part, based upon the supposed agency of Hunt, the vice president of the company. Strang denies it; and while there is some testimony tending to show that Hunt acted for Strang, his agency is not sufficiently established to warrant the court in holding that his knowledge was binding upon Strang. But we do not deem it necessary to go into a discussion of the evidence, for the reason, as already suggested, that the nature of the controversy is one that prohibits too close an inquiry into the weight or sufficiency of conflicting evidence.

It is also insisted by the receiver that the sale of the two 40-acre tracts to Mrs. Edson was afterwards ratified by Strang, and the evidence shows satisfactorily that Strang's attitude was one at least of acquiescence and recognition. The sale to Mrs. Edson was made in October, 1908, and according to his own testimony Strang's attention was directly called to the transaction by his bookkeeper in December of the same year. He made no objection whatever at that time, nor at any other time until the 4th of November, 1909, almost a year after the transaction was completed, and after the receiver had been discharged and the property of the railway company restored to its owners.

The evidence shows without contradiction that prior to the receivership both the railway and the land company had been unprofitable enterprises, and that the success of the land company depended, in a large measure, upon the successful operation of the railway. Whether or not the railway could be operated at a profit and give a service that would be attractive to purchasers of suburban property necessarily required some time to determine. If it could, suburban property tributary to it would enhance in value; otherwise, not. The appellant, if not before, certainly knew in December, 1908, that the receiver had disposed of a portion of the property covered by the Proctor option to his wife at the option price. He knew, also, that this suburban property would increase or decrease in value, dependent upon the successful or unsuccessful operation of the railway, and with this knowledge, instead of bringing the matter to the attention of the court promptly, he remained silent for almost a year, without suggesting any dissatisfaction or claiming any interest whatever, waiting, doubtless, to see whether the efforts then being made by the receiver to operate the road at a profit would be successful. At the end of the year it was demonstrated that the road could be so operated, and that the effect of its operation was to increase the value of the suburban property. It was then, and not until then, that Strang intimated to any one that he was dissatisfied with the sale to Mrs. Edson, or that he would claim any interest in the land purchased by her or the profits arising therefrom. It is quite apparent, we think, from the course taken by him, that if the operation of the railway line had proved unsuccessful, and as a result the value of the suburban property had remained stationary or decreased, Strang would not have been heard from in this or any other proceeding. In addition to the delay of almost a year, he used the

fact that Mrs. Edson had purchased these two 40-acre tracts of land for the purpose of inducing prospective buyers of suburban property to invest in lands owned by the company adjoining and adjacent thereto.

We understand the rule to be that where an act is done openly, as was the case here, even in a case where the court would set aside the transaction, if the parties interested promptly filed their objections, that they will not be allowed to speculate upon the chances, and wait until they can see whether the act of which they complain is likely to result in profit or loss. The party complaining must in all cases act promptly, and before the act of which he complains has become the basis of rights or equities which would be greatly impaired if the transaction be set aside. The stock was all in the hands of the receiver for almost a year after the sale of this property to Mrs. Edson, and if Strang was not satisfied with the transaction it was plainly his duty to make his objections known to the court promptly, in order that his interests might be properly protected. We think the record shows a deliberate and calculating attempt on his part to speculate upon the chances, and a disposition to wait until it was demonstrated that the property could be handled at a profit.

[2] There is another reason why we think Strang, suing as an individual stockholder, cannot maintain this suit. Some time before he filed his petition, all of the stock had been returned to him. Edson had ceased to be president and was in no way connected with the land company. It has been repeatedly decided that, before a stockholder can maintain a suit for the benefit of the corporation or other stockholders, he must by his pleadings make a sufficient showing of unsuccessful effort to induce action by officers of the corporations to bring the suit in the name of the corporation, and no such showing is attempted to be made by the petition in this case. *Randall v. Dudley*, 111 Mich. 437, 69 N. W. 729; *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131; *Dickinson v. Consolidated Traction Co. (C. C.)* 114 Fed. 232; *Rogers v. Nashville, etc., R. Co.*, 91 Fed. 299, 33 C. C. A. 517; also *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Corbus v. Alaska Gold Mining Co.*, 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256; *Watson v. Bonfils*, 116 Fed. 158, 53 C. C. A. 535. See, also, equity rule No. 94 (29 Sup. Ct. xxxvii).

At the conclusion of the receivership, and after the certificates of stock of the Strang Land Company had been returned to him, Strang, on the day the receiver presented his final report, filed his application in the receivership suit for damages which he alleged he had sustained as a stockholder of the Strang Land Company. His petition is based upon the theory that Edson held the stock for the Strang Land Company in a fiduciary capacity, and therefore is liable for the loss to the company of the 80 acres purchased by Mrs. Edson; that this loss to the company depreciated the value of the stock, and that, as Strang owned practically all of the stock, the greater loss fell upon him; that Edson's alleged miscon-

duct in respect of this 80 acres of land was misconduct in his official capacity as receiver. To this petition the receiver answered, the appellant replied, and testimony was taken. On the 2d of March, 1910, the Circuit Court found the issues in favor of the receiver and entered a decree dismissing appellant's petition. On the 24th of March, 1910, the court, upon application made by the receiver, amended the decree theretofore entered by adding thereto the following:

"It is further ordered and decreed by the court that this decree shall operate and have the effect of a release in full to the defendant, J. A. Edson, for any and all claimed liability made or that may be made on behalf of or in the name of the Strang Land Company on account of the subject-matter of this suit."

We are of opinion that the amendment making the decree apply to the Strang Land Company cannot be sustained, for the reason that the company was not before the court, and therefore could not be affected by any orders made by it.

The trial court is instructed to modify its decree, by striking therefrom the amendment of March 24, 1910, making it applicable to the Strang Land Company, and, as so modified, the decree is affirmed.

HOOK, Circuit Judge. Since it is held that Strang cannot maintain this suit as a stockholder, it seems to me unnecessary to determine whether he ratified the transaction in question.

MISSOURI & K. INTERURBAN RY. CO. v. EDSON.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1912.)

No. 3,447.

RECEIVERS (114*)—LIABILITY ON BOND.

A receiver cannot be held personally liable to the corporation, whose property was in his custody, because of contracts or payments which were expressly authorized by the court before they were made.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 201, 202; Dec. Dig. § 114.*]

Appeal from the Circuit Court of the United States for the District of Kansas.

Suit in equity by William B. Strang against the Missouri & Kansas Interurban Railway Company. On exceptions by defendant to report of J. A. Edson, receiver. Exceptions overruled, and defendant appeals. Affirmed.

Justin D. Bowersock (Lester W. Hall, on the brief), for appellant.
Samuel W. Moore, for appellee.

Before HOOK, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RINER, District Judge. William B. Strang, a judgment creditor, on the 4th of June, 1908, filed a bill against the appellant, the Missouri & Kansas Interurban Railway Company, averring that the property of the appellant was incumbered by a mortgage; that its pay rolls were unpaid and its credit impaired, so that it was unable to meet its obligations; and that its property was in danger of seizure and sale. It was further averred in the bill that the motive power used to operate the road was not adapted to the purpose, and that it was necessary to install an overhead trolley system before the property could be operated at a profit. The bill contained a prayer for the appointment of a receiver, the ascertainment of the demands and liens of creditors, a sale of the property, and the distribution of the proceeds. To this bill the appellant filed its answer, admitting the allegations of the bill, and consenting to the appointment of a receiver. J. A. Edson, the appellee, was thereupon appointed receiver, and qualified on June 10, 1908. On the 6th day of July, 1908, the receiver filed a petition asking for instructions, and by consent of all parties an order was entered authorizing the receiver to borrow \$350,000 and to issue receiver's certificates therefor as might be needed for the following purposes:

(a) For the payment of debts and liabilities, the payment of which is provided for in the order appointing the receiver herein.

(b) For repairs upon track and roadbed.

(c) For changing the road into an electric trolley line and installing a system for operation by electricity.

(d) For the purchase or acquisition of proper equipment therefor.

(e) For the purpose of paying and discharging the indebtedness of the railway company and for the purpose of releasing its securities.

Of the \$350,000 worth of certificates authorized, but \$200,000 worth were issued, and the work of equipping the road with an overhead trolley system was completed in December, 1908. September 24, 1909, the railway company filed its application for the discharge of the receiver and the restoration of its property. October 21, 1909, a final decree was entered, restoring the property to the railway company, and reciting that the receiver's certificates theretofore issued had been paid, canceled, and filed. The receiver filed his final report on the 15th day of November, 1909. To this report the appellant filed two exceptions, which were overruled, and it is from the order of the court overruling these exceptions that this appeal is taken.

The receiver, having found it impracticable to make a sale of the certificates to the amount authorized by the order of June 6, 1908, on the 11th day of August, 1908, applied to the court for authority to sell certificates to the amount of \$125,000, par value, to the First National Bank of Kansas City, the proceeds to be used for the purposes specified in subparagraphs "a," "b," "c," and "d" of paragraph 1 of the order of June 6, 1908. The court authorized the sale by the following order:

"The application of the receiver to enter into a contract with the First National Bank of Kansas City for the sale to the said bank of receiver's certificates to the amount of one hundred and twenty-five thousand (\$125,000.00) dollars, par value, came on for hearing; and, the court being fully advised in the premises, it is ordered that the said receiver, J. A. Edson, be and he is hereby authorized to execute a contract with the said First National Bank of Kansas City in accordance with the draft of the same which is hereto attached."

This order was entered with the express consent and approval of the president and solicitor of the appellant. The contract provided that the certificates issued to the bank, so long as they were held by the bank, should be prior, senior, and first to any other receiver's certificates issued by said receiver.

October 10, 1908, the First National Bank of Kansas City expressed a willingness to take additional certificates to the amount and value of \$25,000, the proceeds to be used for the purposes specified in the order of August 11, 1908, and the receiver made application to the court for authority to make the sale. On the same day the court authorized the sale and the execution by the receiver of a supplemental agreement with the bank covering it.

Thereafter, and on June 21, 1909, the court by an order authorized the sale of certificates of the par value of \$70,000 to the Commerce Trust Company, but under this order only \$50,000 worth of certificates were issued. The contract with the Commerce Trust Company for the sale of certificates to it provided that the proceeds were to be applied to one or more of the purposes specified in subparagraphs "a," "b," "c," "d," and "e" in paragraph 1 of the order of July 6, 1908, and no complaint is made that the proceeds received from the sale of any of the certificates were not applied to the purposes authorized.

It is contended by the appellant, under its first exception, that the contract made between the receiver and the First National Bank, in which it was agreed that any additional certificates issued by the receiver should be inferior in lien to those sold to the bank, prevented the sale and disposition of the full amount authorized by the order of July 6, 1908, and that the company was required to pay \$14,500 to obtain an extension on a note, secured by the bonds of the company deposited as collateral, which had been negotiated for its benefit in New York; and it now seeks to hold the receiver personally liable in damages for the money paid to obtain the extension on the note. This cannot be done, for several reasons: First. Because the contract with the bank, before it was executed, was reported to and authorized by the court, with the consent of the president and solicitor of the appellant. Second. Because the contract did not prevent the negotiation and sale of the entire amount. If purchasers could be obtained for all of the certificates authorized, the certificates held by the bank could have been taken up, and the other certificates issued would then have become a first lien upon the property. Third. In any event the damages claimed were altogether too remote.

The receiver, acting under orders of the court, entered into a contract with Arnold & Co., contractors, for installing an overhead trol-

ley system, Arnold & Co. to receive as compensation a percentage of the cost thereof, and to have in addition thereto the use of certain equipment, owned by the railway company, while performing the work. It is insisted, under the second exception, that the value of the use of this equipment should have been charged against Arnold & Co. and deducted from their final payment. This contention is wholly without merit. The compensation to be paid Arnold & Co. was a percentage of the cost; permitting them to use the equipment of the railway company diminished the cost, and necessarily diminished the compensation to be paid them; therefore, instead of being injured, the appellant was directly benefited. In addition to this, the agreement, before it was entered into, was authorized by the court, and when Arnold & Co. presented their final account it was approved by the court and the receiver directed to pay it. These orders fully protected the receiver from any personal liability.

Affirmed.

NIAGARA FIRE INS. CO. OF NEW YORK et al. v. ADAMS et al.

(Circuit Court of Appeals, First Circuit. September 10, 1912.)

No. 958.

COURTS (§ 335*)—STATE PRACTICE—JURISDICTION—ADEQUATE REMEDY AT LAW
—SUIT FOR CANCELLATION OF INSURANCE POLICY.

A federal court of equity will not follow a practice of the courts of the state in which it sits, by entertaining a suit for the cancellation of an insurance policy for fraud of the insured, where the facts alleged would not only constitute a complete defense to an action at law on the policy, but would support an action at law for deceit. *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, and *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, applied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 902-907½; Dec. Dig. § 335.*]

Conformity of practice in common-law actions, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Suit in equity by the Niagara Fire Insurance Company of New York and another against Alma H. Adams and others. Decree for defendants, and complainants appeal. Affirmed.

The following are the opinions of Dodge, District Judge, in the lower court

On Demurrer to Bill.

According to this bill the complainant Niagara Fire Insurance Company issued two policies of fire insurance to the defendant Adams, covering the personal property in the building 47 Juniper street, Boston, and the complainant Glens Falls Fire Insurance Company issued to her one policy covering the same property. The Niagara Company's policies, Nos. 92,407, for \$2,000, and 100,779, for \$4,000, were issued November 21, 1908, and November 22, 1910, respectively; the first-mentioned policy being made payable to the defendant McGinnis, mortgagee, as interest may appear. The Glens Falls Company's policy No. 60,476, for \$1,000, was issued April 23, 1910. Proofs of an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alleged loss under the policies have been presented, whereof the defendants are claiming payment from the complainant companies. The complainants ask the court to declare these policies void for fraud and to enjoin the defendants from suing or enforcing them.

The allegations of fraud are that the two defendants, having been closely associated for years, and being without financial resources, fraudulently agreed and conspired to obtain the policies described, upon articles of little or no value, for the purpose of causing the property to be destroyed by fire and of fraudulently obtaining from the plaintiffs payment of the policies above mentioned; that in pursuance of this plan the defendant McGinnis falsely represented to the Niagara Company, on or about November 20, 1908, that she held a mortgage on Adams' personal property to the amount of \$3,000, and requested the issuance of its policy No. 92,407 for \$2,000, in Adams' name, payable to her as mortgagee as interest may appear, then well knowing that she had no mortgage upon any property of Adams, and that the Niagara Company, believing this statement, issued the policy, upon property worth not more than \$1,000; that also in pursuance of the same plan the same defendant falsely and knowingly represented to the same company, on or about November 20, 1910, that she had sold \$4,000 worth of personal property to Adams, and requested the issuance of its policy No. 100,779 to Adams in order to obtain said insurance on property of little value, and that the Niagara Company, believing said statement, issued said policy accordingly; that the defendant Adams represented to the Glens Falls Company, at some time not specified, that she owned a large amount of valuable property on which there was no other insurance, knowing at the time that she held the policy No. 92,407 above mentioned, and that neither defendant at any time disclosed to either company that the other company had issued policies on the property; and that the defendant Adams in pursuance of said plan set a fire, or caused it to be set, at 47 Juniper street, on December 15, 1910, for the purpose of destroying all the insured property and obtaining payment of a total loss under the policies, but that only part of the property was destroyed by fire, and part of the remainder was damaged by fire, smoke, and water. It is further alleged that Adams never executed any mortgage to McGinnis, but had bound herself by written agreement to pay McGinnis \$7,000, with interest at 6 per cent., in weekly payments of \$10 each, for a large number of perishable articles specified in the proofs of loss afterward presented, wherein the price of each article was fixed far in excess of its value, in order to show that the value of the insured property intended to be destroyed by fire would equal or exceed the total amount insured under all the policies.

The Niagara Company may have believed the alleged false statements to be true when it issued its policies 92,407 and 100,779, but there is no distinct allegation that it was induced to issue them by its belief in the truth of those false statements. Whether the defendant McGinnis held a mortgage on the property or not, or to what amount, would not appear to have been material when the policies were issued. In case of loss under the policies, she would in any event have had to prove her interest in order to recover. Nor would the value of the property appear to have been material when the policies were issued. To recover after a loss, the insured would have to prove the value of what was lost. As to the policy issued by the Glens Falls Company, the bill does not even allege that the statements claimed to have been false were believed to be true by the insurer when it issued the policy, and the statement that there was no other insurance on the property does not appear to have been material, in view of the usual provisions regarding other insurance which all the policies contain. But, assuming it to be shown that the insured took out all the policies in pursuance of a previous plan to cheat the insurers by causing a fraudulent loss, there can be no question that this would show all the policies to have been void when issued, like any contract into which one party enters for the purpose of cheating the other by means of it. *Dow v. Sanborn*, 3 Allen (Mass.) 181; *Haigh v. Delacour*, 3 Camp. 319.

Proof of such a fraud, however, would be a complete defense to an action at law on either policy, and although a federal court of equity may in a proper case order the surrender and cancellation of a policy of insurance void

for fraud in obtaining it, yet it will not generally do so, after a loss is claimed, when the fraud can be perfectly well established as a defense at law in a suit on the policy. Special circumstances must be shown, threatening irreparable injury to the insurer, if he is denied a preventive remedy. That he has no choice of the time of the commencement of the action at law, or less control of its conduct than the insured, are not circumstances sufficient for the purpose. All this appears to be now settled by the decision of the Supreme Court in *Cable v. Insurance Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188 (1903). See, also, *Riggs v. Insurance Co.*, 129 Fed. 207, 63 C. C. A. 365; *Insurance Co. v. Griesa* (C. C.) 156 Fed. 398; *Griesa v. Insurance Co.*, 169 Fed. 509, 513, 94 C. C. A. 635, in the Court of Appeals for the Eighth Circuit, following *Cable v. Insurance Co.*

The bill alleges that the defendant McGinnis may sue the Niagara Company at law on its policy 92,407, that the defendant Adams may also sue it at law on its policy 100,779, that Adams may also make it defendant with McGinnis in an equity suit to establish the respective interests of the two defendants under its policy 92,407, and that Adams may also sue the Glens Falls Company on its policy 60,476. This prospect of a multiplicity of suits is relied on to establish the complainants' right to equitable relief.

It is obvious that part of the apprehended multiplicity is because of the fact that two separate insurers have joined in this bill as complainants; but no connection between them, and no dependence of either on the other, in the issuing of their respective policies, is alleged, and the dates of the policies, as stated, are widely separated. Nor is it alleged that the amount for which either insurer may be held depends on the amount of liability of the other, as in *Virginia-Carolina, etc., Co. v. Home, etc., Co.*, 113 Fed. 1, 51 C. C. A. 21. Except that the policies cover the same property, the frauds alleged upon the respective insurers were distinct and independent. The Glens Falls Company which has issued one policy only on the property can hardly claim rights in equity, which it would not have if it stood alone, because the Niagara Company issued two policies on the same property, one some 18 months earlier and one some 6 months later than its own policy. The two insurers in combination have no more of a cause of action in equity than either would have independently. *Insurance Co. v. Mohlman Co.* (C. C.) 73 Fed. 66; *Insurance Co. v. Hoover, etc., Co.*, 173 Fed. 888, 891, 97 C. C. A. 400, 32 L. R. A. (N. S.) 940.

If the Niagara Company issued two policies on the property, one two years later than the other, the first payable to the alleged mortgagee, as interest may appear, it may be subject to more than one suit; but it can hardly be said to be subject to more than one on the same contract. Litigation between the two insured under one of the contracts can hardly be said to increase the number of possible suits which the insurer may have to defend. That it may have to defend suits on each of the two policies referred to I am unable to regard as establishing a sufficient probability of irreparable injury to it. *Insurance Co. v. Pearson* (C. C.) 114 Fed. 395, decided in this court in 1902, is the authority most relied on by the complainants; but the apprehended multiplicity of suits there treated by the court as a circumstance sufficient, with other circumstances, to establish jurisdiction in equity, consisted in a possibility of many successive suits arising out of the same policy. I find no authority for holding that when the insurer has issued two policies on widely separated dates, though to the same insured and on the same property, the prospect of a suit against him on each policy is enough to entitle him to bring the insured into a court of equity.

None of the other facts alleged in the bill seem to me sufficient to warrant its maintenance, if it cannot be maintained upon the alleged grounds already discussed. The demurrer is therefore sustained. The temporary injunction in force may, if the complainants request it, be continued in force long enough to afford them an opportunity to appeal.

On Demurrer to Amended Bill.

Since the demurrer to the original bill was sustained (see opinion above), the plaintiffs have, with the defendants' consent, been allowed to amend the bill as set forth in their motion filed December 4, 1911.

The amendment has cured some of the defects found to exist in the original bill. It is now averred that the plaintiff Glens Falls Company believed the alleged false statements; also that both the plaintiff companies relied upon said statements and were thereby induced to issue their policies.

The amendment also sets forth the "other insurance" clause found in each policy. Copies of the policies are annexed to the original bill, and this quotation is not, strictly speaking, an amendment. The amendment goes on to aver that by reason of the clause quoted the amount of liability of either insurer depends upon the amount of liability of the other. The clause is in common use in similar policies, and does not, to my mind, bring about the result averred. Recovery under either policy is not made dependent on the amount recovered under the others, but upon the amount insured by them.

The remainder of the amendment changes the wording of the twenty-first paragraph of the bill, but does not seem to me to add anything material. The reasons against taking jurisdiction in equity of the controversy set forth, with the result of depriving the defendants of their right to resort to a court of law, seem to me no less strong than before.

The present demurrer is therefore sustained.

Arthur J. Selfridge, of Boston, Mass., for appellants.

Thomas M. Vinson, of Boston, Mass., for appellee Adams.

W. Kittredge, of Boston, Mass. (Kittredge & Dana, on the brief), for appellee McGinnis.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. To state this case in a short way, but sufficient for our purposes in view of our references to the opinions of the learned judge of the Circuit Court, this is a bill filed by two fire insurance companies, which issued three fire policies, two by the Niagara Company and one by the Glens Falls Company, to the two respondents, who are each asserting certain interests in the property to which the policies relate. The bill alleges frauds in obtaining the policies which, if proved, would be a full defense to them at either law or equity. It also alleges that a portion of the property was destroyed by fire during the currency of the policies, but that only a portion of the property was so destroyed. It also alleges that the respondents hold the policies, and refuse to surrender the same, and pretend to have a claim thereon for possible future loss, "so that, if the remainder of said property should be destroyed by fire, they would have an additional claim under said policies."

The two policies issued by the Niagara Company expired after the decree in the Circuit Court, and after the appeal to this court was perfected. Therefore as to them the appeal becomes a moot appeal, and necessarily fails.

The bill was amended to cover a certain lack of specific allegations, and demurred to in its amended form. The demurrer was sustained, and a decree entered for the respondents, whereupon the complainants appealed to us. No question of pleading now remains, and the case is before us on the merits.

The bill, in addition to the charge of fraud, alleges that there are certain questions of contribution between the two companies, and certain other questions of adjustment, which threaten a com-

plication and multiplicity of litigation, enough to furnish a basis for this bill in equity. There is, however, nothing here beyond the ordinary questions of contribution, which always occur, in the main, as between concurrent underwriters; and as to this proposition we accept the reasoning and conclusion of the Circuit Court.

Also, as to the principal relief sought for by the bill, which is for cancellation of the policies by reason of the alleged fraud in obtaining them, we observe that the topic has been fully discussed by the learned judge of the Circuit Court in two opinions passed down by him; and we are satisfied with the reasoning of the opinions and the conclusions reached therein. We adopt the same, with some additions thereto, as follows:

The conclusions of the Circuit Court on this branch of the case depend on the general proposition that the complainants have full remedy at law; so that, within the authorities cited by the court, among which is *Cable v. Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188 (1903), the bill cannot be maintained, inasmuch as none of the exceptional reasons for maintaining it appears. However, the complainants maintain that, in accordance with the decision of the Supreme Judicial Court of Massachusetts, constituting the district in which these occurrences arose and this litigation was carried on, state courts in equity would have full jurisdiction on the facts shown here, for which see *Commercial Ins. Co. v. McLoon*, 14 Allen (Mass.) 351, the Circuit Court should have accepted the jurisdiction as claimed by the complainants, even though, independently of the local practice, it could not have been required to do so. Of course, the complainants understand that, in matters of equity, the statutes of the United States do not require the federal courts to follow the rules of practice prevailing in the state courts, as they require this in common-law proceedings. Nevertheless the complainants rely on the fact that in some cases, by certain analogies, the federal courts do accept special rules of the locality of the district within which the litigation is pending, giving rights and privileges in equity beyond those usually recognized by the courts of the United States. This, however, never has gone so far as now asked for by the complainants. Perhaps *Cowley v. Northern P. R. Co.* (1895) 159 U. S. 569, 582, 583, 16 Sup. Ct. 127, 131 (40 L. Ed. 263) states this exceptional rule as well as it can be stated anywhere, in the following language:

"Although the statute of a state or territory may not restrict or limit the equitable jurisdiction of the federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common-law side."

Of course, all the decisions in this direction limit this to matters which are of an equitable nature, while in the case at bar there is at the outset no state statute establishing a new right or privilege. We are asked to follow in equity a practice of the state courts not based on any particular legislation, but on general rules of law. If we should admit that proposition here, it would fol-

low that we must in every case in equity follow the practice of the local tribunals. This, of course, no one would undertake to maintain. But this is not all.

It cannot be questioned that in England at the time to which the rules of the Supreme Court in equity refer us, and according to the practice which prevailed in the United States prior to the later decisions of the Supreme Court, and aside from the statute to which they refer, there was a general equity power to set aside instruments obtained by fraud, whether there was a full defense at law or not, and whether or not the case had so far ripened that the parties against whom a bill in equity was brought had a right of action which might be immediately enforced. This was an old rule, as ancient as the period in England when the courts of common law had only limited powers with reference to defenses based on fraud. That equitable right having once originated was never lost, and was early recognized by various Chancellors in the United States, and by the text-writers. For example, Story's Equity Jurisprudence, the first edition of which was published before the decision in *Ins. Co. v. Bailey*, hereinafter referred to, affirmed the general right to compel delivery up and cancellation of agreements, securities, deeds or other instruments obtained by fraud, without any limitation. This was a wholesome doctrine, and was free from the uncertainties and embarrassments connected with the new rule of the federal courts, as fully manifested in *Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, decided at the December term, 1871, and *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451 (1886). These decisions were based on the Judiciary Act of 1789. While ordinarily the Supreme Court has not applied that act to cut down the ancient equitable jurisdiction, it has clearly done so with reference to the particular topic concerned here. The extent to which this line of decisions reaches is shown in *Buzard v. Houston*. There the rule of *Ins. Co. v. Bailey* is fully developed and explained; and this line of decisions necessarily reaches the case at bar, and every aspect of it, notwithstanding there may be a remnant of one of the policies, the Glens Falls policy, which has not yet ripened, so far as an existing right of action is concerned.

We thus refer to *Buzard v. Houston*, first as demonstrating the application of the limitation of the exceptional practice relied on by the complainants, to the effect that in some cases the federal courts may adopt in equity the peculiar rules of the state courts. *Ins. Co. v. Bailey* and *Buzard v. Houston* show that the rules as to cancellation of instruments governing the federal courts grow out of a statute of the United States, which, of course, controls the federal courts, whatever may be the local practice, or even local statutes. Therefore, for this special reason, no federal court would be justified in adopting the local procedure under the circumstances arising here.

We also refer to *Buzard v. Houston* for the second reason, that it establishes the proposition that the learned judge of the Circuit Court was right in holding that there are no peculiar circumstances

here which take this case out of the general rules with reference to the cancellation of instruments. In *Buzard v. Houston* certain untruthful representations were involved which were shown to be false; and yet the court set up the statute of 1789 as a full defense to a proceeding in equity, because it said, at page 253, that "the present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate, and complete remedy." In the present case, if the complainants should bring an action of deceit for fraudulent representations, and maintain their suit, they would obtain a judgment which would create a complete estoppel as against any suits on the policies. This is a fundamental proposition, which disposes of the case in any aspect.

The decree of the Circuit Court is affirmed, and the respondents recover their costs of appeal.

UPDIKE GRAIN CO. v. P. P. WILLIAMS GRAIN CO.

(Circuit Court of Appeals, Eighth Circuit. July 17, 1912.)

No. 3,642.

SALES (§ 72*)—CONTRACT FOR SALE OF GRAIN—CONSTRUCTION—"COUNTRY RUN" OATS.

Evidence considered, and *held* to sustain a finding that "country run" oats, according to the usage and understanding of the grain trade, means the grain as it comes from country stations in car load lots, with the identity of the contents of the several cars preserved, and that a contract for the sale of such oats was not complied with by furnishing oats which had been in a terminal elevator.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 197-202; Dec. Dig. § 72.*]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action at law by the Updike Grain Company against the P. P. Williams Grain Company. Judgment for defendant, on counterclaim, and plaintiff brings error. Affirmed.

Richard A. Jones and Smyth, Smith & Schall, for plaintiff in error.
Arthur B. Shepley and Nagel & Kirby, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. On the 31st of August, 1908, the plaintiff, Updike Grain Company, and defendant, P. P. Williams Grain Company, at Omaha, Neb., entered into a contract in writing for the sale by the plaintiff and the purchase by defendant of 100,000 bushels of No. 3 White Oats at 50 cents per bushel; 50,000 bushels of which were to be delivered the first half of October at St. Louis, Mo., following the contract, and the other 50,000 bushels

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be delivered the last half of October at St. Louis, Mo., following the contract. This contract provided that the Omaha weights and inspection should control. The oats were to be what is known as "country run" oats, and the whole question turns upon what "country run" means in this contract.

On October 1, 1908, plaintiff shipped to St. Louis on account of the contract in question, 24 cars of oats, containing 30,937 bushels. The bills of lading therefor were attached to a draft on defendant for \$14,676.76, which draft was presented to and paid by defendant before the arrival of the oats in St. Louis. As soon as defendant received the oats, it notified plaintiff that the oats were not, in its judgment, "country run" oats, and requested plaintiff to take back the same, which request was refused. Thereafter, on or about October 5, 1908, plaintiff shipped to defendant 14 cars containing 19,218 bushels of oats, and on October 19, 36 cars containing 46,718 bushels, all of which the defendant refused to receive and pay for. Plaintiff brought this action to recover \$3,210.66, the difference between the price which the defendant agreed to pay and the price at which the plaintiff was obliged to sell that part of the oats which the defendant refused to receive. The defendant interposed a counterclaim for \$1,062.50, the difference between what it had paid for the oats which it received, and what those oats were worth. The case was tried by the court without a jury, and judgment entered for the defendant on its counterclaim for \$773.42.

The court made the following finding:

"(8) All of the oats shipped by plaintiff to defendant were loaded out of the South Omaha elevator of plaintiff from bins in which there had, during the previous month, been accumulated, stored, and commingled the contents of various cars. In making this shipment to defendant, in no case was the identity of the contents of any car as it ran from a country station preserved; but in each case the car was loaded from the stock which had been accumulated and stored in the bins of the elevator."

No objection is made to this finding by either party. The claim of the plaintiff is that the oats came from country elevators in different cars, that these cars containing nothing but country elevator oats were all placed in the same bin, that they were not mixed with any other oats or with anything else, and that the identical oats which were put in the bin were loaded into cars and shipped to the defendant; and the plaintiff insists that after being handled in this way they were "country run" oats. The defendant claims that in order to be "country run" oats the identity of the oats as they came from the country must be preserved; that if it is necessary to transfer them from the car into which they were loaded at the country elevator that transfer must be what is known as a direct transfer, that is, from car to car; and that if the oats are put into a bin in a terminal elevator, even though the same oats are later taken out of the bin, they cease to be "country run" oats.

Upon this question the court found as follows:

"(5) By the general and established usage and understanding of the grain trade among merchants and dealers, the term 'country run,' when used in a contract for the sale of grain, meant and signified grain as it came in from

country stations in car load lots, with the identity of the contents of the several cars preserved, which had never been accumulated or stored in a terminal market elevator in bins in which the contents of a number of cars had been mixed or mingled. This general usage and understanding was known to both parties, and no established local usage to the contrary was shown to exist in Omaha. Omaha was a terminal market and the South Omaha elevator of plaintiff was a terminal market elevator within the meaning of that term."

This finding is fatal to the plaintiff if there is evidence to sustain it. The evidence is ample to show that the custom required the identity of the grain to be preserved, and forbade its entrance into a terminal elevator. There is also evidence to support the court's finding that the rule in Omaha did not differ from the rule elsewhere prevailing. Some of this evidence can be found in the testimony of the plaintiff's own witnesses. Cope, its treasurer, testified as follows:

"Q. It is understood to mean grain from the country elevator as distinguished from a terminal elevator? A. Yes; at the same time it could be 'country run' out of a terminal elevator.

"Q. That is not the general understanding? A. No, it is not."

He also testified as follows:

"Q. And that general meaning is that it is oats that has not been through a terminal market; that is the general meaning? A. It is generally understood that 'country run' oats are oats that are not from a terminal market, although they ship 'country run' oats through a terminal market. * * *

"Q. Suppose the Williams Company, in their elevator here (St. Louis) handled those oats in identically the same way you handled them in your South Omaha elevator; would they not be 'country run,' according to your definition, when loaded out for shipment to Chicago, Nashville, or anywhere else? A. No, sir.

"Q. You say they would not? A. No, sir."

Kearney, the plaintiff's superintendent, at the time of the transaction, testified as follows:

"Q. Why did you say, Mr. Kearney, that you would not have put into your South Omaha elevator with these oats, oats that came from a terminal market? A. Because I could not do it and be sure that they were 'country run' oats.

"Q. Because you would not know when they went into that elevator whether something had been done to them when they came out; is not that the fact? A. That is, the elevator from which we received them?

"Q. Yes. A. Yes, sir.

"Q. In other words, you think with respect to that grain that before you call it 'country run' you are entitled to the insurance of that fact, with the further fact that the grain comes in in the original car from the country? A. To be sure of it being 'country run' I would expect—

"Q. It would have to come in in the car from the country? A. From the country station.

"Q. In order to satisfy you it was 'country run'? A. Yes, sir.

"Q. And you would not receive anything that did not have that stamp of genuineness on it? The fact that it was in the original car? A. I would not consider it 'country run' oats."

Huntley, another witness for plaintiff, testified as follows:

"Q. But the identity of that car, that is, the identity of the contents of that car is preserved, is it not? A. It is supposed to be.

"Q. Well, in the absence of dishonesty it is, is it not? A. Where there is a direct transfer."

It is evident from the testimony that, if when a contract is made nothing more is said or done than to put the words "country run" into it, the phrase does not indicate the quality of the grain, but rather the way in which it is handled. The rules of the Omaha Grain Exchange contain no mention of "country run" as a grade or description of grain. Under the terms of this contract which provides for Omaha weights and inspection, the officials of the Exchange had authority to determine whether the oats shipped to the defendant were No. 3 white oats and to weigh them, but they had no authority to determine whether or not they were "country run."

When the defendant bought "country run" oats, it bought not only oats that came from country elevators, but also oats that had never been in a terminal elevator at Omaha. What the defendant wanted was oats which, originating in the country, had not been mixed with other oats or with anything else. The only way to be sure of that was to provide that they should not go through a terminal elevator. Once put in an elevator, no one could tell what would happen to them. Reliance would have to be placed upon what the men in charge of the elevator said had happened to them. For some reason the trade was not willing to so rely. The plaintiff's treasurer was asked: Supposing that, after the defendant received this grain from the plaintiff, it had shipped it to Kansas City, if that grain would there be considered to be "country run," and he answered that he would not so consider it. When asked why, he replied, "Because I don't know whether Williams & Co. mixed it in the elevator or not, or anything about it."

The only proof in this case that the identical oats received from the country elevators, after being stored some time in plaintiff's elevator at Omaha, went to the defendant in St. Louis, is the parol testimony of the plaintiff's superintendent, which is not altogether satisfactory.

That the words "country run" may sometimes be used in a different sense from that stated in the findings is indicated in some of the evidence for the plaintiff. But that same evidence (of the plaintiff's treasurer) also indicates that, when they are used in a different sense than that above specified, "all the facts surrounding the grain must be thoroughly understood between the buyer and the seller, and probably a sample submitted, so they can arrive at an intelligent basis to frame up their contract."

The claim that the oats had to go into a bin in a terminal elevator at Omaha in order to be weighed and inspected, the contract providing for Omaha weights and inspection, finds no support even in the testimony of the plaintiff's own witnesses.

The judgment of the court below is affirmed, with costs.

HORNER v. CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK.

(Circuit Court of Appeals, Seventh Circuit. March 8, 1912. Rehearing Denied May 7, 1912.)

No. 1,824.

RECEIVERS (§ 142*)—SALE—CAVEAT EMPTOR.

Where a purchaser at a receiver's sale of the property of a corporation did not rely on the inventory and appraisalment, but embraced an opportunity to examine the property, after which he bid a specified price, which was accepted, the rule of caveat emptor applied, and he was not entitled to an abatement of the price, because of inability of the receiver to deliver certain of the property contained in the inventory.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 248-251; Dec. Dig. § 142.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Red River Lumber Company against the Maxwell Bros. Company, in which the American Trust & Savings Bank of Chicago, subsequently changed to the Continental & Commercial Trust & Savings Bank, having been appointed receiver of all defendant company's property, sold the same to Sidney A. Horner, and he, not having obtained possession of all of the property purchased, applies for an order requiring the receiver to turn over the property not delivered. From an order awarding petitioner a partial payment of the price, to cover the property not delivered, he appeals. Affirmed.

Lloyd C. Whitman and Henry Horner, for appellant.

Fred H. Atwood, Frank B. Pease, and Charles O. Loucks (John S. Hummer, of counsel), for appellee.

Before BAKER and SEAMAN, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. On the 14th day of July, 1910, the Red River Lumber Company filed in the court below its bill against Maxwell Bros. Company. The bill averred the insolvency of the defendant, and prayed that the court appoint a receiver to conserve the property of the defendant, marshal the assets, determine the liabilities, and award the usual relief awarded upon such bills. On the next day, July 15th, the American Trust & Savings Bank of Chicago, whose name was afterward, during the pendency of the cause, changed to the Continental & Commercial Trust & Savings Bank, was appointed receiver of all the property and estate, real, personal, and mixed, of the defendant, Maxwell Bros. Company. The receiver qualified, and on July 26th filed its inventory of the property coming into its possession as such receiver. Upon petition of the receiver the court ordered that the receiver solicit and advertise for bids for the property. Thereafter one Winternitz, having been appointed to appraise the property, filed his appraisalment, giving his valuations

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the items contained in the inventory. On October 7, 1910, the appellant, Sidney A. Horner, submitted his bid for the property to the receiver, as follows:

"Continental & Commercial Trust & Savings Bank, Receiver of Maxwell Bros. Company: I do hereby bid the sum of eighty-one thousand dollars (\$81,000) for all of the real and personal property of the above-named defendant, mentioned and as described in the appraisalment on file in this court in the above-entitled cause, free and clear of all liens, incumbrances, taxes, assessments, and all other charges thereon, except the general taxes levied thereon for the year 1910. It is understood that for the amount of this bid we are to receive a good and merchantable title to said property, and that this bid shall also include all personal property contained in and about the company's plant at or near Twenty-First and Loomis streets, and in the barn in that vicinity, and also all personal property on the dock and in the sheds near the plant of said company, and shall include the real estate described as:"

Then follows the description of the real estate, with which we are not now concerned. On October 11, 1910, the receiver filed its petition with the court, asking that said bid be accepted, which petition was granted, and an order entered that the bid be accepted and the sale made. The \$81,000 was paid, and the property was immediately turned over to the purchaser. On November 22, 1910 the purchaser, the appellant here, filed a petition in the cause, setting forth the appointment of the receiver, the appraisalment of the property, his bid, and the acceptance of the same, the completion of the purchase, and averring that the receiver failed to turn over the following personal property listed in said appraisalment, to wit:

- 1,586 brass printing plates.
- 516 steel printing plates.
- 28 brass printing plates.
- 900 bundles of hickory straps.
- 156 bundles of hickory straps.
- 6½ tons of hay.
- 14 sacks of alfalfa.
- 200 bushels of oats.
- 1 single set of harness and 1 buggy.
- 200 assorted saws.
- 60,000 oak keg staves.
- 41,000 pounds of hoop iron.
- 250,560 feet of pine and hardwood lumber.

The petition averred that the printing plates, composing the first three items, were not turned over by the receiver because they belonged to other persons than the defendant, Maxwell Bros. Company. As to some of the remaining items it was averred that they were not delivered to the purchaser at all. These items are of small value. The chief claim made was that there were shortages in the property; that there was not so much of it on hand and turned over to the purchaser as was shown upon the inventory and appraisalment.

The master heard a large amount of evidence and made his report finding that the purchaser based his bid upon the appraisalment; that there was a mutual mistake made by the parties to the

sale; that the following property purchased by the petitioner was not delivered to him:

| | |
|----------------------------------|------------|
| 1,614 brass printing plates..... | \$ 617 35 |
| 516 steel printing plates..... | 51 60 |
| 156 bundles hickory straps..... | 78 00 |
| 200 assorted saws..... | 11 00 |
| 41,000 lbs. hoop iron..... | 820 00 |
| 248,400 ft. of lumber | 3,477 60 |
| Total | \$5,055 55 |

—and recommended that the receiver be directed to pay appellant said sum of \$5,055.55.

Numerous exceptions were filed to the master's report. On April 19, 1911, the court overruled all the exceptions of the purchaser, and sustained all the exceptions of the receiver, except in so far as they applied to the printing plates. The receiver has not assigned cross-error upon the court's ruling as to the printing plates, although in our view of the case it might well have done so.

The sale was a judicial sale in bulk. The property sold for \$81,000. It was appraised at \$126,787.56. The purchase price was paid, and the property in the hands of the receiver was delivered to the purchaser, and presumably he has disposed of it. He made no offer to rescind, to return the property when he discovered the shortages, but kept all he got and asked to be made good for the shortages. There is in the case no claim of fraud. The evidence discloses, not only that there was an opportunity given to examine the property, but that the purchaser and his agent did look over it at least twice before the sale was made. Upon this record the question is presented: Shall the purchaser at the sale be awarded the sum allowed by the master, or any sum, because of the mutual mistake which the master found was made, or does the rule *caveat emptor* apply?

"The maxim '*caveat emptor*' is applied in all its force to judicial sales of personal property. There is no warranty, in law, for there is no one to fall back on." Rorer on Judicial Sales (2d Ed.) § 528.

"The rule of '*caveat emptor*' applies in all its rigor to judicial sales. The Supreme Court of the United States hold that 'generally in all judicial sales the rule "*caveat emptor*" must necessarily apply from the nature of the transaction there being no one to whom recourse can be had for indemnity against any loss which may be sustained. Is there, then (they ask), anything peculiar in the powers of a court of admiralty that will authorize its interposition, or justify granting relief to which a party is not entitled by the settled rules of the common law?' They say, 'We know of no such principles.' Though the case in which this doctrine is thus broadly asserted was a case in admiralty, it will be seen that the decision was avowedly put upon the principles of the common law. The same case is expressly referred to and the same principle reasserted by the United States Court of Claims in the case of *Puckett v. United States*." Rorer on Judicial Sales (2d Ed.) § 476.

The same author, in section 475, says:

"It is a well-settled principle that in judicial sales there is no warranty. This principle, as a general rule, holds good as to all those sales of property, real or personal (they being in character judicial sales), made in equitable proceedings under the direction and control of the courts, usually denom-

inated mortgage sales, guardian's, executor's, and administrator's sales, sales for enforcement of vendors' and statutory liens, and sales in proceedings for partition. In short, in all sales made under supervision and control of the courts on decrees in equity or on decrees made in the exercise of equity powers, there is no warranty, and the purchaser takes what he gets. The officer, trustee, or person executing the deed is the mere 'agent or instrument' of the court, is not liable for defect of title or insufficiency of the proceedings, nor at all, except for fraud, unless he conveys with warranty, and then the covenant of warranty binds him personally, and him only. In the *Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174, this rule is plainly asserted by the Supreme Court of the United States, and it is the general doctrine in most, if not all, of the states, and of the common law."

The purchaser in his bid expressly stated:

"This bid shall also include all personal property contained in and about the company's plant at or near Twenty-First and Loomis streets, and in the barn in that vicinity, and also all personal property on the dock and in the sheds near the plant of said company."

This shows that the purchaser did not, as found by the master, rely upon the inventory and appraisalment. The purpose of the clause just quoted was manifestly to include all personal property in and about the company's plant, if any, that might have been omitted from the inventory and appraisalment. Having had the opportunity to examine the property before the purchase, and having before the purchase examined the same, as shown by the record, and there being no fraud alleged or proven, no reason is seen why the rule "caveat emptor" should not apply in all its force.

The decree of the court below should be affirmed; and it is so ordered.

TRUSKETT et al. v. CLOSSER.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1912.)

No. 3,749.

1. INDIANS (§ 16*)—LANDS—TRANSFERS BY MINORS.

Act May 27, 1908, c. 199, 35 Stat. 312, authorizes the leasing of allotments of minor Indians of the Five Civilized Tribes by their guardians under order of the proper probate court of the state, but provides that the jurisdiction of such courts shall be subject to the provisions of the act. It also defines minors as including "all males under the age of twenty-one years." *Held*, that a district court of the state, acting under a state statute, cannot confer majority on an Indian allottee under the age of 21 years so as to qualify him to lease, or otherwise transfer his allotment.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

2. INDIANS (§ 15*)—LANDS—RESTRICTIONS ON ALIENATION.

Act July 1, 1902, c. 1375, § 14, 32 Stat. 717, which provides that lands allotted to Cherokee Indians shall not be alienated "before the expiration of five years from the date of the ratification of this act," does not remove the restrictions on alienation at the end of five years from the ratification of the act, regardless of the date of allotments subsequently made, but such section must be construed in connection with those pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceding and following, the latter of which expressly provides that surplus lands "shall be alienable in five years after issuance of patent."

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 44; Dec. Dig. § 15.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Suit in equity by Fred D. Closser against A. A. Truskett and W. O. Truskett. Decree for complainant, and defendants appeal. Affirmed.

James A. Veasey (L. A. Rowland, on the brief), for appellants.

G. T. Stanford and Eugene Mackey (T. H. Stanford, on the brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. Robert F. Goodman, a Cherokee Indian of one-eighth Indian blood, became 21 years of age on September 25, 1910. Nearly one year before that, and on October 12, 1909, the district court of Washington county, Okl., entered a judgment which purported to remove his disabilities as a minor, and eight days thereafter, on October 20, 1909, he leased to Overfield, the assignor of the appellants, A. A. and W. O. Truskett, who were the defendants below, the land in question, which was patented to him on March 31, 1909, as a portion of his allotment selection in the lands of the Cherokee Indian Nation, under Act July 1, 1902 (32 Stat. 716). On September 14, 1910, the general guardian of Goodman, under authority of the probate court, leased the same land to the appellee, Closser, who was the plaintiff below.

[1] As said by appellants in their brief, the exact question presented is this:

"Did the district court of Washington county, Okl., have jurisdiction to confer the rights of majority on Robert F. Goodman, a Cherokee Indian allottee of one-eighth degree Indian blood? If so, appellants' lease is valid, and their demurrer to appellee's bill should have been sustained. If not, the action of the court below was not error."

The question was presented in the court below by demurrer to the bill. On the overruling of this demurrer defendants declined to answer, and a decree was entered quieting plaintiff's title to his leasehold interest. The decision of the case requires a construction of Act May 27, 1908 (35 Stat. 312).

At the time of the passage of this act, the United States had full control of the land allotted to Goodman. In *Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, decided by the Supreme Court on April 1, 1912, which case affirmed the judgment of this court in a case reported under the name of *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, it was said:

"The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in no wise inconsistent with the retention of control over the disposition of the allotted lands was expressly decided in the case of *Tiger v. Western Investment Co.* [221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738], in which the conclusions of the court were thus stated:

"Conceding that Marchie Tiger by the act conferring citizenship obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship unnecessary to here discuss, he was still a ward of the nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. * * * Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case, when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and, while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

Section 1 of the Act of May 27, 1908, is as follows:

"Section 1. That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections 13 to 23 inclusive, of an act entitled 'An act to grant the right of way through Oklahoma Territory and the Indian Territory to the End and Anadarko Railway Company, and for other purposes,' approved February twenty-eighth, 1902 (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the state of Oklahoma."

Goodman came within the class first named in this section, having less than one-half Indian blood, and it is claimed that his allotment was freed from all restrictions. If that section stood alone, this contention might be sustained, but it must be construed with

other sections contained in the same act. Among them is section 2, which is as follows:

"Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, that the jurisdiction of the probate courts of the state of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

When Congress included minors in section 1, it had the right in other sections of the law to declare who should be considered minors for the purposes of that section. This it did in the latter part of section 2 above quoted. It is said that the declaration there made being in a proviso is limited to the section in which it is found. Congress expressly declared that such was not its intention, for instead of saying, the term minor or minors as used in this section, it said, "the term minor or minors, as used in this act." The same definition of the word "minor" is found in section 4 of the act of July, 1902 (32 Stat. 716).

The exclusive right to determine when Goodman became of age was in Congress, so far as his allotment was concerned. It declared that he should not become of age until he was 21. A law of Oklahoma which declared that he should become of age at 20 would be in conflict with the act of Congress, and would be void. So, any act of the state which authorized any of its courts to determine that Goodman became of age when he was 20, or that at such age he had the rights of an adult, would be in contravention of the same law, and would also be void. The decree of the district court of Washington county emancipating Goodman was based upon the provisions of sections 73, 74, and 75 of Wilson's Revised Statutes of 1903, which were adopted as the law of the state of Oklahoma. These statutes could confer no jurisdiction upon that court to remove the disabilities of infancy under which Goodman labored at the time the decree was made so far as his allotment was concerned. That decree was therefore void, and being void, and Goodman being a minor when the lease was made to Overfield, the latter acquired nothing thereby. The construction of this act came before the Supreme Court of Oklahoma in the case of *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755. In that case an Indian girl married when she was under 18, and while under that age conveyed her allotment. It was held that under the general law of Oklahoma the marriage emancipated her, but that this general law could not have effect in her case, in view of the provisions of the said act of May 27, 1908, and that her conveyance was void.

Section 6 of the act, so far as here important, is as follows:

"Sec. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

The appellants claim that the phrase "except as otherwise specially provided by law" refers to and includes the laws of Oklahoma. It is apparent, however, that the law therein mentioned must be federal law, and not state law. It cannot for a moment be supposed that Congress would take the trouble to place under the jurisdiction of a particular court the affairs of Indian minors, and in the same section provide that the state might by its action entirely nullify that provision.

Appellants also refer to section 4 as strengthening their claims. That section reads as follows:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

It is not necessary to decide here what the effect of that section is, nor what the full effect of section 6 is. When it has been held that the state of Oklahoma cannot by its legislation reduce the age of majority from 21 to 20, enough has been decided to determine this case.

[2] The last contention of the appellants is that as to 50 acres of the 80 acres in question the lease to Overfield was valid, because that was the surplus allotment of Goodman, that as to it all restrictions had been removed prior to the passage of the act of May 27, 1908, and because that act in section 1 provides that nothing therein shall be construed to impose restrictions removed from land by or under any law prior to the passage of the act. The restrictions contained in the act of July 1, 1902, under which this land was allotted, are found in sections 13, 14, and 15, and are as follows:

Section 13:

"Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment."

Section 14:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act."

Section 15:

"All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent."

The appellants rely upon section 14. The five years from the date of the ratification of the act expired on August 7, 1907, but the

five years from the date of the patent to Goodman have not yet expired. This question also has been before the Supreme Court of Oklahoma in the case of *Allen v. Oliver*, 121 Pac. 226, 227. The court there said:

"This policy could not be enforced and carried out if the allotments made under the act were to have been alienable in five years after the date of its ratification. None were made of that date, and many of them not until a much later date, and some, doubtless, were not made until after the expiration of the five years provided for in section 14. Under these circumstances, it is clear that section 14 would fail in providing the necessary period of protection which Congress has uniformly deemed necessary in parceling the lands among the members of these tribes; and there is absolutely no reason to conclude that a different policy was intended."

In 26 Opinions of Attorneys General, on page 354, is found the following statement:

"(1) In regard to your first inquiry, I think the clear and specific statements in section 15 of the Act of July 1, 1902, that 'all lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent,' should be taken as making definite and certain the interpretation to be given the negative expression in the previous section that such lands should not, among other things, 'be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act.' As the purpose of the five-year restriction upon alienation presumably was to keep the allottee in possession of his allotment for that length of time so that he might acquire a knowledge of its value and uses and be better fitted to dispose of it, such purpose might be impaired and perhaps altogether defeated if the date from which the restrictive period was to commence were held to be that of the ratification of the act, as many members might not have received their allotments until long after the ratification of the act and in some cases not until after the expiration of five years from that date. It will be observed that by section 13 the time when homesteads were to become alienable was fixed at 'not exceeding twenty-one years from the date of the certificate of allotment,' upon the receipt of which certificate by section 21 of the act the allottee became entitled to be put in possession of his allotment."

The purpose of the government was to protect the Indian. If section 14 had said that the land should not be alienated for 5 years, and section 15 had said that it should not be alienated for 10 years, can there be any doubt as to the construction which would have been given to those sections by a court? For the better protection of the Indian, it would be necessary to say that the restriction was for ten years and not for five years. Section 13 declares that homesteads shall be inalienable for 21 years from the date of the certificate of allotment. Section 14 says that "lands," and this on its face includes homesteads, shall not be alienated before the expiration of five years. Could it be seriously argued that section 14 should prevail over section 13, so as to make a homestead alienable in five years?

The decree of the court below is affirmed, with costs.

KELSEY v. MUNSON et al.

(Circuit Court of Appeals, Eighth Circuit. August 13, 1912.)

No. 3,498.

1. BANKRUPTCY (§ 333*)—PROOF OF CLAIMS—EFFECT OF INFORMALITY.

All the formalities required in ordinary pleadings do not apply to proofs in bankruptcy, and failure to file a written instrument upon which a claim is founded, pursuant to Bankr. Act July 1, 1898, c. 541, § 57b, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), does not raise a presumption against the existence of the writing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 519; Dec. Dig. § 333.*]

2. FRAUDS, STATUTE OF (§ 23*)—"PROMISE TO ANSWER FOR THE DEBT OF ANOTHER"—ORIGINAL OR COLLATERAL PROMISE.

Where a partnership, to enable one of the partners to borrow the money necessary to commence business, agreed that if the contemplated sureties would sign the note it should become and be a partnership debt, and the sureties signed and the firm obtained the money, its agreement to pay the debt was direct, and not collateral, and not within Rev. St. Colo. 1908, § 2666, requiring every special "promise to answer for the debt of another" to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

For other definitions, see Words and Phrases, vol. 6, p. 5676.]

Appeal from the District Court of the United States for the District of Colorado.

In the matter of the Ladies' Cash Store, a partnership, bankrupt. From an order allowing a claim in favor of H. E. Munson and T. E. Munson, E. M. Kelsey, as trustee, appeals. Affirmed.

Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, Pierpont Fuller, and George A. H. Fraser, for appellant.

Charles L. Allen, and B. M. Webster, for appellees.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. About June 8, 1908, Addie T. Munson and Mary Munson formed a partnership under the name of the Ladies' Cash Store and contracted to buy a stock of goods at Sterling, Colo., for about \$4,000. Addie T. Munson borrowed upon real estate security \$2,000, which she turned over to the firm, and Mary Munson borrowed a like sum of the Logan County National Bank, giving as sureties therefor H. E. Munson and T. E. Munson, which she turned over to the firm, and with the \$4,000 the firm paid for its stock of goods.

As an inducement to sign the Mary Munson note as surety, both Addie T. Munson and Mary Munson told the contemplated sureties that the indebtedness evidenced by the note "would be and become a partnership debt, and the first money derived from said business would be applied to the extinguishment of said indebtedness," and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this was communicated to the payee of the note before its execution or the making of the loan. The new firm, before any credit was extended to it, represented to the commercial agencies and the wholesale houses they were about to deal with that they owed banks \$4,000. May 3, 1910, the partnership of the Ladies' Cash Store was adjudged an involuntary bankrupt, and E. M. Kelsey was appointed and qualified as trustee. H. E. Munson and T. E. Munson filed a claim, based upon the payment by them of the note to the Logan County National Bank, which was assigned to them by the bank. The trustee filed a motion to strike parts of the claim, and exceptions and objections to the claim. The referee refused to allow it, but his action was reversed by the District Court, and Mr. Kelsey, the trustee, appeals.

The case was submitted to the referee and the District Court upon the proof of claim, and motion to strike, and exceptions and objections of the trustee, and an agreed statement of facts. The statutes of Colorado contain this provision:

"In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing and subscribed by the party charged therewith: * * * Second: Every special promise to answer for the debt, default or miscarriage of another person." Revised Statutes Colo. § 2666.

The case turns chiefly upon whether the alleged agreement of the partnership that an individual debt evidenced by said note would be and remain a partnership debt was within the provision of this statute; and, if so, was the alleged agreement by the partnership that the indebtedness would be and remain a partnership debt, or some note or memorandum thereof in writing, subscribed by the partners.

[1] It is insisted that the claim itself did not state that there was such an agreement in writing. All the formalities required in ordinary pleadings do not apply to the filing of proof of a claim in bankruptcy. It is provided by section 57b:

"Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim."

In *Re Dresser*, 135 Fed. 495, 68 C. C. A. 207, the Circuit Court of Appeals of the Second Circuit said:

"It is contended by the appellant that the agreement of the firm of Dresser & Co., to be valid, must be in writing, and as no written agreement is filed with the proof, pursuant to section 57b of the law (Act July 1, 1898, c. 541, 30 Stat. 560), it must be presumed that no such writing exists, and therefore the proof is invalid on its face. The paper is, no doubt, evidence to establish the allegations of the proof of claim; but failure to plead it raises no presumption against its existence. Non constat the writing which the appellant considers necessary may be in the possession of the claimant, to be produced when an issue is presented requiring its production."

[2] In this case the parties expressly stipulated that all the members of the partnership "promised to and agreed with the firm of Munson & Munson (H. E. Munson and T. E. Munson) as an inducement to their signing as sureties said note of Mary Munson, that the indebtedness evidenced by said note would be and remain

a partnership debt," but did not state whether the promise and agreement were in writing or otherwise.

But the principal question in this case is: Was it necessary that the assumption of this debt by the partnership should be evidenced in writing under the provisions of the Colorado statute of frauds? The agreement on the subject was made to induce the sureties to sign the note, and while the note upon its face was the note of the individual, Mary Munson, and her sureties, upon which the partnership was not liable before it was executed and before the loan had been made, the partnership agreed it should become a partnership debt. The firm then had about \$4,000 of property and no debts, and no reason can be assigned why the partnership could not thus assume this debt.

Was such an agreement a specific promise to answer for the debt, default, or miscarriage of another person? It is well recognized that, if the agreement be in effect a guaranty, it is within the statute, and is said to be collateral; while, where one promises, upon an independent consideration passing to him, to pay a debt, it is not embraced within the statute, but is said to be direct or original. If A. says to a merchant, Let B. have certain goods, and I will see you paid, or will guarantee that he will pay for them, that is ordinarily a collateral agreement, and void under the statute. But, on the other hand, if A. says to the merchant, Let B. have certain goods and I will pay for them, that is direct, not within the statute, and may be proven, though oral. In *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826, the Flagstaff Silver Mining Company was in debt to Erwin Davis. The company and Davis made an agreement that J. N. H. Patrick should become manager as attorney in fact, and he appointed M. F. Patrick foreman of the mine, who in turn employed A. S. Patrick to transport ore. Davis, being interested in the transportation of ore, from which he was to be paid for past and future advances, orally promised to pay A. S. Patrick, and it was held that this was a direct promise and not within the statute of frauds. In that case the court quotes with approval from *Emerson v. Slater*, 22 How. 28, 43 (16 L. Ed. 360):

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

This court in *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229, said:

"Where the promise to pay the debt of another is not the chief purpose of the transaction in which it inheres, and a substantial and valuable consideration therefor inures directly to the benefit of the promisor, as in a case in which he obtains a conveyance of property in consideration of his promise to pay the debt of the grantor, or to pay an incumbrance upon the property, the promise does not fall within the statute, and no writing is necessary to support it. In cases of this character, the fact that the object of the promisors is not to answer for the debts, defaults, or miscarriages of others, but is to obtain substantial benefits or advantages to themselves, which they ac-

tually secure as the consideration for their agreements, distinguishes these promises from those within the statute, and makes them original agreements of the promisors, which are valid without writings."

See *In re Dresser*, 135 Fed. 495, 68 C. C. A. 207; *Choate v. Hoogstraet*, 105 Fed. 713, 46 C. C. A. 174; *Humphreys v. St. Louis, I. M. & S. Ry. Co.* (C. C.) 37 Fed. 307.

If the partnership, to enable one of the partners to borrow the necessary original capital to enable the firm to embark in business agreed that, if the contemplated sureties would sign a note of one of the members, the indebtedness should be and remain a partnership debt, and thereupon the sureties signed and the firm obtained the money, the agreement to assume the debt was not within the statute of frauds; and, it being agreed that such a contract was made, H. E. Munson and T. E. Munson were under the facts entitled to have their claim allowed, and all other questions argued become immaterial.

The action of the District Court is affirmed.

MESERVEY v. ROBY et al.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1912.)

No. 3,540.

1. BANKRUPTCY (§ 175*)—VOIDABLE TRANSFER—INTENT.

To avoid a transfer of property by a bankrupt under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), it is incumbent on the plaintiff to show actual fraud, as distinguished from constructive fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

2. BANKRUPTCY (§ 178*)—VOIDABLE TRANSFERS—INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS.

The conveyance by a bankrupt within four months prior to the bankruptcy of real estate to a mortgagee in consideration of the cancellation of his claim and the payment of other valid mortgages and liens covering that and other property is not voidable for fraud as intended to hinder, delay, and defraud creditors, under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), where it was made in good faith, and the amount paid was not so inadequate as to be of itself an actual fraud upon creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 264-274, 283, 284; Dec. Dig. § 178.*]

Appeal from the District Court of the United States for the District of Colorado.

Suit in equity by Albert B. Meservey, trustee in bankruptcy of Flora Waycott and Ernest Waycott, against Elizabeth S. Roby and others, executors of the will of W. H. Roby, deceased. Decree for defendants, and complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

W. J. Chinn, of Colorado Springs, Colo. (Arthur Cornforth and D. P. Strickler, both of Colorado Springs, Colo., and J. Alfred Ritter, on the brief), for appellant.

W. B. Price (Ira Harris, on the brief), for appellees.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. This suit was originally brought against W. H. Roby, deceased, and others. After the decree in the District Court and the appeal was perfected, W. H. Roby died testate, and the suit has been revived in this court against the executors of his will.

The facts as shown by the record are substantially as follows:

Flora Waycott and Ernest Waycott, husband and wife, were separately adjudged bankrupts by the United States District Court for the District of Colorado February 17, 1908, upon their own separate petitions; and the appellant, Meservey, was thereafter duly appointed trustee of their respective estates.

On and prior to January 15, 1908, and prior to the filing of said bankruptcy petitions, Flora Waycott owned and was in possession of certain residence property and certain business property in the city of Colorado City, Colo., a city of some 4,000 or 5,000 inhabitants adjacent to Colorado Springs, Colo., which was all of the property then owned by her not exempt from execution. The only property then owned by Ernest Waycott was certain store fixtures of the value of \$1,000 to \$1,200.

The residence and business property together were incumbered by four mortgages to secure certain debts then owing by both of the Waycotts, viz.:

| | |
|--|----------|
| (1) One made to deceased Roby, June 24, 1904, for..... | \$25,000 |
| (2) One made to the Newton Lumber & Mfg. Co., February 1, 1905, assigned to deceased Roby, for..... | 4,250 |
| (3) One made to the Houston Lumber Co., May 1, 1906, for..... | 1,100 |
| (4) One made to the Newton Lumber & Mfg. Co., December 1, 1906, for | 1,000 |

Total amount of the principal of above liens..... \$31,350

Each of said mortgages covers both properties.

The bankrupts were also jointly indebted to one Emma Sackett in the sum of \$138.70, which was secured upon some other property.

Flora Waycott was also then indebted to other creditors in the sum of \$13,607, which was unsecured, and Ernest Waycott to other creditors in the sum of \$18,864, unsecured (including said \$13,607, owing by Flora); and both were then insolvent, and they so knew. On said January 15th, the deceased, Roby, purchased from Mrs. Waycott the business property above mentioned for an agreed consideration of \$40,001, and received from her a warranty deed there-

of which was signed by her husband. The consideration, as paid by him for the property on that day, is as follows:

| | |
|--|-------------------|
| (1) The release by him to her of the Roby mortgage and indebtedness which it secured, amounting with interest to..... | \$28,527 81 |
| (2) The release of the Newton Lumber & Mfg. Co.'s mortgage and indebtedness then held by him, which with interest amounted to..... | 4,628 87 |
| (3) The payment by him of the Houston Lumber Co.'s mortgage and indebtedness, which with interest amounted to..... | 1,425 45 |
| (4) The payment by him of the Newton Lumber Co.'s mortgage and indebtedness, which with interest amounted to..... | 1,062 50 |
| (5) Insurance, Water Charges, and Taxes, against the property... | 3,238 62 |
| (6) A claim of the First National Bank of Colorado City, against the Waycotts, secured by assignment of certain rentals of some of said buildings..... | 600 00 |
| (7) Two other small items aggregating..... | 42 50 |
| (8) Cash to Flora Waycott..... | 475 25 |
| | <hr/> \$40,001 00 |

The notes or other evidences of the indebtedness so paid by the deceased were surrendered to Mrs. Waycott.

Upon receipt of the conveyance of said property, Roby caused all of the residence property to be released from the liens of said mortgages and other incumbrances, and at once went into possession of the business property and thereafter received the rents therefrom. The value of this property is estimated by the witnesses to be from \$40,000 to \$70,000. The District Court entered a decree dismissing the bill at complainant's costs, and he prosecutes this appeal.

Counsel for appellant contend in their brief that the result of the conveyance of the business property to Roby was a preference under sections 60a and 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), that Roby had reasonable grounds to so believe, and that it is therefore voidable at the instance of the trustee. But in the argument at the bar they expressly disclaim all right to recover the property as a preference, and seek a reversal of the decree upon the ground alone that the conveyance was in violation of section 67e of the Bankruptcy Act and the statutes of Colorado, 1908; and fraudulent in fact as against the existing creditors of the Waycotts.

The Revised Statutes of Colorado 1908, relied upon by the appellant, as set out in the brief of his counsel, are:

Section 2671:

"Every conveyance or assignment in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents and profits issuing thereupon, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered with the like intent as against the person so hindered, delayed or defrauded, shall be void."

Section 2674:

"The question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact, and not of law; nor

shall any conveyance or charge be adjudged fraudulent against creditors or purchasers solely on the ground that it was not founded on a valuable consideration."

It is the contention of the appellant that the equity of Mrs. Waycott in the business property was at least from \$12,000 to \$15,000 over and above the amount paid by Roby for that property, and that the effect of the conveyance to him was to hinder, delay, and defraud her creditors.

There is no possible ground under the testimony upon which this contention can be upheld, unless it be that the property at the time of its conveyance to Roby was worth more than he agreed to pay, and, in fact, did pay for it. The indebtedness of Mrs. Waycott secured by the incumbrances upon the property were in good faith owing by her, were past due and had been for some time, and she was not keeping up the interest payments, the taxes, and other charges upon the property. Under such circumstances, it was natural that Roby should insist upon the payment of that which was due him. Mrs. Waycott was unable to do so, and it was finally agreed between them that she should convey to Roby the business property in satisfaction of such incumbrances and the debts secured thereby, and the payment by him of the taxes, and other charges which he paid, and the cash payment of \$475.25, and release the residence property from the liens of such incumbrances and charges. Admitting that Roby knew, or should have known, that the Waycotts were then insolvent, what is there in this to stamp the transaction as fraudulent? The property had been pledged to Roby, and the other mortgagees, as security for their respective debts years before the bankruptcy proceedings, and these liens and the taxes and other charges were liens thereon prior to the claims of the general creditors; and, aside from the cash payment of \$475.25, there was nothing in the property for such creditors, assuming that its value was not greater than the consideration paid by him for it.

There is hardly any question upon which there may be a wider range of opinion than upon the actual value of property in a town or small city. The business property in question consists of four lots each 30 by 120 feet well located in the business center of Colorado City, upon which are brick buildings of different sizes, built in 1901 and later years, but which had not been kept in a very good state of repair at the time of the conveyance of the property to the deceased. The witnesses vary in their estimates of the value of this property from \$40,000 to \$70,000. It is alleged in the bill of complaint that the rentals of the property received by the deceased after he acquired it were not less than \$500 per month; and in his answer the deceased admits that he has been in possession of the property since January 15, 1908, and has received the rentals thereof, which amounted approximately to \$500 per month. Upon this as a basis of the rental value of the property, the complainant asked several of his witnesses what in their judgment would be the value of the property; and some of them, who are unsecured

creditors of the Waycotts, estimated the value at \$60,000 and some at \$70,000. Other of the complainant's witnesses estimated its value from its location and condition as known to them at \$50,000 to \$60,000, and deceased's witnesses from \$40,000 to \$50,000. The \$500 monthly rental, however, was not the net rental or income from the property. For the year 1908 Roby testifies that the gross rents of the property, other than from the opera house were \$3,928.-50, that the taxes, insurance, water rent, maintenance, and care of the property for the year were \$1,630.64; thus leaving the net income of the property for that year, \$2,297.86. Some of the rooms were not rented during a part of that year, and from the opera house he received nothing. The rentals for other years are not shown.

The trial court carefully considered all of the testimony bearing upon the condition, age, and rental value of the property, and found its fair value on January 15, 1908, to be \$45,000, and that there was no intent on the part of the Waycotts in making that deed, or on the part of Roby in receiving it, to hinder, delay, or defraud other creditors of Mrs. Waycott. Recognizing the firmly settled rule that when the chancellor has considered conflicting evidence, made his findings, and rendered a decree thereon, it must be taken as presumptively correct and will not be disturbed unless an obvious error of law, or some serious mistake in the consideration of the evidence has been made, this finding of the trial court will not be disturbed, for no such error or mistake appears to have been made in this case.

[1] To avoid this transfer under section 67e of the Bankruptcy Act, it is incumbent upon the complainant to show actual fraud in fact in the conveyance of the property to the deceased, as distinguished from constructive fraud. *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; *Id.*, 213 U. S. 242, 29 Sup. Ct. 436, 53 L. Ed. 772. Conceding that the conveyance of the property to Roby, and its effect upon the unsecured creditors of Mrs. Waycott, may be considered as an item of evidence in determining whether or not actual fraud in the transaction existed, we are clearly of the opinion that the facts under which this conveyance was made do not show any such fraud in fact in this transaction.

[2] A transfer by one to another of his property in good faith, either beyond or within the four months immediately preceding the filing of a petition in bankruptcy by or against him, to pay an honest antecedent debt, is not of itself sufficient to establish actual fraud in fact, or an intent on his part, or on the part of the creditor receiving the property, to hinder, delay, or defraud other creditors of the debtor within the meaning of section 67e of the Bankruptcy Act. *Stewart v. Dunham*, 115 U. S. 61-66, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Lampson & Powers v. Arnold*, 19 Iowa, 479-483, 484; *Coder v. Arts*, 152 Fed. 943-947, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, above; *Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed. 949-951, 42 C. C. A. 106.

Nor does section 2764 of the Revised Statutes of Colorado (1908) in our opinion aid the complainant. That section provides:

"Nor shall any conveyance or charge be adjudged fraudulent against creditors or purchasers solely upon the ground that it was not for a valuable consideration."

That the consideration paid by Roby was not a valuable consideration, if under any circumstances it could be so held, would not alone under this section be sufficient to avoid the conveyance on the ground of actual fraud, seems entirely clear. That the \$40,000 paid by Roby for the property was a valuable consideration admits of no doubt. The most that could be said of that is that under one view of the testimony it may not have been its full value; but it is not so inadequate as to be of itself an actual fraud upon the unsecured creditors of Mrs. Waycott. *Campbell v. Colorado Coal & Iron Co.*, 9 Colo. 60, 10 Pac. 248; *Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed., 42 C. C. A., above. Our conclusion therefore is that the decree of the District Court must be affirmed, and it is so ordered.

Affirmed.

GILBERT et al. v. HOPKINS et al

(Circuit Court of Appeals, Fourth Circuit. July 10, 1912.)

No. 1,098.

APPEAL AND ERROR (§ 336*)—AMENDMENT OF WRIT OF ERROR—OMISSION OF NECESSARY PARTY.

Under Rev. St. § 1005 (U. S. Comp. St. 1901, p. 714), providing for amendment of writs of error, if a writ had been actually sued out within the time limited by statute, although defective, the defect, even to the extent of inserting a party omitted before, may be corrected by amendment, although the time within which an original writ of error could be sued out has expired; but in such case the new party must be brought in by a new citation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868–1876; Dec. Dig. § 336.*]

Amendment of writ of error, citation, or notice of proceedings for review, see note to *Thomas v. Green County*, 77 C. C. A. 490.]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville.

Action at law by A. Louisa M. Gilbert and Ida Isabella K. Gilbert, heirs at law of L. W. Gilbert, deceased, against W. R. Hopkins, George Reeves, E. I. Leighton, John Matthews, and B. P. Bole. Judgment for defendants, and plaintiffs bring error. On motion of plaintiffs for leave to amend writ of error, and, on motion of defendants to dismiss writ of error. Motion to amend granted, and motion to dismiss overruled.

See, also, 171 Fed. 704.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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James H. Merrimon, Marshall W. Bell, and J. S. Adams (Thomas S. Rollins, on the brief), for plaintiffs in error.

F. A. Sondley and C. B. Matthews (W. B. Council and Theodore F. Davidson, on the brief), for defendants in error.

Before GOFF, Circuit Judge, and KELLER and SMITH, District Judges.

PER CURIAM. In this cause an application is made to the court by plaintiffs in error for leave to amend the writ of error and citation herein by inserting the name of F. W. Bruch in the writ of error and in the citation, and also a motion is made for permission to substitute for the present appeal bond a new and amended bond conforming to the amended writ of error and citation, if the amendment should be allowed. This motion is made under the terms of section 1005, Rev. St. U. S. (U. S. Comp. St. 1901, p. 714). The defendants in error object upon the ground that the time for suing out a writ of error has passed, and that, the record being fatally defective, in that F. W. Bruch, a necessary party to the appellate proceedings, was omitted from the writ of error and not notified by the service of any citation, it is now too late to amend, after the time of suing out a writ of error as against him is concerned, by making him a party now to the writ of error and citation.

The defendants in error have also served notice of a motion to dismiss the appeal on the ground that this defect is fatal, and upon the further grounds that the surety company on the bond of the plaintiffs in error for costs in the court below is not joined as a plaintiff in error, although named in the judgment below as bound for the costs below, and that the bond filed by the plaintiffs in error is not a bond on a writ of error to review a judgment at law, but a bond on appeal to review a decree in equity, and lacks a proper surety.

F. W. Bruch having been one of the parties in whose favor the judgment below was made, as a cotenant in the premises which are the subject of the controversy, it would seem that he is a necessary party to the proceedings to review that judgment. He should have been originally made a party, by being included in the writ of error, and being also included in and duly served with the citation. Under the principles decided in the cases of *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 6 Sup. Ct. 74, 29 L. Ed. 432, *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127, *Walton v. Marietta Chair Co.*, 157 U. S. 342, 15 Sup. Ct. 626, 39 L. Ed. 725, *Altenberg v. Grant*, 83 Fed. 980, 28 C. C. A. 244, *Thomas v. Green County*, 146 Fed. 969, 77 C. C. A. 487, and *Martin v. Burford*, 176 Fed. 554, 100 C. C. A. 159, it would appear to be settled that this court, under the provisions of section 1005, Rev. St. U. S., above mentioned, has the power to allow an amendment such as the one moved for in this case although thereby an additional party is inserted in the writ of error and the citation, and

although at the time the amendment is allowed the period within which the writ of error should have been sued out from the original judgment has elapsed.

These decisions would seem to be to the effect that the naming of the defendant in the writ of error and naming and serving him in the citation is not necessary to the jurisdiction of the appellate court. The jurisdictional feature would appear to be that the writ of error to a judgment intended to be corrected should have actually been sued out within the time limited. If it is actually sued out within the time limited, although it may be defective, yet such defects, even to the extent of inserting a party omitted before, may, under section 1005, be corrected, although the period within which a new writ of error could be sued out from the date of the original judgment has elapsed. *Dodge v. Knowles*, 114 U. S. 430, 5 Sup. Ct. 1197, 29 L. Ed. 144; *In re Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782.

When, however, the amendment is allowed, any necessary party to the appellate proceedings who was omitted from the writ of error and citation must be notified and brought before the court. As the judgment to be awarded by the appellate court may affect his interests, he is entitled as of right to notice and to be heard upon the appeal, and, under the practice settled in the above cited cases, if an amendment is allowed, a new citation will have to be issued and served upon the defendant *F. W. Bruch*. The allowance of the amendment is addressed to the discretion of the court; but it appearing to the court that the omission of the name of *F. W. Bruch* in this case was wholly inadvertent and accidental, and that there are matters of sufficient gravity and merit involved in the appeal to justify this court in allowing the parties desiring to have the judgment below corrected to be heard above, this court in the exercise of its discretion will allow the amendment.

The allowance of the amendment disposes of the motion to dismiss the writ of error; the other ground for that motion not being, in the opinion of the court, well taken. It is therefore ordered that the plaintiffs in error have leave to amend the original writ of error by inserting the name of *F. W. Bruch* at the proper place therein, and have leave to have issued a new citation herein in proper form, said new citation to include the name of *F. W. Bruch*, provided such amendment be made and the new citation be served within 30 days from notice to counsel for plaintiffs in error of the filing of this order, and thereupon the cause stand upon the docket of this court for hearing in due course.

It is further ordered that plaintiffs in error be further allowed to file a new appeal bond conforming to the order of the court below as to the original appeal bond, but corrected so as to agree with the amendments hereby allowed and the character of the appellate proceeding; such bond to be filed within the same period as above allowed for the amendments and service above allowed.

H. D. WILLIAMS COOPERAGE CO. v. SAMS.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1912.)

No. 3,691.

1. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—RISKS ASSUMED.

A servant assumes only those extraordinary risks of his employment which he knows and appreciates or which are obvious, and not those which, by the exercise of ordinary care, he should have known but did not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. MASTER AND SERVANT (§ 281*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff had been employed for several months in defendant's mill in operating a circular saw in sawing barrel heads from bolts cut of the required lengths from logs, and mounted in an upright position on the carriage, which was pushed against the saw by means of a lever. When the foreman was operating the saw, he asked plaintiff to assist by pushing on the carriage, and in doing so plaintiff's hand was caught by the saw and injured. In an action to recover for the injury, plaintiff alleged negligence in that the saw was dull and that the bolt being sawed was of unusual length, but he testified that he knew both of such facts and that both added to the danger because the bolt in such case was more likely to slip. There was no evidence that the bolt did slip, and it did not touch plaintiff's hand. *Held*, that both such risks were assumed, and that, under the evidence, the proximate cause of the injury was plaintiff's own negligence which barred his recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Action at law by Joe Sams against the H. D. Williams Cooperage Company. Judgment for plaintiff, and defendant brings error. Reversed.

P. J. McLaughlin (Cockrill & Armistead and Roscoe R. Lynn, on the brief), for plaintiff in error.

William Gilmore and B. B. Hudgins, for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. Sams, the defendant in error, plaintiff below, recovered a judgment for \$1,500 for injury to his hand caused by its being caught in the circular saw of a barrel heading machine operated by the defendant below, plaintiff in error here.

The defendant is a manufacturer of barrel headings. It uses for that purpose a circular saw five feet in diameter set in a heavy frame. The logs before being brought to the machine are cut into short lengths, generally 22 or 23 inches long, but sometimes 28 inches long.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

These pieces are called bolts. A bolt is set almost perpendicularly in a movable carriage and pushed against the saw. The pieces are sawed off as the bolt and carriage are pushed forward after each backward automatic swing. There is a handle upon the upper part of the carriage for the operator to take hold of as he pushes forward the carriage.

At the time of the accident the plaintiff, Sams, was employed, and his duty was, according to his complaint, to operate this saw. While he was not the head sawyer, he had worked about the saw for six or seven months, and, as he said, had had a good deal of experience in operating it. His witness, the foreman, said that he could saw heading all right.

It was their custom in sawing, when they came to a bolt longer than usual, to lay it one side. There was upon the machine a set screw that allowed a part of the carriage to slide up and down so as to set it for a bolt of any length.

On the morning of the accident Sams and the foreman were engaged in clearing up the yard and sawing up the culls. Sams had been sawing himself a few minutes before the accident when the foreman came to rest him. The latter, coming to a harder bolt than usual, called Sams to help him push the carriage through. Sams, according to his own testimony, put his hand with a glove on it on a piece of the iron on the side of the carriage below the handle which was seized by the foreman. They sawed off one piece; but, when the bolt was pushed against the saw again, the plaintiff's hand was caught, and he received the injury complained of. The plaintiff testified that he did not know how he got his hand on the saw nor what caught it, but he said that the bolt did not hit it. He also said that he had never been called upon to do this kind of work before.

The negligence charged in the complaint is: (1) The dullness of the saw; (2) the carelessness of the foreman in compelling the plaintiff to operate the dull saw on a bolt which was of unusual length.

At the close of all the evidence the defendant asked the court to instruct the jury to return a verdict in its favor. To the denial of this request the defendant excepted, and this ruling is the principal error assigned.

The court charged the jury as follows:

"Was this one of the risks that the plaintiff assumed? The general rule in regard to that is that in accepting the employment the employé assumes all the ordinary and usual risks incident to that employment, and also all unusual and extraordinary risks of which he knows and which under the exercise of ordinary care he should have known. He assumes these ordinary and usual risks, and if he gets hurt by reason thereof the master is not responsible. And in addition he assumes all the extraordinary dangers which under the exercise of ordinary care he ought to have known. If you find that this was one of the risks and hazards of the business which he was taking, then there could be no recovery, even though the defendant was negligent."

[1] The servant assumes only those extraordinary risks which he knows and appreciates, or which are obvious, and not those which by the exercise of ordinary care he ought to have known. With this

modification this instruction was correct. *Chicago, Burlington & Quincy Railroad Co. v. Shalstrom* (Circuit Court of Appeals, Eighth Circuit) 195 Fed. 725; *Republic Elevator Co. v. Lund et al.* (Eighth Circuit) 196 Fed. 745, 116 C. C. A. —, filed May 13, 1912.

[2] After an examination of the evidence we think that it conclusively shows that Sams knew all about the condition of the saw, the condition of the carriage, the danger of working with a dull saw, and the danger, if there were any, of sawing bolts of unusual length; and that he knew and appreciated the danger and the risks although they might have been unusual. The court, having stated the rule with substantial accuracy, should, we think, have charged the jury that the extraordinary risks had been assumed, and consequently should have granted the defendant's motion for a directed verdict.

So far as the dullness of the saw is concerned, the plaintiff himself testified that he knew that it was dull and that he knew it was more dangerous when it was in that condition than when it was sharp. While working with the saw under those conditions, he assumed the risk occasioned by the dullness of the saw.

With reference to the other charge of negligence, while there is evidence that it was more dangerous to saw bolts of unusual length, which fact the plaintiff said he knew, yet it also appeared that that danger came from the fact that the bolt was liable to slip. The plaintiff's witness, the foreman, testified that he did not think that the bolt did slip; that he did not know whether it did or not, but that was not the cause of the trouble if it did. The plaintiff testified, as has been seen, that the bolt did not touch his hand. It therefore appears that the fact that the bolt was of unusual length was not the proximate cause of the injury; it had nothing to do with the accident. It is very evident that the proximate cause of the injury was the plaintiff's own negligence in getting his hand into the saw. The foreman testified that he had done what the plaintiff had done a thousand times and never got caught. The saw was in plain sight. The bolt was in plain sight. There was nothing complex about the machine. He knew exactly where the bolt would have to go.

Among other things to which the plaintiff testified are the following:

"Q. Yet you put your hand in a position where it would have to go through a space of not more than 1¼ inches between the saw and the iron bar, a part of the carriage? A. Yes, sir. Q. You knew it was that close all the time, didn't you? A. Yes, sir. Q. You had to close your hand in there? A. Yes, sir. Q. You had a glove on your hand at the time, didn't you? A. Yes, sir. Q. And that made your hand stand out thicker, didn't it? A. Yes, sir. Q. You don't claim there was anything wrong with the saw at all, do you? A. No, sir; there was not. Only it was dull. * * * Q. Did not you know that was dangerous down there? A. Yes, but I never thought. * * * Q. You knew that it was more dangerous when in that condition than when it was sharp, didn't you? A. Yes, sir; of course, I knew it, but I didn't think."

The judgment of the court below is reversed, with costs, and the case remanded for a new trial.

* BURGESS v. MAZETTA MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,874.

PLEADING (§ 204*)—DECLARATION—COUNTS—DEMURRER.

If any count in a declaration is good, a general demurrer to the whole declaration is unsustainable, unless the court sustains it in part and overrules it in part; and this is also true where matter divisible in its nature is alleged by different paragraphs in the same count, which states an additional cause of action of the same nature.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Aaron S. Burgess against the Mazetta Manufacturing Company. From a judgment sustaining a demurrer to the declaration, plaintiff brings error. Reversed and remanded, with directions.

Harry S. Mecartney, for plaintiff in error.

Sidney S. Gorham, Henry W. Wales, and John S. Stevens, for defendant in error.

Before KOHLISAAT and MACK, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge. This record presents a question of pleading. The action is libel. The declaration in two counts was demurred to. First a general demurrer was filed, and this was followed by 16 special assignments of demurrer to the declaration and to each count thereof. Each count of the declaration charges matter libelous per se, and also adds elements not actionable per se, but claimed by innuendo to have a libelous meaning.

The special assignments of demurrer were all directed to the matter in various form charged by innuendo, and it was within the power of the trial court, if the court found a portion of the words libelous per se, and other portions obnoxious to demurrer, to have made the judgment accord with the truth, and sustain the special demurrer and overrule the general demurrer; but the record shows the order "that the demurrer be, and the same is, hereby sustained." Plaintiff elected to stand by his declaration, and judgment for costs was rendered in favor of defendant. The effect of this ruling was to sustain, not only the special assignments, but the general demurrer as well.

Counsel divide squarely on the issue thus presented. Plaintiff contends that, if any portion of any count shows a cause of action, the general demurrer should have been overruled; and defendant contends that, if any portion of any count is bad, the general demurrer as to such count must be sustained. We think the plaintiff's contention must prevail. It is elementary that, if any count in a declaration is good, a general demurrer to the whole declaration must be over-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruled, unless the court shall make the ruling speak the whole truth by sustaining in part and overruling in part.

Upon reason and authority the same principle controls where matter, divisible in its nature, is alleged by different paragraphs of the same count and states an additional cause of action of the same nature. The rule which applies is, "Utile per inutile non vitiatur." *Lusk v. Cook*, 1 Ill. 84; *Brady v. Spurck*, 27 Ill. 478. This is the Illinois rule, and we think is the generally approved rule, though some courts hold otherwise.

The declaration, without those parts which charge by innuendo, states a good cause of action. The additional parts are surplusage, and do not make the declaration bad.

Reversed and remanded, with direction to proceed in accordance with the view herein stated.

In re HAMILTON AUTOMOBILE CO.

C. P. KIMBALL & CO. v. JOHNSON.

(Circuit Court of Appeals, Seventh Circuit. June 7, 1912.)

No. 1,909.

BANKRUPTCY (§ 440*)—PREFERENCES—PLENARY SUIT—JUDGMENT—REVIEW.

Where a bankrupt's trustee recovered judgment for an alleged preference in a plenary suit, such action was not a "proceeding in bankruptcy," and the judgment was therefore reviewable by appeal or writ of error; and not by a petition for revision.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Illinois.

In the matter of bankruptcy proceedings of Hamilton Automobile Company. Action by E. H. Johnson, trustee, against C. P. Kimball & Co. to recover an alleged preference. Judgment was rendered for plaintiff, and defendant filed a petition for revision and review. On motion to dismiss. Granted.

James Rosenthal, for petitioner.

Clarence J. Silber, for respondent.

Before SEAMAN and KOHLISAAT, Circuit Judges, and SANBORN, District Judge.

PER CURIAM. Leave to file this petition was inadvertently allowed, as the petitioner presents no proceedings in bankruptcy reviewable under section 24b of the Bankruptcy Act. Act July 1, 1898, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431). The judgment of the District Court whereof review is sought arose in a plenary suit, brought by the trustee in bankruptcy against the petitioner, to recover the value of an alleged unlawful preference,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pursuant to section 60b of the Bankruptcy Act; and the rule is well settled that the provision of section 24b is inapplicable to such judgments, so that they are reviewable only on writ of error or appeal pursuant to the general statutes. In re Rusch, 116 Fed. 270, 53 C. C. A. 631; In re Friend, 134 Fed. 778, 67 C. C. A. 500; In re Mueller, 135 Fed. 711, 68 C. C. A. 349. The Supreme Court has recently approved and adopted this rule, and the distinctions between "proceedings in bankruptcy" and "controversies at law and in equity" arising in the course of bankruptcy proceedings, on which it rests, in answer to a question certified by the Circuit Court of Appeals for the Sixth Circuit, in the case entitled Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

With the interpretation of section 24b thus determined by the Supreme Court, in accord with the prior rulings of this court, it is unnecessary to discuss or mention the various authorities cited in the brief of counsel as lending support to this petition. Review thereunder is unauthorized, and the petition is dismissed.

STAR BUCKET PUMP CO. v. BUTLER MFG. CO.

(District Court, W. D. Missouri, W. D. July 8, 1912.)

No. 3,551.

1. PATENTS (§ 243*)—INFRINGEMENT—PATENT FOR COMBINATION.

A patent for a combination in which an essential element, constituting the principal part of the invention, is designed for a particular function, specifically described, is not infringed by a combination in which such element, although present in form, owing to a difference in the construction of the other parts, is wholly inoperative to perform the function specified, but is used for a different purpose.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 382-384; Dec. Dig. § 243.*]

Patentability of combinations of old elements as dependent on results attained, see note to 91 C. C. A. 123.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PUMP-CURB RESERVOIR.

The Bartliff patent, No. 616,394, for a pump-curb reservoir, designed particularly for chain pumps, claim 1, construed, and *held* not infringed.

3. PATENTS (§ 328*)—DESIGNS—INVENTION—DESIGN FOR PUMP-CURB.

The Bartliff design patent, No. 28,190, for a design for a pump-curb, conceding that the subject is a proper one for a design patent, is void for lack of patentable invention, in view of prior structures.

In Equity. Suit by the Star Bucket Pump Company against the Butler Manufacturing Company for infringement of letters patent No. 616,394, for a pump-curb reservoir, granted to Charles A. Bartliff December 20, 1898, and design patent No. 28,190, for a design for a pump-curb, granted to the same patentee January 18, 1898. On final hearing. Decree for defendant.

F. R. Cornwall, of St. Louis, Mo., and Kimbrough Stone, of Kansas City, Mo., for complainant.

Wallace R. Lane, of Chicago, Ill., and George Y. Thorpe, of Kansas City, Mo., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

VAN VALKENBURGH, District Judge. Both parties to this suit are corporate citizens of the state of Missouri—the complainant a resident of St. Louis, and the defendant a resident of Kansas City. The complainant has filed its bill as the assignee and owner of letters patent of the United States No. 616,394 and No. 28,190; the former being a mechanical patent relating to pump-curb reservoirs, and the latter a design patent for a pump-curb. It is charged that the defendant has infringed both patents, and the bill prays for the usual relief of injunction, accounting, and damages. The defense assails both patents for want of patentable novelty and invention, and denies infringement. It is also urged that the title to said patents does not appear to be in the complainant, but no stress is laid upon this contention either in argument or in brief. The design patent embraces but one claim, and the entire patent is, therefore, involved in the controversy. The mechanical patent embraces two claims; the charge of infringement being made as to the first claim only. This claim reads as follows:

"The combination with a pump-curb, of a reservoir, a spout which leads from said reservoir, a plate arranged within the reservoir, and fastening devices which pass through the pump-curb and engage the spout and said plate for clamping the parts together, substantially as described."

The history and object of this patent is disclosed by the original claims and correspondence set forth in the file wrapper and contents of complainant's mechanical patent. The original specification recites:

"This invention relates to a new and useful improvement in 'reservoirs for pump-curbs', and particularly to that class of pumps known as 'chain pumps,' together with means for attaching the same thereto, the object being to construct a reservoir in a cheap and substantial manner, and, at the same time obviate the present objections existing in the usual form of reservoirs now in general use, the same being hereinafter mentioned, and another object is to construct a pump-curb which can be rapidly assembled. With these objects in view, the invention consists, generally stated, in a reservoir, a conduit pipe leading thereto, means for securing said conduit pipe to said reservoir, a spout leading from said reservoir, and means for securing said spout and reservoir to the pump-curb."

The objections to be obviated are thus stated:

"The usual form of reservoirs now in general use are made of galvanized, or sheet, iron, and are generally secured to one side of the pump-curb by means of a yoke, or stirrup-shaped bar of metal which passes around the outside of said reservoir, usually in a groove adapted to receive the same, while the free ends of said yoke pass through the curb and then through the flanges on the spout, and are threaded to receive suitable nuts. This construction is, however, objectionable, as the reservoir is made, as before stated, of thin material, and, in tightening the nuts on the free ends of the yoke, it constantly weakens and finally crushes the reservoir especially when handled by inexperienced persons. Another objection to the usual form of reservoirs is the method of attaching the conduit pipe thereto, which is usually done by simply flanging the upper end of the conduit pipe, and then soldering the same to the bottom of the reservoir. This is objectionable, in that the conduit pipe is generally quite long, and the perpetual jolting and shaking of the same, caused by the entrance and passage of the chain, and its respective flights there-through, causes the soldering to soon break away. My invention contemplates means for remedying these many objections, as will be seen by referring to the drawings," etc.

The main device for remedying these defects is shown and stated to be a metal plate arranged within the reservoir through which fastening devices pass engaging the spout on one side, the reservoir on the other, and the pump-curb between them, whereby these parts are clamped together; the reservoir thereby being held firmly in place, thus doing away with the necessity of the yoke or stirrup-shaped bar of metal formerly used, which was claimed to weaken, and finally to crush, the reservoir. Incidentally, this firmer fastening of the reservoir to the pump-curb affords a more rigid support for the tubing suspended from said reservoir, and minimizes the perpetual jolting and shaking of the same which causes the soldering soon to break away.

In the patent, as granted, these features are further specified and emphasized. The title is "pump-curb reservoir," and the specification says of it:

"This invention relates to a new and useful improvement in reservoirs for pump-curbs; and it consists in the construction, arrangement, and combination of the several parts, all as will hereinafter be described and afterward pointed out in the claims.

"The object of this invention is to provide an economical and easily-applied attaching device for the reservoir and spout, clamping the two in position on the pump-curb.

"In the drawings, *A* indicates the reservoir, which is preferably made of sheet metal, the four walls being complete, as shown, with the exception of the opening for the passage of water in the front wall.

"*B* indicates a portion of the curb, and *C* the tubing leading into the bottom of the reservoir *A*, through which a chain and its flights for elevating the water pass.

"15 indicates a plate arranged inside the reservoir *A* and against the front wall thereof, said plate being preferably secured in position by rivets, as shown. This plate is also provided with a suitable opening 16, which registers with an opening 17, in the reservoir for the passage of water, said opening being designed to receive the inner end 18 of the spout 19. Spout 19 is provided with a flange 20, which rests against the outer face of the curb.

"21 indicates lugs extending from flange 20 for receiving screw-bolts 22, which pass through the curb and reservoir and are threaded into plate 15, thus clamping the reservoir and spout to their respective sides of the curb.

"Plate 15 preferably covers a considerable area of the front wall of the reservoir to clamp the same firmly in position against the curb, so as to afford a rigid support for the tubing *C*, which is suspended from said reservoir. * * *

"Having thus described my invention, what I claim, and desire to secure by letters patent, is—"

Then follow the claims, the first of which is quoted above, and the second is as follows:

"The combination with a pump-curb, of a reservoir formed of sheet metal comprising four walls, a plate fitting against the front wall of said reservoir, a pipe leading into the bottom of the reservoir, a spout having an inward extension opening into said reservoir through said plate and curb, a flange on said spout which bears against the outer face of the curb, and screw-bolts which pass through said flange and are threaded into said plate, for clamping said spout and reservoir to the curb, substantially as described."

As will be seen, the subject-matter of this patent is a pump-curb reservoir, and more particularly a clamping device for holding it more firmly in position, with a view to its protection and the bene-

ficial operation of the parts, particularly the tubing suspended from it. The spout is only incidentally mentioned as an element of the combination, but in no sense affected by the objections raised to prior structures. The invention contemplated particularly that class of pumps known as "chain pumps," because for them the tubing was necessary, and the strain upon the reservoir and the connections between reservoir and tubing was "caused by the entrance and passage of the chain and its respective flights." The patent as issued is not restricted to chain pumps, but that its object and that of the structures employed relate more particularly to such pumps clearly appears from the language of the specifications and from the drawings filed in connection therewith and referred to therein.

Subsequently, for reasons of economy and utility, complainant departed, in this pump at least, from the chain mechanism and adopted a bucket mechanism. In the latter the water is carried in buckets and discharged into the reservoir from the top, instead of being sucked or drawn through tubing from the bottom. This does away with the necessity for tubing and the jolting and shaking incidental to the passage of the chain through it. Consequently the independent four-wall reservoir is no longer a necessity; but economy is attained by using the front and sides of the pump-curb itself for three of the walls, a back wall and bottom being supplied in a separate piece which is soldered to the sides and front wall of the curb. Into this the water is poured from above by the buckets in their flight, and finds its way out through the spout as before. The metal plate, therefore, no longer performs the office of attaching the front wall of the reservoir to the pump-curb for which it was especially designed and described. The element of an independent reservoir and of the front wall of such a reservoir is omitted. The plate still remains in place now directly against the inner wall of the curb, and through this and the curb the fastening devices are passed which secure the spout on the outside of the curb in place. This construction is substantially employed by both complainant and defendant, and it is the use by defendant of this plate, in this position, that is urged as an infringement of the complainant's mechanical patent. The utility of the plate in its present position is now said to be the stiffening of the front wall of the curb, whereby the spout is held more firmly than if attached to the thin wall of the curb by the usual bolts, screws with nuts, or other devices, unsupported by the more rigid plate. The defendant contends that the present use does not involve the original essential elements of the combination by which patentable novelty and invention was originally present, if at all, and that the present construction is not covered by the patent, and does not present novelty or invention in any event. Complainant urges that this is a use disclosed and protected by its patent to which it exclusively is entitled, and that the attempt thus to narrow claim 1 makes it identical with claim 2, from which it was intentionally differentiated, and that such a construction is neither just nor permissible.

It should be remembered at the outset that the patentee of the patent in suit stated in his specification that this invention relates to a new and useful improvement in reservoirs for pump-curbs; and "consists in the construction, arrangement, and combination of the several parts, all as will hereinafter be described and afterward pointed out in the claims." The claim under consideration recites the elements of the combination to be (1) a pump-curb; (2) a reservoir; (3) a spout which leads from said reservoir; (4) a plate arranged within the reservoir; (5) fastening devices which pass through the pump-curb and engage the spout and said plate for clamping the parts together, substantially as described. No doubt this refers us back to the nature of the invention thus "substantially described."

[1] This is avowedly a combination patent, and the invention consists "in the construction, arrangement and combination of the several parts" to be hereinafter "described and afterward pointed out in the claims." The parts hereinafter described and afterward pointed out in claim 1 are the pump-curb, the reservoir, the spout, the plate, and fastening devices for clamping the parts together. The object is to clamp the reservoir firmly in position against the curb so as to afford a rigid support for the tubing which is suspended from said reservoir. It is a pump-curb reservoir with which the patent is concerned, according to its title and to its specifications. Manifestly, all the elements described in the claim must be present to give to the combination the novel and useful effect specified. In the devices before the court, the plate performs merely the office of adding rigidity to the curb at the point where the spout is attached, with the separate reservoir wall omitted or merged in the curb itself. The plate becomes inoperative for the purposes specifically described. The case in this particular seems to fall within the doctrine announced in *Union Match Co. v. Diamond Match Co.*, 162 Fed. 148, 89 C. C. A. 172, wherein it was said:

"Where the claims of a patent specify the elements of a combination, but do not specify the means whereby those elements perform their functions but call for 'means' generally, and close with the words 'substantially as and for the purpose' described, or specified, or set forth, such words import into the claims the specific means described in the specification, and the claims are limited accordingly. * * * No device can be held to infringe a combination claim of a patent, unless it employs all the elements of it. A patent for a described means or mechanism to accomplish a desired end must be limited to the particular means described in the specification, or their clear mechanical equivalents, and does not cover any other mechanical structure which is substantially different in its construction or in its operation."

In claims for combinations:

"If the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality." *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979.

It is quite true that:

"The courts are not permitted to construe a patent by reconstructing it to conform to what the court may think was in the mind of the patentee at the time." *Edison Electric Co. v. E. G. Bernard Co.* (C. C.) 88 Fed. 267-274.

"Infringement cannot be avoided by reading into a broad claim of a patent specific devices claimed in narrower claims of the patent." *Locomotive Works v. Trent* (C. C.) 92 Fed. 375-388.

But this is not such a case. Here the patentee has specified what was in his mind at the time, and what elements were necessary to effectuate his purpose. One of those elements in the sense there employed, if not entirely, is now found to be omitted. The true rule is stated by Judge Sanborn, speaking for the Court of Appeals for this Circuit, in *Mast, Foos & Co. v. Dempster Mill Mfg. Co.*, 82 Fed. 327, 27 C. C. A. 191:

"One using the essential elements of a combination as enumerated in one claim cannot escape infringement because he does not use subordinate or unimportant elements of combinations described in other claims, and which were manifestly omitted from the claim in question that the inventor might more perfectly secure the essential elements of his invention."

But here the defendant is not using the essential elements of the combination as enumerated in claim 1. On the contrary, one element is omitted, and that the most vital one to the expressed purpose of the patent. In such cases the same court has declared:

"The absence from an infringing device of a single essential mechanical element of a patented combination is fatal to a claim of infringement." *H. F. Brammer Mfg. Co. v. Witte Hardware Co. et al.*, 159 Fed. 726, 86 C. C. A. 202.

The case falls directly within the reasoning of the court in *Dunlap v. Willbrandt Surgical Mfg. Co. et al.*, 151 Fed. 223, 80 C. C. A. 575. Judge Hook, in delivering the opinion, said:

"Of course, there are cases in which, in determining whether a subsequent device infringes, it is unimportant whether it is made in two pieces instead of three, or whether a member is mechanically attached to the remainder of the structure, or is made integral with it. * * * They are, however, inapplicable to a case in which the very divisibility into parts or in which the particular method of attachment constitutes the law of the structure or is declared or appears to be of the essence of the supposed invention."

Complainant invokes the rule that, while the particular function now deemed important may not have been referred to in terms in its specifications, nevertheless it inhered in the specifications and drawings and in the construction, as shown by the specifications, claims, and drawings, and therefore that complainant is entitled to it in whatever form it may be used. This would be true if this were merely a new or double use of the same combination, all the elements being present, and each performing its functions in the same way; but such is not the case. We have here practically to consider whether this claim fairly covers the mere application of a metallic plate to the galvanized iron wall of a pump-curb as a stiffening agent to render the spout attachment more rigid. As I have

said, I do not think this function can be carved and separated from the combination specifically described and declared on; but, if it can be, then we are to consider this claim as presenting such a device as involves patentable novelty and invention. Suppose the applicant had originally applied for a patent upon a combination consisting of a pump-curb, a metallic plate, and a spout with fastening devices to clamp the three together; the specific object being to stiffen the curb and make the attachment more rigid. Can any one believe that this would have passed muster from the standpoint of novelty and invention? It has been the common practice in every unskilled occupation to add strengthening layers of wood or iron to parts deemed too unstable for purposes of reinforcement. This would occur readily to the lay mind, not to speak of that of the skilled mechanic. No invention is involved in such procedure. *Crouch v. Roemer*, 103 U. S. 797, 26 L. Ed. 426.

[2] I am therefore of the opinion that there has been no infringement of the patented combination, and that in the aspect here presented the mechanical device patented lacks both novelty and invention.

[3] To my mind, the design patent presents greater difficulties, because the solution of the controversy is addressed to the individual senses rather than to general rules of law. The principles involved are simple, but the decision must always, in large measure, be governed by the impressions of the chancellor in each specific case. Section 4929 of the Revised Statutes (U. S. Comp. St. 1901, p. 3398), as it existed prior to the amendment of 1902, limited a design patent, so far as is pertinent to this case, to "any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication." It is conceded that the intention of Congress by the acts granting design patents was to encourage the decorative arts. Utility is not contemplated, but appearance. *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20 L. Ed. 731. The exercise of the inventive faculty is just as essential to the validity of a design patent as it is to the validity of a patent for any kind of mechanical device. *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606. The usefulness referred to is not mechanical utility, but the presentation of something new and pleasing by which the value of the object is increased, and originality and the exercise of the inventive faculty must be displayed from the standpoint of prior use, prior patent, or prior publication. "The attempt to patent a mechanical function, under cover of a design, is a perversion of the privilege given by the statute." *Weisgerber v. Clowney* (C. C.) 131 Fed. 477-480. The article may be useful, as well as ornamental, but this adds nothing to the validity of the design patent. Designers of articles of manufacture not otherwise entitled to receive design patents cannot justify the issuance of such patents on any theory that the design is a trade-mark. *Rowe v. Blodgett & Clapp Co.*, 112 Fed. 61, 50 C. C. A. 120. The utility

depends entirely upon the pleasing effect, if any, imparted to the eye. *General Gaslight Co. v. Matchless Mfg. Co.* (C. C.) 129 Fed. 137. There must be present originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, beautiful, or useful they may be in their new role, is not invention. *Smith v. Whitman Saddle Co.*, 148 U. S. 674-679, 13 Sup. Ct. 768, 37 L. Ed. 606.

Such are the general principles to be kept in mind when perception and judgment are to be applied to any particular case. It is evident that the mere fact that one device looks like another has no controlling effect in determining the validity of a design patent, because such a patent does not operate as a trade-mark nor involve considerations of unfair competition in trade. In fact, in the present case, the latter consideration was expressly eliminated when the demurrer was sustained to certain parts of the bill as originally filed. Color constitutes no element of a design patent. The question before us then would seem to be whether the complainant's pump-curb presents an article of manufacture so new, useful, and original in shape or configuration, so pleasing to the eye, and so indicative of inventive genius in any appreciable degree, as to sustain the validity of this patent. If so, there is undoubted infringement, because the defendant's curb is sufficiently like it to sustain such a charge.

Pump-curbs of this type, departing from the shape commonly employed in the old wooden chain pump, have been substantially and suggestively similar. In fact, the shape in a general way has been dictated in no small degree by the requirements of the mechanism encased by the curb. There have been variations in size and in details, but, aside from the latter, general terms of description would fit most of them, including those now before the court. None of them, to my mind, can fairly be termed beautiful or ornamental. It would be rather strained to associate them, in any sense, with the decorative arts which this statute was intended to foster and encourage. The object of this design evidently was to present a shape differing in minor particulars from those that had preceded it, with a view to stamping this product after the analogy of trade-marks. If this satisfied the statute, then the obtaining of a design patent would be a mere formality and the entire spirit and purpose of the act would be evaded and defeated. In 1895, three years before the issuance of this patent, O. P. Shriver, as patentee, procured design patent, No. 24,116, for a curved curb for chain pumps. This curb is similar in its general outlines to that of the patent in suit. It would appear that slight variations have been made in the curved lines of sides and edges. The cap is, perhaps, a little more shallow. The band or beadwork separating the cap from the body is not unlike. The top of the curve is described as a "compound curve," while that of the Shriver patent is a "simple curve." I do not think it required more than ordinary mechanical

skill to make the alterations here apparent. I am unable to perceive that this device satisfies the demands of the statute under which the design patent was issued.

For all the foregoing reasons, the bill will be dismissed, and an appropriate decree may be drawn in accordance with this opinion.

VACUUM CLEANER CO. v. WALDORF-ASTORIA HOTEL CO.

(Circuit Court, S. D. New York. August 25, 1910.)

1. PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The rules governing the practice with respect to the granting of preliminary injunctions on unadjudicated patents considered.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

2. PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—"FAIR DOUBT."

Under the rule that a preliminary injunction should not be granted on an unadjudicated patent if there is "a fair doubt as to invention, anticipation, construction or infringement," the term "fair doubt" does not refer only to the effect produced on the judicial mind by the direct evidence submitted on the motion, but is wide enough to cover a belief that other reachable testimony exists which by reasonable effort the party may adduce.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

Grounds for denial of preliminary injunction in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

3. PATENTS (§ 301*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—VACUUM CLEANER.

A preliminary injunction against infringement of the Kenney patents, Nos. 847,947 and 847,948, relating to vacuum cleaners, denied.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489, 490-495; Dec. Dig. § 301.*]

In Equity. Suit by the Vacuum Cleaner Company against the Waldorf-Astoria Hotel Company for infringement of letters patent Nos. 847,947 and 847,948 to Kenney for vacuum cleaner. On motion for preliminary injunction. Denied.

See, also, 198 Fed. 867.

Ewing & Ewing, Thomas Ewing, Jr., and V. M. Dorsey, for the motion.

William R. Baird (Stephen J. Cox, of counsel), opposed.

HOUGH, District Judge. [1] This action is upon an unadjudicated patent. Admittedly this does not by itself constitute a reason for refusing injunctive relief before final decree; yet it is interesting to note how difficult it has been to sustain preliminary injunctions on unadjudicated patents whenever the party enjoined has had courage or money enough to take the matter to the appellate court. Complainant cites and relies upon the Circuit Court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—55

decisions of which *Fuller v. Gilmore* (C. C.) 121 Fed. 129, is the best known. With the doctrine of these cases I fully agree, for it would seem that, where the matters in controversy are confined to an examination of the prior art as revealed in other patents, to the construction of some claim or claims of the patent in suit, or the decision of questions of title depending upon the meaning of written documents, no reason exists for not deciding the matters in controversy on affidavits and an examination of uncontroverted documents, instead of requiring the parties to present exactly the same matter to the court in lengthy and expensive fashion.

Nevertheless an examination of such cases in the Circuit Court of Appeals as *Sprague Electric, etc., Co. v. Nassau, etc., Co.*, 95 Fed. 821, 37 C. C. A. 286, *Newhall v. McCabe Hanger, etc., Co.*, 125 Fed. 919, 60 C. C. A. 629, and *Armat Moving Picture Co. v. Edison Mfg. Co.*, 125 Fed. 939, 60 C. C. A. 380, shows in my opinion upon what a slender foundation the so-called rule of the Second Circuit rests. The function of the appellate court has more frequently been directed to discovering doubt, and thus delaying decision, than to adjudicating matters far more fully and elaborately presented to the lower court than it was the practice in equity to do when so vital a litigation as that over the Morse electric telegraph reached the Supreme Court. The record of that case, compared with modern records, is an instructive example of deterioration in procedure.

I am aware (though my examination has not been exhaustive) of but one case in which (when the law permitted it) a motion for preliminary injunction which had been lost in the court below prevailed in the Circuit Court of Appeals; and *Pelzer v. City of Binghamton*, 95 Fed. 823, 37 C. C. A. 288, is also applicable to this case, in that a user against whom an injunction pendente lite was ultimately granted occupied substantially the same position as does the *Waldorf-Astoria Company* in the present litigation.

[2] While believing, therefore, that the granting of a preliminary injunction upon an unadjudicated patent in any but almost undefended cases is far more likely to involve all parties in idle expense than to benefit even the most meritorious complainant, it is my duty to apply the theory laid down as a rule in the *Newhall Case*, supra, 125 Fed. 921, 60 C. C. A. 631, viz.: That the injunction prayed for should be granted, unless there is "a fair doubt as to invention, anticipation, construction or infringement." It would serve no useful purpose to discuss at large in this memorandum the arguments presented as to invention, construction, and infringement. It is sufficient to note that so far as I am concerned I believe, upon a record far more intelligible than the average of those presented at final hearings, that complainant should prevail. I am also of opinion that under present rulings it would be my duty (sitting in a court of first instance) to overrule the defense based upon the International Convention of Paris, even though I think that the arguments of Archbald, J., in the *Hennibique Case* have never been answered. The defense of anticipation, as applied

to this motion, requires some exposition of what I think is meant by the "fair doubt" spoken of in the Newhall Case, *supra*.

That Westman's patent used merely as a reference does not anticipate Kenney I have no doubt. But it is vigorously urged that, before Kenney made application for his patent, Westman had as matter of fact dispensed with the brush shown in his drawings and described in his specifications, and used the balance of his device as a true suction cleaner, dependent for its successful operation upon a narrow elongated slot kept in sealing contact with the article to be cleaned. It is believed that if Westman did this commercially, and when and as alleged, the defense of prior use is established. On the affidavits submitted on this motion I have no doubt at all that this defense has not been established. Therefore in one sense I do not think the court can be said to have a fair doubt.

But it does not seem to me that fair doubt refers only to the effect produced on the judicial mind by the direct evidence submitted on motion for preliminary injunction. That doubt should be wide enough to cover a belief that other reachable testimony exists which, by reasonable effort, the party may adduce.

[3] That is the case here. This action has been pending for over a year. Other actions upon the same patent have been pending against other persons. A cursory examination of the proceedings in one of those other actions persuades me that it would be an improper exercise of power to grant a preliminary injunction when the matter directly submitted in this case is no more (so far as the Westman prior use is concerned) than certain excerpts from the testimony in other cases. The Westman defense is serious; and, where no preliminary injunction has been moved for in those cases in which it has been fully gone into, I must decline to grant injunctive relief at present in this case, in which it has merely been hinted at.

Motion denied.

VACUUM CLEANER CO. v. WALDORF-ASTORIA HOTEL CO.

(Circuit Court, S. D. New York. February 6, 1911.)

PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not be granted on an unadjudicated patent, where, upon a strongly contested issue involving the validity of the patent, a large amount of testimony has been taken in other pending cases which is not produced on the motion, and where with proper diligence the case should have been ready for final submission.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

In Equity. Suit by the Vacuum Cleaner Company against the Waldorf-Astoria Hotel Company. On motion for preliminary injunction. Denied.

For former opinion, see 198 Fed. 865.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mr. Ewing and Mr. Messimer, for the motion.
Mr. Cox, opposed.

HOUGH, District Judge. The vigor with which this application has been pressed by able counsel has led me to go through the entire mass of documents again. The result is to leave the court in the same frame of mind as in August last with the exception of one point.

That point is this: Six months have passed since the previous hearing. It was then apparent (if it had never appeared before) that the defense was very active and very insistent, and that the testimony on the Westman use was not so free from doubt as to render easy the granting of a preliminary injunction. Yet during the past six months it is asserted, and not denied, that no substantial progress has been made in getting the case ready for final hearing. It seems to me that in the light of the large records already compiled regarding the Westman use in other cases orders limiting time would have been made and drastically enforced, and that a final hearing might easily have been had at or about the date of this second motion for preliminary injunction. The conclusion, therefore, seems irresistible that there is some reason for preferring *ex parte* affidavits to testimony which may be made the subject of cross-examination. This has increased doubt weighing against the granting of any injunction; and I am still of opinion that such doubt may properly be based, not only on the affidavits submitted, but on any other facts brought to the attention of the trial judge.

It may now seem no more than fair to counsel to say with respect to the affidavits before the court that I am entirely satisfied that Westman did clean carpets by suction; that it is very probable that he so used his suction blast as to produce a partial vacuum whether he knew it or not; that an appliance has been produced alleged to have been used by Westman which might have been so used as to come near to anticipating the essential element of Kenney's idea; and that the evidence as to whether he did so use his machine, and whether he did use it without a brush, is so hopelessly conflicting and much of it so obviously unreliable as to leave in my mind now rather a stronger doubt, or, at any rate, a greater absence of certainty, than I entertained in August last. This is enough, and more than enough, to require the denial of an injunction, and a fair illustration of the possibly disastrous effects of such doubt (if resolved in favor of a complainant) is shown in *Tompkins Co. v. New York, etc., Mattress Co.*, 159 Fed. 133, 86 C. C. A. 323, where the appellate court reversed a decree on final hearing because it took a favorable view of the testimony of a single witness, and that an interested one. The Virginia occurrences are not so remote as to render it impossible, or even improbable, that some one witness may be produced who will turn the scale and change the result even in an appellate court.

The suggestion is made that an injunction be granted *pro forma* in order to enable the whole case to be submitted to the Circuit Court

of Appeals. Entirely apart from the impropriety of such short cuts, the result of such action would in my judgment be merely delay, without any benefit to either party.

The motion is denied.

T. B. WOOD'S SONS CO. v. VALLEY IRON WORKS.

(District Court, M. D. Pennsylvania September 23, 1912.)

No. 120, In Equity.

PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—CONCLUSIVENESS OF JUDGMENT.

Where, pending a prior suit for infringement of a patent between the same parties, defendant began constructing and using a different device from that involved in such suit with complainant's knowledge, complainant was not bound to then urge infringement by such new device in such action by supplemental bill, though it might have done so, and the judgment in that suit was no bar to plaintiff's right to sue thereafter for infringement of the subsequent device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

In Equity. Suit by the T. B. Wood's Sons Company against the Valley Iron Works, for infringement of a patent. On motion to dismiss. Denied.

F. B. Brock, of New York City, for the motion.

Prindle & Wright, of New York City, opposed.

WITMER, District Judge. The defendant, by his motion, seeks to have the bill of complaint dismissed on the ground of an alleged estoppel arising from a previous suit between the parties. The former litigation began by a suit for infringement of the letters patent herein involved, but, it is said, upon an infringing construction differing from the one since devised, whereof complaint is here made. If this be true, the former suit, though between the same parties for infringement of the same patent, will not prevent the present suit, since the issue involved differs from the former. It is true that the infringing construction, forming the basis of the complaint, was to the complainant's knowledge made and sold by the defendant after bill filed and before decree, and therefore could have been brought into the other suit by supplemental bill, yet there was no obligation requiring the complainant to do so. The infringement here complained of raises a cause of action different and distinct from that litigated in the former action and gives rise to a separate cause of action, which may be the subject of a separate suit. "While a party can bring only a single suit for one individual cause of action, there is no rule which requires him to unite in one suit several independent causes of action. A party may bring against another as many separate actions as he has causes of action, and the fact that they might all be united in a single suit does not qualify his right." *Priest v. Glenn*, 51 Fed. 405, 2 C. C. A. 311; *Olsen v. Whitney* (D. C.) 109 Fed. 80.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

As was said by Mr. Justice Fields, in *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195:

"The language, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. * * * But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted."

It is true that the validity of the patent was settled by the former suit, and, as well, the issue of infringement on facts regarding a certain constructed device then made and sold by the defendant, but whether a certain other device now made and sold by the defendant constitutes infringement of such patent was not then decided and could not be determined from the evidence submitted. Whether the changed device, differing from the one involved in the former suit, infringes the patent, is a mixed question of law and fact, which could not be decided in contempt proceedings, and ought not to be on an accounting. How, then, are the ends of justice to be met, if not by separate suit?

The motion to dismiss is denied.

UNITED STATES v. UNITED SHOE MACHINERY CO. OF
NEW JERSEY et al.

(District Court, D. Massachusetts. August 28, 1912.)

No. 301 (911).

EQUITY (§ 355*)—DEPOSITIONS—TAKING BEFORE EXAMINER—EQUITY RULE 67
—RIGHT OF PUBLIC TO ATTEND.

The taking of depositions before an examiner in an equity suit under equity rule 67 (29 Sup. Ct. xxxiii) is not a judicial trial, nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present at such taking. Until a deposition has been presented to the court, it does not become evidence in the case, nor has either party until then an opportunity to be heard upon the question of the competency, materiality, or relevancy of the statements made by the witness, and the public can have no right to know what the testimony is until the court knows what it is.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 739-742; Dec. Dig. § 355.*]

In Equity. On the question of the right of the public and press to be present during the taking of testimony before an examiner. Right denied.

Asa P. French, U. S. Atty., Edwin H. Abbot, Jr., Sp. Asst. U. S. Atty., and W. S. Gregg, Sp. Asst. Atty. Gen.

Charles F. Choate, Jr., Walter Bates Farr, and H. G. Donham, all of Boston, Mass., for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BROWN, District Judge. The United States, having given notice that it desires evidence to be taken orally under the sixty-seventh rule in equity (29 Sup. Ct. xxxiii), contends that the public and the press should be admitted to the proceedings wherein the depositions of witnesses are to be taken before the examiner.

It is urged that the public and press should be afforded an opportunity to attend and to hear whatever may be said upon the examination before it has been reduced to writing and signed by the witness, and before the deposition is presented to the court. This contention is not supported by the citation of any authority, and is so contrary to the usual practice both at law and in equity that it might be summarily disposed of save for the statement of the United States attorney that in cases under the Sherman Act such a course has been followed. The cases cited by the United States which uphold the undisputed principle of publicity in trials and in judicial proceedings do not in the slightest degree support the contention of the United States, and afford no assistance upon the question before us. This question is whether the public and the press should be admitted to the taking of depositions for use at a trial not then begun, but which is to take place in the future.

The question is easily solved upon a consideration of the essential difference between a trial or a judicial proceeding held by an officer with judicial authority, and the merely preliminary step of taking depositions.

Equity rule 67 provides that the examination shall take place in the presence of the parties or their agents, by their counsel or solicitors; that the depositions taken shall be reduced to writing by the examiner; that the testimony of each witness shall be read over to him and signed by him in the presence of the examiner and such of the parties or counsel as may attend, etc. The examiner may note objections, but he "shall not have the power to decide upon the competency, materiality or relevancy of the questions." The original depositions, authenticated by the signature of the examiner, must be transmitted by him to the clerk of the court, to be there filed of record, in the mode prescribed by Revised Statutes, § 865 (U. S. Comp. St. 1901, p. 663).

Rule 69 (29 Sup. Ct. xxxiv) provides that upon the return of the commissions and depositions into the clerk's office publication may be ordered by any judge of the court upon due notice to the parties, and further provides for publication by consent in writing of the parties.

The nature of this proceeding is well described in Wigmore on Evidence, § 1376 (2). "This process of securing in advance the evidential material for a trial is a part of the preliminary procedure of courts," etc.

It is also described by Wigmore in section 1331 as "testimony given extrajudicially before a specially authorized officer for the purpose of subsequent use at a trial. * * * In a deposition the testimony is the writing taken down by the officer and signed by the deponent. The officer's writing is not his report of the witness' oral deposition. There is only one testimonial utterance—the writing."

Mr. Wigmore refers also to the chancery practice, saying:

"In this practice all testimony was taken in writing, and in the theory¹¹ the testimony or deposition was the writing and nothing else."

The brief of the United States attorney asserts:

"The right of the public is to hear testimony, and that is not accorded when it is given merely the privilege to read it."

It is also asserted:

"There is a right of the public to hear what is being said in this case while it is being said."

It is quite apparent from what we have said that such a supposed right has never existed in the practice of the chancery courts, nor has such a right in respect to the taking of depositions ever existed at law. Both common-law judges and juries are compelled to receive testimony in the form of written depositions, and upon such written testimony of witnesses whom they have never seen nor heard may make decisions as to the rights of parties.

The public has a right to such form of testimony as the law provides shall be received at trials at law or at hearings in equity or upon other judicial proceedings. If judges and juries may not object that they have not seen and heard the witness while he was testifying, the press and public may not object.

Furthermore, neither at law nor in equity does a deposition become evidence in a case until it is offered by one of the parties; until there is an opportunity for a judicial hearing as to its competency. A party in a cause has a right to the protection of the court in a judicial hearing. In the proceedings before an examiner such right is not afforded him. No question of right is submitted to the examiner, and under the provision of equity rule 67 and under the doctrine of *Blease v. Garlington*, 92 U. S. 1, 7, 23 L. Ed. 521, the examiner must take down all the examination in writing. The party has the right to have his exceptions noted and to file further exceptions when the deposition is filed in court.

"The testimony is taken to be submitted to the court where the suit is pending, and all questions upon the evidence, its materiality and sufficiency, are to be determined by it, and after it by an appellate court." *Nelson v. United States*, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673.

The only opportunity for redress which the party has against improper or irrelevant testimony follows the filing of the deposition. If all is to be made public before it is reduced to final form in writing and before there is an opportunity for a hearing upon the propriety and competency of the testimony, all effective protection against scandal, impertinence, and irrelevancy is practically gone.

When justice is being administered by a judicial officer, the public is entitled to attend, save under exceptional conditions, with which we need not deal.

In *Cowley v. Pulsifer et al.*, 137 Mass. 392, 50 Am. Rep. 318, Mr. Justice Holmes considered the question of the policy of publicity, and marks the distinction between what takes place in open court and the

filing in the clerk's office of a petition containing a written preliminary charge. Of such preliminary steps he said:

"These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice."

Due process of law requires that the parties have an opportunity to be heard. For the court to enforce a rule that the public and the press shall have an opportunity to listen before the parties to the case have an opportunity to be heard would be a plain violation of elementary rules of fair play. The proceeding before the examiner lacks the essential element,—an opportunity to be heard by a judicial officer and to submit questions of right to a judicial officer.

Furthermore, another essential difference is that upon a trial or judicial proceeding the rights of the parties are submitted for an adjudication. A party in equity ordinarily may dismiss his bill at any time before final hearing. *Houghton v. Whitin Machine Co.* (C. C.) 160 Fed. 227; *Morton Trust Co. v. Keith* (C. C.) 150 Fed. 606. Under the view of the United States a bill may be filed, the testimony of hostile witnesses may be presented to an examiner, the public and the press may attend, and the complainant may then dismiss the bill, leaving the defendant no opportunity to reply or to procure an adjudication which will offset the injurious statements of witnesses. It is manifest from the nature of depositions, because they are not yet legal evidence and because the parties against whom they are taken have had no opportunity for a hearing, that the proper practice is that which has been uniformly observed. Equity rule 69 expressly provides for publication either upon the order of a judge or by consent of parties, after the return of the depositions by the examiner.

In *Patterson v. Colorado*, 205 U. S. 454, 462, 27 Sup. Ct. 556, 558, 51 L. Ed. 879, 10 Ann. Cas. 689, it was said:

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court."

Premature publication of proceedings before an examiner might make the author subject to proceedings for contempt. In *Wigmore on Evidence*, § 1836, the writer states that publication of proceedings may be prohibited, and—

"of palpably just grounds there are at least two: First, that the proceeding is only a preliminary or ex parte one, and that a publication would therefore give an erroneous impression of the conduct of the parties; secondly, that conditions of popular emotion exist, amid which the publication before verdict rendered would tend to excite the public mind, to cause pressure upon the minds of the witnesses, the judge, and the jury, and thus to do injustice to one of the parties by preventing a fair and unbiased investigation of the facts."

If upon these grounds a court may stop the publication of proceedings which have actually taken place in open court, it would follow that the court, were it necessary, might prohibit by order the publication of preliminary proceedings before an examiner; but such order

is not necessary, for the reason that by common understanding of the bar and bench the taking of depositions is a private and not a public proceeding.

Testimony at times must be taken out of court. *Alexander v. United States*, 201 U. S. 117, 26 Sup. Ct. 356, 50 L. Ed. 686. Trials are held at times and places appointed by law. Depositions may be prepared at times and places whereof no public notice is given by law or is required from the parties, at places not accessible to the public, and at places where there is no provision for the attendance of the public. The court is provided with officers for the preservation of order. The examiner, under ordinary conditions, is not so provided. Depositions are taken at deathbeds, in prisons, in remote and even foreign jurisdictions. They may be taken in many jurisdictions for a trial in another jurisdiction. Within a short time it has been reported in the public prints that depositions in cases under the Sherman Act have been taken at a room in the Parker House in Boston and at a room in the Narragansett Hotel in Providence. What truth there is in such reports we do not know, but they illustrate what may properly be done and is ordinarily done in the course of taking depositions, but what is entirely inconsistent with the contention that public policy requires the attendance of the press and the public.

The impropriety of the publication pending the suit of depositions so taken is manifest from what we have already said. It is evident that upon ordinary principles of fair play the examiner's office should not be used as a vehicle for spreading statements which have not been subjected to judicial test.

The fact that testimony orally delivered is often more satisfactory than testimony read from a document has no bearing upon the present question. The mere preference for testimony of this character yields to the considerations of convenience and necessity which justify the general law of depositions.

What is termed by Mr. Wigmore in section 1396 "demeanor evidence," while desirable, is not essential. If, in the course of a chancery suit, it is desirable to produce particular witnesses in open court in order that their demeanor may be observed, there is provision that the court may, in its discretion, "permit the whole, or any specific part of the evidence, to be adduced orally in open court on final hearing." See equity rules 67, 78 (29 Sup. Ct. xxxiii, xxxvi).

The provision in these rules is an indication that oral proceedings before an examiner are regarded as essentially different from proceedings in open court. It is quite clear that the taking of depositions, either at law or in equity, is in no proper sense a trial or a part of a judicial trial, using the term to mean "that final examination and decision of matter of law as well as fact, for which every antecedent step is a preparation, which we commonly denominate the trial." *Carpenter v. Winn*, 221 U. S. 533, 538, 539, 31 Sup. Ct. 683, 55 L. Ed. 842; *Hess v. Reynolds*, 113 U. S. 73, 80, 5 Sup. Ct. 377, 28 L. Ed. 927; *Carson v. Hyatt*, 118 U. S. 289, 6 Sup. Ct. 1050, 30 L. Ed. 167; *Delaware County Commissioners v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; *Nelson v. United States*,

201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673; *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318.

In *Ex parte Milligan*, 4 Wall. 121, 18 L. Ed. 281, it was said: "Every trial involves the exercise of judicial power."

That the public and press should be entitled to hear what is not yet evidence and what may never become evidence before the court which is to try the case hears it is an unprecedented and unreasonable proposition. The contention that judicial proceedings shall be held with open doors is not under dispute. The proposition that the taking of depositions by an examiner, who is merely a ministerial officer, is subject to the same rule, is in our opinion manifestly erroneous.

To justify a departure from the general practice and from the requirements of the natural meaning of the equity rules of the Supreme Court, which have the force of statute, it is necessary for the United States, if unable to produce authority, to show some reasons for its position. It asserts merely the right of the public to hear testimony. The public will have that right when testimony is offered. The public interests are fully preserved from the fact that the trial in the present case must be conducted with open doors.

The defendants claim that the court is bound as a matter of positive law by the sixty-seventh and sixty-ninth equity rules, and that these rules mean that no one else shall be present at the taking of the testimony except the parties mentioned in the rules; that, if these rules do not fully cover the question, equity rule 90 (29 Sup. Ct. xxxvii) applies. The contention that upon a proper construction of equity rule 67 the examination is to be private is directly supported by the decision of Jessel, Master of the Rolls, in *Re Western of Canada Oil, Lands & Works Company*, L. R. 6 Chan. Div. p. 109:

"The place where the examiner sits is not a public court, but a mere office. That was so before the Judicature Acts, and those acts, so far as I know, have made no change in his position, and his office remains a private office to this day.

"The thirty-first section of the Act 15 & 16 Vict. c. 86, which is still in force for this purpose, provides that 'all witnesses to be examined by or before one of the examiners of the court, or by or before an examiner to be specially appointed by the court, * * * and such examination shall take place in the presence of the parties, their counsel, solicitors, or agents.' That must mean in the presence of the parties, their counsel, solicitors, or agents exclusively. It cannot mean that the parties, their counsel, solicitors, or agents must be present. It can only mean that the examination shall take place in their presence if they choose to attend. Subject to this, it is a private examination.

"In my opinion the public have no right whatever to go into the examiner's office, and the examiner has no discretion as to admitting them."

The language construed by the learned judge was substantially that of rule 67.

We may further notice that rule 13 of the Circuit Court contained the form of commission upon interrogatories at law or in equity. Among other things it is provided:

"You will not, without the consent of the parties in writing, permit any person except yourself to attend at the taking of any deposition, or to communicate with any witness, whilst giving his deposition, in relation to the subject-matter thereof, except that you may permit to be present such dis-

interested person (if any) as you may think fit to appoint as a clerk to assist you in reducing the deposition to writing, and you will take such deposition in a place separate and apart from all other persons."

Certainly this is inconsistent with the existence of any supposed rule that the public has a right to hear what is being said as distinguished from an opportunity to hear it read at the trial. In conclusion we may say: Is it not time enough for the public to know what the testimony is when the court knows what it is? Is it not enough for the public to receive testimony in the form in which the court must receive it?

The examiner will not, without the consent of both parties, allow the attendance of persons other than those mentioned in rule 67.

Judge PUTNAM sat at the hearing of this matter by this court assembled under the statute; but, as he had expressed an opinion when the question involved was brought before him as a single judge, he deemed it proper to withdraw from expressing any further opinion.

In re SMITH.

District Court, E. D. Wisconsin. September 23, 1912.)

BANKRUPTCY (§ 185*)—AMENDATORY STATUTE—APPLICATION.

A chattel mortgage having been given by the bankrupt on March 17, 1908, was not filed until September 8, 1909, thereby becoming good for two years from that date, but expiring then, unless within 30 days before the expiration of the 2 years a renewal affidavit was filed. *Held* that, no sufficient affidavit having been filed, the mortgage was in full force and effect under section 47a of Bankr. Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), when it was amended June 25, 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]), so as to provide that the trustee should thereafter be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and hence such amendment was applicable to the mortgage which, without extension, became void as against creditors and therefore as against the mortgagor's trustee in bankruptcy on September 8, 1911.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 235, 273; Dec. Dig. § 185.*]

In Bankruptcy. In the matter of bankruptcy of Fred M. Smith. On proceedings to review a referee's order denying an application of John Bartram. From an order directing the trustee to sell certain property covered by a chattel mortgage held by Bartram, and to apply the proceeds on a mortgage debt. Affirmed.

On March 17, 1908, the bankrupt executed and delivered to the petitioner, Bartram, a chattel mortgage upon property and to secure an indebtedness therein described. Such mortgage was filed with the town clerk of the town wherein the property was located on September 8, 1909, pursuant to section 2314, Statutes of Wisconsin of 1908. On March 5, 1910, the mortgagee made, and on March 7th filed with the town clerk, an affidavit of renewal intended to be pursuant to the Statutes of Wisconsin 1898, § 2315. On September 5, 1911, adjudication of bankruptcy ensued, whereupon one Parrish, who had theretofore levied upon the mortgaged property, was elected trustee, and, doubtless being advised that his execution levy could not prevail, abandoned it, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

continued to hold the seized property as trustee in bankruptcy. Bartram, the chattel mortgagee, applied to the bankruptcy court for an order directing the trustee to sell the property covered by the chattel mortgage, and apply the proceeds on his mortgage debt. The trustee contested the application, claiming that the mortgage was void. The order of the referee upholding the trustee's contention and denying the application of the chattel mortgagee is now here for review.

F. F. Wheeler, of Waupaca, Wis., for trustee.

E. E. & E. L. Browne, of Waupaca, Wis., for John Bartram.

GEIGER, District Judge (after stating the facts as above). On June 25, 1910, Congress passed an amendment to section 47a (2) of the Bankruptcy Law, adding, relative to the duties of trustees in bankruptcy, the following:

"And such trustees as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

Prior to the passage of this amendment, a trustee in bankruptcy was vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. He "stood in the shoes of the bankrupt," and had no greater right; and where, under the state law, which was binding on the bankruptcy court, a chattel mortgage was valid as between the bankrupt and the mortgagee, but not against purchasers, mortgagees, or creditors, it was good as against a trustee in bankruptcy. The adjudication of bankruptcy was not an assertion of a lien, and did not put the trustee in the position of creditors who had, through process, acquired specific liens against the property covered by the mortgage. In other words, if the mortgage, though not filed, was good between the parties, the trustee was not a purchaser, a mortgagee, nor a lienee. *Ullman v. Duncan*, 78 Wis. 213, 47 N. W. 266, 9 L. R. A. 683; *Manson v. Phoenix Ins. Co.*, *Garnishee*, 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; *York Manufacturing Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

The single question is therefore presented whether, in view of the amendment cited, these general principles govern the situation now here for review. The mortgagee's contention is that the amendment to the Bankruptcy Act, to be applicable, must be given a retroactive effect, but the referee declined to take this view.

As noted, the mortgage was dated March 17, 1908. To be valid as against purchasers, mortgagees, or lien creditors, such mortgage had to be filed. The mortgagee did not file it until September 8, 1909. Under the law, such filing was effective for two years; but, unless within 30 days before the expiration of such two years a renewal affidavit was filed, it ceased to be valid. It appears that on March 7, 1910, or about six months after filing the mortgage, the mortgagee (evidently conceiving the renewal provision of the statute to refer to the date of execution, and not to the date of

filing) filed a renewal affidavit. It is assumed as well settled that such filing of a renewal affidavit at a time other than that specified in the statute was wholly nugatory, and therefore the two-year limit expired, and the mortgage ceased to be valid as against those designated on September 8th, 1911. Thus, on June 25, 1910, when the amendatory act was passed, the mortgage was effective, not only as between the parties, but as against all others, because it had been filed.

Can the mortgagee be heard to say that the amendment is inoperative because at the time of the execution and delivery of the mortgage the rights which purchasers, mortgagees, or creditors could assert, had not been conferred upon trustees in bankruptcy? As an academic proposition he might plausibly claim that, not being required, as against the trustee, to file the mortgage at all, the immunity against attack by the latter was a valuable right which should remain unimpaired until the mortgage debt is satisfied. But the practical situation is this: He did in fact file the mortgage, and in doing so shielded it against attack from all sources—he secured the full protection which the statute gives to a filed mortgage. He was at liberty to maintain this protection by filing a renewal affidavit, or he could neglect to do so and thereby hazard attack. Has the amendatory act done anything more than in some degree possibly to change the hazard by introducing the trustee into the class or classes permitted by the state statute to question such mortgage if not filed or renewed? At the time the amendment went into effect, did not the situation itself reserve to the mortgagee all of his rights as they then existed; or, to put it in the least favorable light, is not the amendment entirely consistent with his rights under the mortgage if he would but exercise the choice or opportunity given him by the state statute for the preservation thereof? I think this must be answered affirmatively; and, if so, the question respecting the invalidity of the amendment because retroactive, or for any other reason, is wholly eliminated. It is elementary that a law, unless the legislative intent be clear, will not be given a retroactive effect. But the objection that the law is retroactive must, to be available, be based upon its necessary and unavoidable effect upon rights which had accrued, and not upon its succession in point of time. In my judgment these considerations distinguish the case of *Artic Ice Machine Co. v. Trust Co.*, 192 Fed. 114, 112 C. C. A. 458, where the trustee sought to enforce his rights against an unfiled contract of conditional sale; and the court declined to give the amendment effect, because it necessarily cut off the vendor's title, which, at the time of the passage of such amendment, was good. As indicated, however, in the case now before us, the mortgage might have been held valid against the trustee if not filed, but was also valid because in fact filed and the possibility of claiming the amendment to be retroactive can arise only when the mortgagee, through choice or neglect, has failed to file the renewal affidavit.

I think the referee's decision was right, and the order is affirmed.

In re PICKHARDT.

(District Court, E. D. Wisconsin. September 5, 1912.)

BANKRUPTCY (§ 476*)—TRUSTEE—CUSTODIAN—ALLOWANCE.

Where a trust company was appointed trustee in bankruptcy, it was its duty to provide a custodian for the property delivered to it as trustee, required by an insurance company before it would insure the same; and it appearing that no night watchman was necessary, the trust company was not entitled to an additional allowance for the services of a custodian at the expense of the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. § 476.*]

In the matter of bankruptcy proceedings against Max Pickhardt. Application by trustee for an allowance of the services of a custodian. From a referee's decision, denying the application, the trustee applies for review. Affirmed.

Review of referee's decision on application of trustee for allowance of charge incurred for services of a custodian. The petitioning trust company, a corporation thereto duly authorized, was appointed receiver prior to, and trustee after, adjudication. A stock of goods belonging to the bankrupt, located in a store building, was placed and held in its custody as receiver. In its petition it is alleged that "it was necessary to procure fire insurance on the same, and to do so it became necessary to appoint a custodian to be placed in charge of said merchandise." Whereupon a custodian was hired, for the reasonable value of whose services, allowance was asked.

The referee denied the application, assigning his reasons as follows: "The hearing was upon the petition, and the statement of facts therein which are conceded, and the matter submitted, whereupon I held that the allowance of said bill was not justified under the law, and that the said expense was not necessarily incurred by the trustee in the preservation of the property of the bankrupt. My reasons for so holding are that receivers and trustees are appointed by the court for the purpose of taking possession of and preserving property of bankrupts, and that the fees which are paid to receivers and trustees constitute their compensation for the care and preservation of the bankrupt estate and their services rendered in administering the same. In this case the trustee is a trust company, organized and equipped for the transaction of such business as pertains to the office of a trustee, and it can only act by and through its officers, servants, and employes; and when a trust company accepts and assumes the office of trustee in bankruptcy, it becomes its duty to take charge of and preserve the property of the bankrupt, and it may and should perform this duty by its officers, servants, and employes, and it is not contemplated that a trust company may assume the responsibility of taking charge and possession of bankrupt estates, and delegate such services to persons whom it may specially employ, aside from its own officers, servants, and employes, and charge against the bankrupt estate the expenses of the person so specially employed. "Where an individual is appointed and assumes the office of trustee, it is expected and as a matter of practice he does assume the personal charge and care of the property, for which he is compensated by the fees allowed him by the statute. I can see no reason why a trust company, acting in this capacity, should be permitted to make independent charges against the bankrupt estates for the services of persons whom they may place in charge thereof. There is, of course, this exception, that where the property is of such a character that it is necessary to employ a night watchman, the expenses of such watchman are, in my judgment, a legitimate charge against the estate, and it has been the practice of the court to allow the same in a reasonable sum. In the present case it appears that no night watchman was necessary, and the sole

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

question is: Can the estate employ a custodian at the expense of the bankrupt estate? I do not think so, and for this reason feel it my duty to disallow the claim, and the same is therefore disallowed."

C. E. Wild, of Milwaukee, Wis., for trustee.

GEIGER, District Judge. A receiver or trustee in bankruptcy, whatever other duties may be cast upon him, is certainly the legal and actual custodian of the property which is the subject of the proceeding; and, under the rule of this court (bankruptcy rule No. 3), a receiver, unless otherwise ordered, can "act only as custodian to care for the property (and have the same insured) for delivery to the trustee." It is rightly presumed that the duty to so act, as every other duty, must, in the first instance, be performed by the receiver or the trustee personally, as an incident to or burden of the office, and in consideration of whatever compensation may be allowed. The right to assistance, at the cost of the property in custody, in addition to such compensation, must arise out of circumstances or conditions disclosing a burden beyond the reasonable possibility of performance by the single individual charged therewith. Such situations are found when the property is of great bulk, situated in different localities, or where, in its care and preservation, service of a special or unusual character is required.

The referee has applied these general elementary principles to a corporation—a trust company, acting in the capacity of receiver or trustee. Manifestly, such a corporation should be subject to the same rules as individuals. It can act only through its officers or agents; but it must be ready through them to perform the duties of the office or the trust, just as an individual must perform them. It is merely empowered to discharge the functions as an individual otherwise might, but not at greater cost nor burden to the estate.

This brings us to an application of these principles to the facts before us. A stock of goods located in a store building, where the bankrupt conducted his business, is turned over to the corporate receiver. The property is insured, and it is alleged that, in order to effect insurance, a caretaker was required to be and was placed in immediate charge of the property. It is not made to appear that the watchfulness thus bestowed by the receiver through his hired servant—at the behest of the insurer—was something beyond or in addition to the service contemplated to be performed by an individual or corporate receiver, charged solely with a custodianship. The intimation that, except for the demand made by the insurer, the receiver would not have placed a watchman in direct charge of the property, by no means satisfies the requirement of reasonable necessity in casting an additional burden upon the property. The presence of a watchman is necessary, if at all, as an incident to the general custodianship involving the particular duty to insure, and the service thus rendered is, as above stated, one which the receiver or trustee personally must perform, unless absolved by reason of situations arising as indicated. The necessity for its performance by an agent or another cannot arise out of or be demonstrated by the mere fact of its being so performed.

It was claimed, upon argument, that receivers and trustees should be treated with the same liberality as are sheriffs or marshals, upon seizures of property; that the latter invariably deputize others, at the cost of the parties or property, to take actual charge. Such officials are charged with the performance of other public duties, which fact, of itself, usually determines the necessity of assistance in the discharge of any particular duty. Their right to assistance is not absolute, but is determined in each case by circumstances showing necessity.

The fact that the rendition of service as a watchman or caretaker over property may be irksome, or certainly not congenial to those acting as receivers or trustees, and, further, as intimated or claimed upon the argument, that, in view of the moderate compensation allowable under the bankruptcy act, individuals or corporations would decline to act in such capacities unless greater liberality is shown, because they could not afford it, cannot justify allowances not otherwise sanctioned under a general rule sound in principle and applicable to all cases. And because the receiver herein failed to bring itself within such rule, I think the referee rightly disallowed its claim.

The order is affirmed.

UNITED STATES v. PAYETTE LUMBER & MFG. CO. et al.

CONKLIN v. COBBAN et al.

(District Court, D. Idaho, S. D. July 26, 1912.)

Nos. 49 and 255, Consolidated as No. 60.

1. DEEDS (§ 70*)—FRAUD.

Where a complainant contracted to sell certain lands lying within a forest reservation for an agreed price per acre, the fact that without her knowledge the conveyances as drawn by the purchaser and signed by her ran to the United States, instead of to himself, and that other papers were presented to and signed by complainant to enable the purchaser to select lieu lands under the statute, did not constitute a fraud which would support a suit in equity to set aside the transaction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

2. PRINCIPAL AND AGENT (§ 171*)—RATIFICATION.

In a suit to recover lands which were patented to complainant as lieu lands selected in exchange for lands in a forest reservation, which had been conveyed to the United States, but which lieu lands had been conveyed to another under a power of attorney alleged to be invalid, the complainant must be considered as having ratified all proceedings and instruments executed by her relating to the exchange of lands.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

3. PRINCIPAL AND AGENT (§ 103*)—DEEDS—INVALID POWERS OF ATTORNEY.

Complainant and another, owners in common of several thousand acres of land within a forest reservation, made a verbal contract to sell the same at a stated price per acre, conveyances for the several tracts to be deposited in escrow and delivered to the purchaser only on payment for the particular tract. The contract was made in the office and pres-

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ence of a lawyer who was attorney for the other owner and acting, as complainant supposed, as her attorney also. Shortly afterward a number of papers were brought by a messenger from the attorney's office to complainant and her co-owner for their signature, and were signed without much examination in the belief that they had been prepared or approved by the attorney. Such papers consisted of deeds conveying the lands to the United States, applications for lieu lands with the descriptions left blank, and powers of attorney to convey such lieu lands in blank. Such papers were in fact not seen by the attorney personally, but were prepared by the purchaser, and in some manner returned to him after their execution without the attorney's knowledge or consent. After filing the deeds, he sold certain of the "scrip" to one of the defendants, who filled out and filed the applications, and, after their acceptance, inserted his own name in the powers of attorney, and, acting thereunder, conveyed the lands to his codefendant. Complainant received but a small part of the purchase money; and, after discovering the facts, brought suit to cancel the conveyances made under the powers of attorney and to recover her interest in the lands conveyed, which had been patented to her and her co-owner of the reserve lands. *Held*, that the powers of attorney, having been delivered without complainant's authority or knowledge, carried no implied authority from her to fill the blanks, without which they were void, and the conveyances thereunder did not divest her title; but that, as defendant had purchased the land in good faith and paid for the same, complainant would be required to convey on payment to her of a just proportion of the sum due her under the contract of sale.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

4. PRINCIPAL AND AGENT (§ 10*)—POWER OF ATTORNEY IN BLANK.

A power of attorney to convey land, executed in blank, like a deed with the name of the grantee left blank, is wholly inoperative until the name of a donee is inserted by some one having authority from the donor.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 21, 22; Dec. Dig. § 10.*]

5. ESCROWS (§ 14*)—AUTHORITY OF DEPOSITARY—UNAUTHORIZED DELIVERY.

One authorized by a vendor of land to deliver conveyances or powers of attorney to execute conveyances only on receipt of the purchase price is a special agent or an escrow depositary, and a delivery contrary to such instructions does not bind his principal even in favor of subsequent purchasers without notice.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 17-20; Dec. Dig. § 14.*]

In Equity. Consolidated suits by the United States against the Payette Lumber & Manufacturing Company, John A. Benson, Joseph C. Campbell, R. M. Cobban, E. B. Weirick, and E. B. Weirick, trustee, and by Mollie Conklin against R. M. Cobban, E. B. Weirick, individually and as trustee, Payette Lumber & Manufacturing Company, and others. On final hearing. Decree for defendants in first suit, and for complainant in second.

C. H. Lingenfelter, U. S. Atty., and S. L. Tipton, Asst. U. S. Atty. N. E. Conklin and W. B. Davidson, for complainant Conklin.

Richards & Haga and McBride & McBride, for defendants Cobban and Weirick.

Cavanah & Blake, for defendant Payette Lumber & Mfg. Co.

A. A. Fraser, for defendant Campbell.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DIETRICH, District Judge. The United States and Mollie Conklin bring separate actions exhibiting the same general controversy, and involving the same general state of facts. The suits were consolidated for trial, and have now been submitted together. There is great similarity in the averments of the two bills, but the prayers are wholly different; the demand being, in the one case, that the United States be adjudged the true owner of 3,767 acres of timber lands situate in Boise county, Idaho, and in the other that Mollie Conklin be decreed an undivided half interest in the same land. A similar bill relating to California lands, but involving the same transactions, was exhibited by the government in the United States Circuit Court for the Northern District of California, which, upon demurrer, was dismissed for want of equity, and, upon appeal to the Circuit Court of Appeals, the judgment of the lower court was affirmed. *United States v. Conklin* (C. C.) 169 Fed. 177; *Id.*, 177 Fed. 55, 100 C. C. A. 473. The facts here disclosed by the evidence are, to say the least, no more favorable to the government than were the averments there held to be insufficient, and upon the authority of that case its bill must be dismissed.

The parties defendant in the remaining suit are R. M. Cobban, E. B. Weirick, and the Payette Lumber & Manufacturing Company, a corporation. Title to the lands referred to was conveyed jointly to the plaintiff and the estate of Patrick Reddy, deceased, by the United States, whereupon the defendant Cobban, assuming to act under powers of attorney purporting to have been executed in his favor by the plaintiff and the legal representatives of the Reddy estate, transferred the same to Weirick, as trustee, who, in turn, transferred the same to the defendant corporation. The plaintiff prays that these powers of attorney be held to be void and of no effect, and that she be adjudged to be the owner of an undivided one-half interest in the lands, and for general relief. The salient facts will now be stated.

Some time prior to the year 1900 Alvah Russell Conklin, the plaintiff's husband, acquired title to lands aggregating approximately 9,600 acres, situate in Inyo and Tulare counties, Cal., and referred to in the record as the "Monache lands." He conveyed an undivided one-half interest therein to Patrick Reddy, his brother-in-law, who was a member of the law firm of Reddy, Campbell & Metson, of San Francisco. Subsequently, and before the year 1900, the lands were included within the Sierra forest reserve. Under a general act of Congress, the owners of such lands, by complying with certain conditions, were authorized to exchange them for other public lands subject to settlement. To make such exchange, it was requisite that the owner execute a deed conveying the reservation lands, sometimes referred to as the "base," to the United States, and have such deed recorded in the proper county recorder's office, and thereafter file the same, together with an abstract showing a clear and unincumbered title in the United States, in the land office, together with an application to select other specifically described land in lieu thereof; such other land being generally referred to as "lieu" land.

Both Conklin and Reddy died prior to the transactions in 1900 out of which this litigation grows, and their estates were in the process of administration. For some years prior to the death of Reddy, J. C. Campbell was his partner, and upon his death the firm continued as Campbell, Metson & Campbell, and either he personally or his firm acted as counsel for both the Reddy and the Conklin estates. John A. Benson, residing at San Francisco, appears to have been a land agent or attorney, and to have been engaged on a comparatively large scale in dealing in land scrip, and in securing title to public lands. He had discussed with Reddy the matter of purchasing his (Reddy's) interest in these lands, but the negotiations were cut short by the latter's death. In the early part of the summer of 1900 both the plaintiff Mollie Conklin, who had in the meantime succeeded to the interest of her deceased husband, and the representatives of the Reddy estate, which was still in process of administration, being desirous of disposing of the Monache lands, a meeting of the several parties with Benson was arranged for at the office of J. C. Campbell. As to the question whether or not there was more than one meeting at which the plaintiff was present, and as to just what occurred, or was finally agreed upon, the evidence is highly conflicting. There seems, however, to be no doubt that at one meeting, at which an understanding was practically arrived at, the plaintiff and her son, who was a young lawyer, Benson, Campbell, and Reddy's widow, who was also one of the representatives of the Reddy estate, were present. Putting aside for the moment the disputed details, the understanding then reached was that the owners were to dispose of the Monache lands for the agreed price of \$3.80 per acre. Plaintiff's version is that this meeting took place in the month of August, 1900, and that the agreement was that Benson should purchase the lands at the price named, such purchase to be completed and the full amount of the purchase price paid within 90 days. Deeds were to be executed and placed in escrow, with instructions to deliver to Benson upon the payment of the purchase price. Upon the other hand, Benson's testimony is to the effect that it was not understood that he was to purchase the base land outright, but that it was to be exchanged for other land, as provided by law, and that he was to make payment only when the titles were approved by the proper government officials. The truth probably is that, upon the one side, the plaintiff, not being familiar with the procedure by which base lands are exchanged for lieu lands, gave little attention to, and did not understand, such explanations as may have been made by Benson, and went away with the impression only that Benson was to purchase, and that she was to deed to him directly, her interest in the base lands. Upon the other hand, Benson, being advised of the conditions under which base lands could be handled and exchanged, and being familiar with the procedure, understood that the owners would execute, and, in due time, deliver such papers as were necessary to make the exchange and transfer. The plaintiff wanted to sell the lands, and was interested particularly in procuring the desired price. Being concerned only with the ultimate result, she probably gave very

little thought to the means by which that result would be reached. In view of the entire record, it is wholly improbable, and I am unable to conclude, that Benson agreed, or that he understood, that he would directly purchase the base lands, or that deeds from the then owners were to convey the title to him personally.

At this point it should also be stated that the record discloses a direct conflict upon the question as to whether or not, in the negotiations leading up to the agreement referred to, and in making the agreement, and in the subsequent transactions still to be related, Campbell was acting in the capacity of attorney for the plaintiff. It is her contention that he was so acting, but by him such relation is emphatically disclaimed. As already stated, he or his firm had been acting for her as the representative of the Conklin estate, and he was at the time the attorney for the representatives of the Reddy estate, but there is no positive or strong circumstantial evidence tending to support the plaintiff's contention that he or his firm consciously acted in such capacity for her personally in this or any other matter. In view of the fact that Campbell had been associated with her brother-in-law, Reddy, and that her son had studied law in his office, and that he, Campbell, or his firm, had, up to the very time of the meeting, acted as counsel for the estate of her deceased husband, she doubtless entertained great confidence in him, and it is entirely probable that she expected him to protect her interests, without giving any thought to the question whether or not he had been expressly retained for that purpose. Upon the other hand, from the entire record, I have concluded that Campbell himself did not understand that he was, in a technical sense, acting as her attorney. While at times he appeared to render services to the plaintiff in connection with the matter, it is to be borne in mind that he was all the time attorney for the Reddy estate, and that the Reddy estate owned an undivided one-half interest in the property, and the interests of the estate as against Benson were therefore identical with those of the plaintiff. In other words, in properly caring for and protecting the interests of the Reddy estate, Campbell could not well avoid the appearance of also protecting the interests of the plaintiff.

It seems to have been understood that, upon being furnished with the necessary data, Benson would, at his own expense, procure abstracts of title, and draft the necessary instruments to effect the exchange, and a short time after the meeting referred to he caused to be sent to Campbell's office numerous papers, with the request that they be executed. At this point the evidence is very fragmentary and very unsatisfactory. Campbell apparently had an extensive practice, and the details of the business were left to assistants and clerks in the office. The papers thus prepared by Benson and delivered at Campbell's office upon two different occasions were apparently taken by one of the clerks or office boys to the plaintiff and Mrs. Reddy for execution. The testimony of the plaintiff is that the first group was brought to the home of Mrs. Reddy, where she, the plaintiff, was temporarily staying. They

hastily scanned some of them, and then, concluding that they would not have been sent for signature unless they had Campbell's approval, they signed them, and turned them back into the hands of the messenger. The number of the papers is not disclosed, but there were many of them. Later on another bunch was presented to the plaintiff by some one whom she recognized as being connected with Campbell's office, at a hotel in San Francisco where she was temporarily staying, and these she signed in the same way and upon the same assumption. Campbell himself testifies that he personally took the notary public to the hospital, and there procured the execution of certain of the papers by one of the Reddy representatives, who was ill at the time. Unfortunately, before the evidence was taken in this case, both of the representatives of the Reddy estate and the notary public died.

Subsequently, from time to time, but under just what circumstances, or how often, or when, does not appear, these papers came into Benson's hands, and they now appear to have consisted of a large number of deeds conveying the base lands to the United States, an equal number of applications, signed by the owners of the base lands, for the selection of lieu lands, a like number of instruments empowering some undesigned person to make selections of lieu lands, and also an equal number conferring upon undesigned persons irrevocable authority to convey the title or titles of the lieu lands to purchasers thereof. It seems that, under the prevailing rules of the land department, the right to make selections of lieu lands was held to be nonassignable, and therefore patents always issued to the grantors of the base lands. It consequently became necessary either for such grantors to make a conveyance to the purchasers, or to authorize an attorney in fact to make such conveyance, and the instruments referred to seem to have been such as were sometimes used to make the necessary transfer complete.

All of these deeds and powers of attorney were signed by the plaintiff and the two representatives of the Reddy estate, and, from the notarial certificate attached, appear to have been duly acknowledged before a notary public. The plaintiff testifies that she never appeared before a notary public or acknowledged any one of the instruments, and that in that respect the certificates are all false. In this position she is strongly corroborated by other evidence, and upon the whole record there is left no room for doubt that her testimony is true.

During the years from 1900 to 1903 the defendant Cobban resided at Missoula, in the state of Montana, and was engaged in the real estate business which was being conducted by a corporation bearing his name. In 1900 or 1901 he and a number of other persons in Montana associated themselves together for the purpose of assembling and placing upon the market titles to valuable timber lands; Cobban being put forward as the active agent of the association. Neither Cobban nor his associates personally knew Benson, Campbell, Conklin, or Reddy; but, in some manner learn-

ing of Benson's possession of the Monache scrip, Cobban negotiated for the purchase of several lots thereof, aggregating approximately 3,723.52 acres, by mail, for the purpose of enabling him and his associates to acquire the title to the lands now in controversy, which were at the time public timber lands of the United States. The scrip was purchased in the ordinary course of business, and at the going price, namely, \$4 per acre. From time to time as the scrip was needed, Cobban ordered it from Benson, and the same was sent to a designated bank, either at Butte, Mont., or Boise, Idaho, where the papers were examined by Cobban or his representative, and, they being found to be satisfactory, the purchase price was paid into the bank, and the scrip delivered to the purchaser. This scrip, as it will be understood, was made up of substantially the papers executed by the owners of the base lands as hereinbefore detailed. After purchasing the scrip, Cobban inserted in the blank application to select lieu lands a description of the lands by him selected, and also inserted in one of the powers of attorney such description, together with his own name, and thereupon the papers were filed in the proper land office, and if the same were, upon examination, found to be satisfactory by the Land Department, and the exchange was approved, patent issued, conveying title to the selected lands to the plaintiff and the representatives of the Reddy estate. Upon the issuance of such patent, Cobban, exercising the authority which he assumed he had, as holder of the scrip, either wrote, or caused to be written, his own name in the powers of attorney which had been signed in blank by the plaintiff and her co-owners, and thereupon executed a deed in the name and upon behalf of the plaintiff and the representatives of the Reddy estate, conveying such patented selected land to the defendant Weirick, as trustee, Weirick having been chosen by his associates as their representative, to take the title. Thereafter, Cobban's association having effected a sale of all of the lands thus acquired, Weirick, as such trustee, acting upon behalf of his associates, and with their approbation, for a valuable consideration, transferred the title to the purchaser, the defendant Payette Lumber & Manufacturing Company, in whose name, as has already been stated, the title now stands.

Plaintiff charges that Benson, Campbell, and the defendants conspired together to defraud her; that she has never been paid the stipulated price; that she unwittingly attached her signature to the papers constituting the scrip; that she never in fact acknowledged the execution of any of such papers; that their delivery to Benson was unauthorized and without her knowledge or consent; and that the powers of attorney, when delivered to Cobban, being blank as to the name of the person authorized to exercise the powers, were ineffective for any purpose, and therefore conferred no authority upon Cobban to execute any deed or other conveyance.

[1] We may put aside as being immaterial the fact that the notarial certificates attached to the instruments constituting the so-called "scrip" sold to Cobban were false, in that the plaintiff never appeared

before a notary public or made any acknowledgment at all. As between the parties acknowledgment was not essential to their validity. So also it is thought not to be highly important to determine whether, by the original agreement it was contemplated that title to the base lands should be conveyed directly to Benson, as is asserted by the plaintiff, or was to be relinquished to the United States substantially in the manner testified to by Benson and Campbell. In either view, the plaintiff must have understood that, for a certain specified price, she was to alienate all of her interest in the lands, and, that being the case, the mere fact that the conveyances ran to the United States, and not to Benson, in itself furnishes no adequate ground for the interposition of a court of equity. *United States v. Conklin* (C. C.) 169 Fed. 177, affirmed 177 Fed. 55, 100 C. C. A. 473; *Conklin v. Benson*, 159 Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537. Moreover, there is no substantial foundation for the charge, elaborated at great length in the bill, that Benson, Campbell, Weirick, Cobban, and others conspired to defraud the plaintiff. So far as Cobban and Weirick are concerned, together with their associates and the promoters and officers of the defendant Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purposed to defraud, or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff. They purchased the scrip by mail in due course of business, were not acquainted with either Benson or Campbell, and had no knowledge of the facts of which the plaintiff now complains. While there is much in the record to support the view that Campbell failed to properly discharge his obligations to the plaintiff, it cannot be held that he conspired with Benson, or at any time entertained corrupt or improper motives. Such delinquency as in law may be properly charged against him is to be attributed to a want of personal attention upon his part, and either to his neglect to give definite instructions to his subordinates, to whom, in a measure, he intrusted the business, or to their disregard of his instructions, rather than to any design or willingness to wrong the plaintiff. I am satisfied that there was no evil intent. That Campbell owed some duty to the plaintiff cannot be controverted. She intrusted to his keeping the instruments of conveyance which were executed jointly by her and the representatives of the Reddy estate, either because she regarded him as her attorney, or because recognizing him as the attorney for the Reddy estate, and reposing great confidence in him, she assumed that he would deliver the instruments only in accordance with the agreement, of the terms of which he was fully advised. Whether formally employed as an attorney or not, having, with full knowledge of the conditions upon which they were to be delivered to Benson, received the instruments, it was his duty either to return them to plaintiff or to comply with such conditions. This, however, is not an action to determine Campbell's liability, nor is he made a party defendant, and therefore the precise nature of his relation to the plaintiff is material only in so far as it bears upon the effect upon the plaintiff's rights, of the unauthorized and improper delivery of the instruments through his office to Benson,

and by Benson to the defendants, who purchased them for value and without knowledge of any wrongdoing.

[2] And in disposing of that issue we may dismiss from our consideration all those instruments used merely in effecting an exchange of lands with the United States. Such are the deeds executed in favor of the United States, the applications to select lands in lieu of those relinquished, and powers of attorney authorizing the making of such selections. This suit is based upon the theory that the plaintiff is entitled to the fruits of the exchange, namely, the lands patented to her by the United States in consideration of her relinquishment of title to the base lands, and therefore it may be held that, by prosecuting the suit, the plaintiff has ratified all proceedings relating to such exchange. There is, however, no evidence to support the theory that the plaintiff ever authorized or ratified the delivery of any power of attorney "to convey" without the prior payment to her of the full purchase price agreed upon. Whether we accept the theory of the plaintiff or that of the defense, whether the understanding was a transfer directly to Benson of the Monache lands or an exchange thereof with the government, and thereupon a transfer of the lieu lands to Benson or such person as Benson might designate, according to all of the testimony, payment of the agreed price was to precede the delivery of the instruments effecting a transfer of the title or the control of the title from the plaintiff. Such is the testimony of the witnesses for the plaintiff, Campbell in the most emphatic terms so declares, and Benson, in effect, admits that such was the understanding. It is true, I think, that, when she signed the large number of documents sent to her from Campbell's office, the plaintiff acted without fully understanding their legal import, but even if it be held that, having voluntarily attached her signature, she is chargeable with an understanding of their meaning and legal effect, it still remains true that neither expressly nor impliedly did she authorize their delivery to Benson. Campbell testifies that it was not his understanding that such instruments were ever to be executed, and that personally he was wholly unaware of their existence until after this suit was commenced. He never saw them and did not deliver them to Benson or authorize their delivery. Benson ventures no explanation and advances no theory in justification of their delivery to him. In some way, it does not appear just how, they all reached his office bearing false notarial certificates of acknowledgment, and came from either Campbell's office or directly from the hands of the notary public. The delivery was made either by the notary or a subordinate in Campbell's office, but, whether such delivery was the result of fraudulent collusion or only innocent inadvertence, it was not in accordance with the original agreement, and had the authorization or consent of neither Campbell nor the plaintiff.

It may be said generally that there is nothing in the conduct of plaintiff, unless it be her act of signing the powers of attorney and giving them back into the hands of Campbell's clerk, that can be put forward as a substantial reason why she should be denied equitable relief. She did not know, and had no reason to suspect, that the

powers of attorney had been delivered to Benson until long after the Cobban sales had been consummated, and, upon learning of the facts, with reasonable diligence, she executed, and caused to be recorded, in Boise County, Idaho, where the lands are situated, a revocation of such power. This revocation was filed January 16, 1903, five months before Cobban and his associates, through Weirick, their trustee, sold to the defendant Payette Lumber & Manufacturing Company. (Neither expressly nor impliedly has she ratified the delivery of the instruments, and since learning of their delivery she has consistently, and with reasonable diligence, proclaimed her unwillingness to be bound thereby, and has asserted her ownership of the selected lands. If estopped at all, therefore, or barred by laches, such estoppel or bar must be found in the act of signing and sending the instruments back to Campbell's office.

The substantial facts with regard to the payments made to the plaintiff are not in controversy. The amounts paid to her credit on account of the entire transaction aggregate only \$2,750. What, if any, part of this amount should be credited to the Cobban sales is not entirely clear, and is left for later consideration. The scrip sold to Cobban alone covered 3,723.52 acres, on account of which, if we credit the plaintiff at the rate of one-half of \$3.80 or \$1.90 per acre, there became due to her the sum of \$7,074.68. These sales were all made, and the money arising therefrom, received by Benson, between the 1st day of February and the 1st day of July, 1901.

At the hearing, counsel for the defendants, assuming that plaintiff had declined an offer of full payment, earnestly insisted that it would be extremely inequitable to permit her to refuse substantially that for which she had contracted, and now recover title to these lands from the defendants, who have already in good faith made full payment, and I was inclined to regard such a view with much favor. But, upon a most careful search of the record, I do not find the assumption of tender well founded. At one point the witness Campbell testified that the plaintiff refused further payments, but the statement is immediately qualified in such a way as to leave it practically worthless. Benson evidently seeks to leave the impression that plaintiff was unwilling to receive payment, but he seems studiously to avoid any direct statement to that effect, and clearly all of his testimony upon the point relates to a time long after he consummated the sales to, and received full payment from, Cobban. It is difficult to harmonize Benson's use of the powers of attorney and his conduct generally with the ordinary standards of honesty and fair dealing. In his letter of December 11, 1901, written to Campbell in response to the latter's request for a report as to the status of the whole matter, he uses the following language:

"All of the land, except 400 acres, has been deeded to the United States, and deeds placed upon record, and selections made of other land in accordance with the provisions of the Act of Congress of June 4, 1897 (30 Stats. 36).

"This was all, or nearly all, located for parties who were desirous of securing title to unoccupied government lands of the United States, under the provisions of contracts or agreements which in terms provided that after

the land selected in lieu of the land surrendered had been located and said locations had been accepted by the Commissioner of the General Land Office, and proper evidence furnished thereof, that the parties in whose interests the locations were made, would, upon the delivery of a deed conveying the right of the owners, pay the amounts agreed upon.

"Up to the present date there has not been a single location accepted by the commissioner of the General Land Office. It is my intention just as soon as these acceptances can be had to ask for a confirmation of the sales by the Court so that settlements can be made to both the owners and the parties in whose interests the locations were made. We have been bringing every effort to bear to get the Commissioner of the General Land Office to act upon these matters, and as he has lately added several to the working force in his office it is likely we will not have very much longer to wait."

Clearly he thus intended to give the impression that the original owners still controlled the title, and that no money had been paid by the purchasers, and that payment would be made only upon the delivery of proper deeds by the original owners, whereas in truth the fact was that, months prior thereto, he had received, in installments, the full purchase price for the scrip covering all of the lands described in the bill, and had delivered to Cobban the several powers of attorney purporting to authorize the transfer of title from the plaintiff and the Reddys to unnamed purchasers. By implication the letter recognizes the correctness of the plaintiff's contention that she was to convey title only upon receiving payment in full, and the fact was concealed that the instruments now under consideration were in existence at all. There were doubtless some negotiations looking to a settlement of the whole controversy, and not improbably Benson conditionally offered to make certain payments, but there never was an unconditional or actual tender to the plaintiff of what was clearly due her upon account of the Cobban sales. From the record the inference is unavoidable that if Benson had during the year 1901, or during the larger part, at least, of the year 1902, offered to account for and pay over the moneys arising from the Cobban sales, he would have been met with no hesitation upon the part of the plaintiff in accepting payment, but, as appears from the letter above referred to, he was putting her demands for payment off by evasion and deception. After the plaintiff learned, through inquiries prosecuted by her son, in the year 1902, that her understanding of the agreement was being violated, and especially when it appeared that Benson had come into possession of, and had improperly disposed of, the powers of attorney to convey, not without reason she looked with suspicion upon, and was reluctant to accept, offers of partial payment. She had a right to know the facts, and this knowledge was denied to her. Benson declined to discuss the matter except through or with Campbell, and Campbell, for some reason, was very difficult of access. It may be conceded that had the plaintiff and her son gone about their investigation in a more direct way, and had they insisted upon getting Benson and Campbell together, and, upon having a full and comprehensive report upon the whole transaction, certain unfortunate misunderstandings might have been avoided, and possibly a satisfactory settlement secured, but in passing criticism upon the course pursued we must adjudge the conduct of the plaintiff and her son in the light which

they then had rather than in the light of the facts later disclosed. Not without some apparent reason, they doubtless entertained a suspicion that Benson and Campbell were in collusion for some purpose antagonistic to their interests, and that it would be useless, if not perilous, to advise them of such suspicion until certain facts had been learned from disinterested sources. While the course pursued is not free from criticism, it is not thought to be such as should debar the plaintiff from seeking relief in a court of equity. It may be thought that the fact that the Reddys were paid much larger amounts than were paid to the plaintiff tends strongly to corroborate the theory that plaintiff refused to accept payment, but it seems that from time to time Campbell, putting forward the needs of Mrs. Reddy for money, strongly urged Benson to make advances to her. Campbell testified that he understood that the moneys so paid were not the proceeds of sales, but were advanced from time to time by Benson in anticipation of such sales, and, in view of the statements contained in Benson's letter of December 11th, it is not improbable that from time to time he led Campbell to believe that, under the contract, there was nothing legally due from him, and that the payments which he made were to be understood as advancements only. In that view, Campbell was justified in turning over to Mrs. Reddy alone such sums as he received, for they were by Benson paid to her credit exclusively, whereas it was his duty to distribute equally between her and the plaintiff all proceeds arising from the sales of lands.

[3] We are thus brought to a consideration of what seems to be the controlling issue of the case, namely, to what extent, if at all, is the plaintiff bound by the unauthorized delivery of the blank powers of attorney to convey. The defendant corporation, relying upon the maxim that, where one of two innocent persons must bear a loss due to the injurious act of another, he must sustain the loss who has put it within the power of such other person to do the wrong, earnestly insists that, having executed the powers and returned them to Campbell, her agent, the plaintiff must suffer the consequences of their unauthorized delivery. Upon the facts before it, the Supreme Court of California adopted such view in *Conklin v. Benson*, cited *supra*. It is to be said, however, that, while that case involved the same general transactions, the ultimate facts upon which the court seems to have placed its decision are, in some material respects, different from the findings warranted by the present record. In that case it was found that when the powers of attorney were, by Benson, delivered to the purchaser, they were complete, and the inference is drawn that they were in that condition when they left the plaintiff's hands. Here it is conceded that when the plaintiff signed the instruments, and indeed until some time after they were delivered to Cobban, they were blank, at least as to the name of the person authorized to exercise the specified powers. It was further substantially found in that case that all the moneys due on account of the purchase price of the lands had been paid over by Benson to Campbell, and that the delinquency, if any, in making payment to the plaintiff, was with Campbell, the plaintiff's agent, and not with Benson. Here it appears that nothing in

excess of \$2,750 on account of the entire transaction was ever paid by Benson to any person to the credit of the plaintiff. In the third place, in applying the principle of the maxim above referred to, the California court appears to have assumed that Campbell and Benson were the general agents for the plaintiff for the sale of these lands, whereas the record here does not support the theory of such general agency. Again, it was there assumed that Campbell, the plaintiff's agent, knowingly delivered the papers to Benson, while here it appears that Benson's possession thereof was without his knowledge or consent.

[4] 1. Under all of the circumstances of the case, did the blank powers of attorney operate to confer upon Cobban power to convey? The answer, it is thought, must be in the negative. The rules by which the validity of a power of attorney to transfer the title to real estate is governed are substantially the same as those which apply to conveyances themselves. If a deed to real estate is executed, with the name of the grantee left blank, the deed is inoperative until the name is inserted by some person authorized so to do. Formerly the rule was that such authority must be evidenced in writing, but it is now held in many jurisdictions that parol authority is sufficient. *Devlin on Deeds* (3d Ed.) § 456. But, as was said by Mr. Justice Field, delivering the opinion of the court, in *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90, even where the more liberal rule is recognized, there are still "two conditions essential to make a deed, thus executed in blank, operate as a conveyance of the property described in it. The blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." Putting aside the question as to the time Cobban inserted his name in the blank instruments, it is sufficient to say that he had no authority at all so to do. If it be conceded that such authority need not be in writing, and that it need not even be expressly conferred, it still remains true that in some manner it must emanate from the grantor. It is not pretended that in the present case the plaintiff, in writing or otherwise, expressly authorized Cobban to act as her agent in this respect, and authority, if any there was, arose by implication alone. But from what fact or facts can the inference of such authority be legitimately drawn? Where a grantor receives the purchase price agreed upon and delivers a deed, otherwise complete, from these facts alone, it may, not improperly, be inferred that he intended to authorize the purchaser to insert the name of the grantee in the blank left for that purpose. Such would be a natural inference. But the plaintiff here did not deliver these papers, nor did she receive the stipulated purchase price. They came into Cobban's possession through the fraud of Benson, either actual or constructive, and without the knowledge or consent of the plaintiff, or of her agent, assuming that Campbell was her agent. She had never heard of Cobban, and, prior to the meeting at Campbell's office, Benson had been a total stranger to her. The payment to, and the receipt by, Benson of the purchase money paid by Cobban gives rise to no implication. It is not the payment of the purchase money by the purchaser, but the receipt by the grantor, that tends to disclose the grantor's intent.

Benson had no authority to receive the purchase money for the plaintiff. He was not her agent, and probably never thought of the relation existing between himself and the plaintiff as that of agency. In his transactions with Cobban, he was the vendor, and in his relations with the plaintiff he was the vendee or purchaser. Certainly it would be quite as reasonable to hold that he was the agent of Cobban to deliver the purchase money to the plaintiff as to hold that he was the agent of the plaintiff to receive it. My conclusion is that, when Cobban purchased these instruments, he took them at his peril. Upon their face they appeared to be incomplete, and therefore inoperative, and, to give them effect, it was requisite that the name of a qualified person be inserted by some one authorized so to do. The authority was not conferred by the naked instruments themselves, and Cobban was bound to know that, unless it was evidenced by some writing or express declaration of the plaintiff, he must, if he would rely upon the power which the instruments purported to grant, establish facts from which it could legitimately be inferred. Such facts the record fails to disclose, and the instruments must therefore be held to be inoperative.

[5] 2. It is further thought that, aside from the fact that the instruments were in blank, the plaintiff is not bound by their unauthorized delivery. If it be assumed that Campbell directed or consented to such delivery, he acted in violation of his instructions, and transcended his authority. As clearly understood by all parties, Benson was to receive possession of the deeds or other instruments divesting the plaintiff of her title, or putting out of her hands the control thereof, only after he had paid in full the purchase price. I am aware that the line between a general and a special agency is not always well defined, but in no view of the record can it be held that Campbell had the authority of a general agent to bind the plaintiff. His authority was limited to a very narrow scope. The terms of the sale had all been arranged between the principals in Campbell's presence. Benson was to draft the papers, and, after their execution, they were to be deposited by Campbell in escrow with the Anglo-Californian Bank, with instructions to deliver to Benson upon receipt of the stipulated amount. While Campbell has no recollection that the papers were so to be placed in escrow, he does remember that it was agreed that payment should be made through the Anglo-Californian Bank. But, if the papers were not to be left with the bank, it is difficult to understand why payment through that particular bank, or, for that matter, through any bank, should have been discussed or considered important. Upon the one side it was doubtless insisted that the conveyances should not be delivered until payment was made, and, upon Benson's side, he doubtless desired assurance of such delivery when he tendered payment, and, altogether, it would seem that a deposit in escrow was a very natural course to pursue, and I am inclined to think that the plaintiff's version of the understanding is correct. Campbell's duties, therefore, were few and simple, and his authority limited. Little, if anything, was left to his judgment, and he had no discretion touching the conditions upon which delivery was to be

made to Benson. Under the rule of special agency, in dealing with him and accrediting his acts, third persons were bound, at their peril, to take cognizance of the limitations of his authority. "It is believed to be a general rule that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal is bound to know the extent of his authority." *Schimmelpennich v. Bayard*, 1 Pet. 264, at page 290 (7 L. Ed. 138). The power of Campbell was analogous to that of an escrow holder. The understanding was that he should make a deposit of the papers in escrow, and, having failed to comply with that understanding, he must be deemed to have retained them in substantially the capacity of an escrow depository. Certainly his authority to deliver was no greater than would have been the authority of the Anglo-Californian Bank if, in accordance with the agreement, it had received them, under the stipulated instructions. The unauthorized delivery of an escrow deed does not operate to effect a transfer of title. "The great weight of authority sustains the view that an unauthorized delivery of the instrument conveys no title or gives no right, even in favor of an innocent subvendee, without notice of the conditions or events stipulated in the escrow contract; and the authorities are very strong where the escrow has been obtained or delivered through fraud. The principle on which the doctrine rests is that an instrument delivered in violation of the terms on which it has been placed as an escrow is not, in fact, delivered, and that its possession by the grantee is no more effective to convey title than would be the possession of a forged or stolen instrument. Some authorities proceed on the theory that a depository is a special agent of the depositor, and therefore, his powers being limited to the conditions of the deposit, one who claims through him takes the risk of the agent exceeding his powers." 16 Cyc. 581. "Until the condition has been performed and the deed delivered over, the title does not pass, but remains in the grantor. If the condition is not performed, the grantee, we have seen, is not entitled to the deed. If the depository deliver the deed without authority to do so from the grantor, or if the grantee obtain possession of it fraudulently, without performing the condition, the deed is void. The deed thus obtained conveys no title either to the grantee or purchasers under him." *Devlin on Deeds* (3d Ed.) § 322. While not expressly deciding the precise question, the Supreme Court of the United States, in *Provident Trust Co. v. Mercer County*, 170 U. S. 593, 604, 18 Sup. Ct. 788, 793 (42 L. Ed. 1156), distinguishing between the case of a bona fide purchaser of negotiable paper, wrongfully delivered by an escrow holder, and that of a purchaser of real estate under similar conditions, seems to quote with approval the language of Chief Justice Bigelow, in *Fearing v. Clark*, 16 Gray, 74, 76, 77 Am. Dec. 394, as follows:

"The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case no title or interest passes until a delivery is made, in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted."

Speaking for the Circuit Court of Appeals of the Ninth Circuit, Judge Gilbert, in *Balfour v. Hopkins*, 93 Fed. 564, 35 C. C. A. 445, uses the following language:

"The authorities are not in entire harmony as to the effect of the delivery of a deed which has been left in escrow to be delivered to the grantee upon the performance of a condition, and which has been wrongfully delivered before the condition was performed. The decided weight of authority seems to sustain the view that such a delivery is inoperative to convey title, even in favor of an innocent purchaser, without notice, unless the grantor has, by some act or conduct of his own, estopped himself to deny the delivery."

In *County of Calhoun v. American Emigrant Co.*, 93 U. S. 124, 23 L. Ed. 826, it was said:

"Beyond doubt, the deed of the lands was delivered to the clerk of the respondents as an escrow, and subject to the condition that it should not be delivered to the grantees until they gave a mortgage to secure the full performance of the agreement under which the deed was executed; but it is equally clear that the condition required to be fulfilled before the delivery could be made was never performed, and the rule is established by repeated decisions that, where a deed is delivered as an escrow, nothing passes by the deed unless the condition is performed."

See, also, *Knapp v. Nelson*, 41 Colo. 447, 92 Pac. 912; *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800; *Bradford v. Durham*, 54 Or. 1, 101 Pac. 897, 135 Am. St. Rep. 807; *Powers v. Rude*, 14 Okl. 381, 79 Pac. 89; *Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

3. In the third place, whatever may have been Campbell's authority, he did not knowingly deliver the instruments. In some unexplained manner they came into Benson's possession, without Campbell's knowledge or consent. Campbell's positive disclaimer of knowledge is corroborated by the facts and circumstances of the case. It is wholly improbable that, experienced lawyer that he was, he would, knowingly, authorize or acquiesce in the course pursued in this case, and thus needlessly jeopardize the interests of his clients. Whether Benson procured the papers by deception or through the inadvertence of the clerks in Campbell's office, his acceptance and use of them constituted a fraud upon the plaintiff's rights. There was no legal delivery of the instruments, either by the plaintiff or by her agent. *Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

It is to be added that while, as has already been said, the defendants are guilty of no moral wrong, and are wholly exonerated from the charges of fraud preferred in plaintiff's bill, it is doubted whether, in purchasing the scrip, they exercised that measure of care required of those who would claim the protection of the maxim which they invoke. To some extent, as testified to by Cobban, the custom may have prevailed of buying conveyances and powers of attorney executed in blank, but, custom or no custom, such purchase is attended with great hazards. However, aside from that feature of the "scrip," we find that these powers of attorney were signed by the administrators of the Reddy estate jointly with the plaintiff; and, while this fact was apparent upon the face of the instruments themselves, they were accepted without any inquiry on the part of

Cobban as to the legal authority of the administrators to execute them. There was certainly no presumption that these administrators, residing in California, and appointed by, and acting only under, the authority of a California court, had the power to delegate to an unknown agent the authority to convey lands belonging to the estate of their intestate, situate in Idaho. To be sure, this consideration does not relate to the plaintiff's interest in the lands, but if, in the exercise of what would seem to have been ordinary prudence, Cobban had set on foot inquiry concerning the validity of the powers of attorney so far as they concerned the Reddy interests, doubtless he would have discovered facts which would have put him upon his guard as to the plaintiff's rights.

Now as to the relief to be awarded to the plaintiff. Under the circumstances, our purpose should be to protect her rights in such a manner as will be least injurious to the defendants. To grant that for which she specifically prays might work great and unnecessary hardship to them. It is not improbable that expenses aggregating considerable amounts have been incurred in procuring title to the selected lands, and in caring for the timber growing thereon, and in paying taxes and other charges; nor is it unlikely that the lands are now of a value greatly in excess of the amount due to the plaintiff under her contract with Benson. It would therefore seem to be inequitable to award to the plaintiff property the value of which is in a large measure the fruit of the defendants' expenditure, foresight, and care. If the plaintiff receives the amount which Benson should have paid to her, she will have suffered no substantial injury. She will thus have gotten what she contracted for. Time was not of the essence of her agreement with Benson, and it would seem that the rights of all parties can now best be conserved by requiring its substantial performance. In the course of her testimony, the plaintiff declared that what she wanted was pay for the land, and in the course of their argument her counsel reiterated that the plaintiff desired nothing inequitable, but that she was entitled either to the land or the stipulated purchase price. I have therefore concluded that if the defendants will, within a reasonable time hereafter to be specified, pay to the plaintiff the amount due to her, under the terms of the Benson agreement, she will be required to execute to the defendant corporation a proper instrument of conveyance, and thereupon the relief which she specifically prays for will be denied; otherwise, in default of such payment, her prayer will be granted.

My present impression is that the record, as it now stands, does not enable me to make an intelligent finding as to the precise amount due the plaintiff under the Benson agreement, and it is possible that it will be necessary to take further evidence. However, before making any order in the premises, I will hear further from counsel, and to that end the several attorneys are requested to be present in court on Monday, July 29th, at 10 o'clock a. m.

ALEXANDER ECCLES & CO. v. LOUISVILLE & N. R. CO.

(District Court, N. D. Alabama, N. E. D. August 2, 1912.)

No. 1,836.

PRINCIPAL AND AGENT (§ 177*)—LIABILITIES AS TO THIRD PERSONS—NOTICE TO AGENT.

An agent of a railroad company having no authority to issue bills of lading except for property actually received for shipment cannot ratify the act of another in issuing such bills in the name of the company, nor will his knowledge of a custom on the part of such another to issue bills in advance of the receipt of the goods charge the company with notice of such custom so as to render it liable to one defrauded by false bills of lading so issued, where the agent was a party to the fraudulent transactions.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670-679; Dec. Dig. § 177.*]

At Law. Action by Alexander Eccles & Company against the Louisville & Nashville Railroad Company. On motion of plaintiff for new trial. Motion denied.

Harrington, Bigham & Englar, of New York City, and Percy, Benners & Burr, of Birmingham, Ala., for plaintiff.

Gregory L. Smith, of Mobile, Ala., and Eyster & Eyster, of New Decatur, Ala., for defendant.

GRUBB, District Judge. The plaintiff relied in support of its motion for a new trial exclusively upon its exception to the following portion of the court's oral charge to the jury:

"One principle of law I omitted to call your attention to in my charge. I said that notice to Bywater of irregularities that might be sufficient to charge him with knowledge that these were spurious bills of lading of the character the evidence disclosed if he were the proper kind of agent, that is, one authorized to receive the notice, would be notice to the company. I want to qualify that to this extent: Where an agent himself commits fraud, as for instance in this case suppose you are reasonably satisfied from the evidence the fact to be that Bywater and Knight conspired to commit this fraud, then Bywater would be the guilty agent, and in that event notice to him under any circumstances, as I understand the law, would not be notice to the defendant, because the law says that it could not be presumed that the guilty agent would communicate the notice to any other officer of the defendant. You see what I mean. If Knight was running this scheme by himself, not in collusion with Bywater, and Bywater received notice of this kind, then the notice to Bywater, under the qualifications I before stated, might be notice to the company, because in that case Bywater would not be a co-conspirator, and it would be presumed he would do his duty, and notice to him would be notice to the company; but, on the other hand, if you should be persuaded from the evidence that Bywater and Knight were in collusion, and that Bywater was committing a fraud, as well as Knight, then notice to Bywater would be no benefit to the company, because the presumption would be, as Bywater was committing a fraud of his own, he would not give the defendant any benefit of notice he received; in other words, he would conceal the notice just like he did the crime."

The correctness of this part of the court's charge depends upon the issues that were submitted to the jury.

The action was one for deceit, predicated upon the false representa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions contained in certain purported bills of lading of defendant that the cotton therein described had been received by the defendant, when in fact it had not been so received. The liability of the defendant depended upon whether this confessedly false recital in bills of lading was or was not its representation. If the bills of lading containing it were its bills of lading, the representations therein would be its representations, and vice versa. The bills of lading were signed in its name by John W. Knight, a cotton shipper, who was not its agent. Authority to sign the bills of lading for defendant was claimed by Knight to have been derived from defendant's foreign freight agent, Bywater. Under the authority of the case of *Friedlander v. T. & P. R. R. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991, the jury was instructed that Bywater had no power to authorize Knight to issue bills of lading for the defendant for cotton not contemporaneously received by it and of the delivery of which to it there was then no present expectation, and that bills of lading issued by Knight under such claimed authority would not bind defendant, nor would the representations contained in them be the defendant's representations.

In order to fasten liability upon defendant, the court charged the jury that the plaintiff would have to show a course of business relating to such bills of lading, continued so long and under such circumstances as to impute to defendant knowledge of their issue by Knight before receipt of the cotton and acquiescence therein; and that in that event only would the bills of lading so issued by Knight be the defendant's bills of lading and fix responsibility upon it for the false representations contained in them. From such a course of business, knowledge on the part of responsible agents of defendant would be presumed, even in the absence of a showing of actual knowledge on their part; and it was on this alone that the case was submitted to the jury.

Actual notice of the course of business to defendant would avail as well as presumptive notice. Actual notice of a kind to displace presumptive notice would have to be fastened upon defendant through an agent authorized to bind it. The court charged the jury that, as Bywater had no authority to issue or cause to be issued on defendant's behalf bills of lading in the absence of the receipt of the cotton, notice to him alone, of all defendant's agents or officers, that such bills of lading were being so issued by Knight on his supposed authority, could not amount to a ratification by defendant, since Bywater, being without authority to issue or cause them to be issued, was likewise without authority to ratify by subsequent knowledge or acquiescence what he could not have originally authorized to be done.

If the court was correct in holding that Bywater was without authority to issue or cause to be issued bills of lading without receipt of cotton, it seems clear that the court was also correct in charging the jury that no knowledge on Bywater's part of transactions of like character, if confined to him alone, would amount to a ratification by defendant of such a course of business, since Bywater, being without authority to issue them or cause them to be issued, could not by

subsequent knowledge and acquiescence ratify for defendant what he was without authority to authorize.

If inquiry had been made through Bywater of defendant by plaintiff as to the validity of the bills of lading, the basis of the suit, and in the performance of defendant's duty, to give such information to plaintiff, Bywater, as its authorized agent in answering such inquiry, had certified to their validity when he knew of their invalidity, a different case would have been presented and one like those relied on by plaintiff. Bywater's knowledge would then have been defendant's knowledge, since defendant was, through him, performing a duty resting upon it, and, having delegated to him the performance of this duty, it could not escape the consequences of his knowledge in the particular transaction.

In this case, on the contrary, Bywater was in no way concerned in the transactions involved in the suit. No inquiry was made of him by plaintiff, nor was anything he did or said influential in inducing the plaintiff to take the bills of lading as genuine. So far as is shown by the record, neither Bywater nor any other agent of defendant knew of the issue or existence of the specific bills of lading relied upon by plaintiff for its cause of action until long after plaintiff had accepted the drafts on the faith of their genuineness. The defendant therefore failed to perform no duty it owed plaintiff with reference to these bills of lading through Bywater's act or default.

So that the only relevancy the question of Bywater's knowledge could have had in the case would have been to fasten knowledge of the course of business on defendant, and thus make it responsible by ratification and acquiescence for what, for want of authority in Bywater, it was not responsible in its inception. But Bywater's knowledge, if proven, was insufficient for this purpose, since he, as agent, could not ratify an act which he was without power to have authorized. For this reason it seems to me that Bywater's knowledge, uncommunicated to any of his superior officers in defendant's service, could not have improved plaintiff's right to recover whether he was or was not a guilty conspirator with Knight. If so, clearly the part of the charge excepted to was even more favorable to plaintiff than it was entitled to, since the court was right in charging, as it had done in a previous part of the oral charge, that the knowledge of the course of business on Bywater's part, if no other agent of defendant had such knowledge, could not constitute a ratification and could not avail to make the bills of lading defendant's act and the representations therein contained defendant's representations.

However, it is a well-recognized principle of law that knowledge of a fraud, acquired by an agent in the commission of a fraud in conspiracy with another upon his principal alone or upon his principal and a third person, does not charge the principal with notice, since the agent is acting adversely to his principal, and it will not be presumed that such knowledge will be communicated to the principal or used for his benefit.

This principle is thus stated in the case of *American Surety Co. v. Pauly*, 72 Fed. 470-483, 18 C. C. A. 644, 656 (quoted with ap-

proved by Supreme Court, s. c., 170 U. S. 159, 18 Sup. Ct. 563, 42 L. Ed. 987):

"When two or more officers of a corporation have entered into a scheme to purloin the money of the corporation for the benefit of one of them, in pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the bank but in reality to consummate said scheme, and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers and without express authority—the corporation being ignorant of the fraud—the officers are not, in thus consummating such theft, the agents of the corporation."

In the same case the Supreme Court of the United States (170 U. S. 133, 156, 157, 18 Sup. Ct. 552, 561 [42 L. Ed. 987]) said:

"The presumption that the agent informed his principal of that which his duty and the interests of the principal required him to communicate does not arise where the agent acts or makes declarations, *not in execution of any duty he owes to the principal*, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases, the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time *actual notice* of them, or, having received notice of them, failed to disavow what was allowed to be said and done in his behalf."

And again (syllabus, page 134 of 170 U. S. [18 Sup. Ct. 552, 42 L. Ed. 987]):

"When an agent has in the course of his employment been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed."

In the case of Union Central Life Insurance Co. v. Robinson, 148 Fed. 358, 78 C. C. A. 268, 8 L. R. A. (N. S.) 883, the Circuit Court of Appeals for the Fifth Circuit said:

"The rule has no application to a case where the agent is acting for himself, in his own interest, adversely to his principal. In such case the adverse character of his interest takes the case out of the operation of the general rule, because: First, he will be likely in such case to act for himself rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be therefore both unjust and unreasonable to impute notice by mere construction under such circumstances."

In the case of Hudson v. Randolph, 66 Fed. 216, 222, 13 C. C. A. 402, 408, the same Court of Appeals said:

"In the case of Investment Co. v. Ganzer, 63 Fed. 647 [11 C. C. A. 371], on a review of the authorities it was held that, although as a general rule the principal is bound by the knowledge of his agent and by his acts within the scope of his authority, the principal is not bound by the uncommunicated knowledge of his agent, where the agent and parties dealing with him have colluded for fraudulent purposes, for in such cases the agent cannot be presumed to have communicated his own delinquency to the principal."

In the case of Thomson-Houston Electric Co. v. Capital Electric Co. (C. C.) 56 Fed. 849, Circuit Judge Lurton said:

"The general rule is that the principal is charged with the agent's knowledge, affecting the particular transaction. This rule is, however, subject to

some limitations. One of these exceptions, as stated by Mr. Pomeroy, is this: 'It is now settled by a series of decisions possessing the highest authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud, contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, and under such circumstances, the principal is not charged with constructive notice of facts known by the attorney, and thus fraudulently concealed. In other words, if, in the course of the same transaction in which he is employed, the agent commits an independent fraud for his own benefit, and designedly against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal, then the ordinary presumption of a communication from the agent to his principal fails; on the contrary, a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice. The courts have carefully confined the operation of this exception to the condition described, where a presumption necessarily arises that the agent did not disclose the real facts to his principal, because he was committing such an independent fraud that concealment was essential to the perpetration. It has never been extended beyond these circumstances. It follows therefore that every fraud of an agent in the course of his employment, and in the very same transaction, does not fall within this exception; and most emphatically it does not apply when the agent's fraud consists merely in his concealment of material facts within his own knowledge from his principal.'

It is clear from these citations that the exception to the general rule is recognized by the federal courts.

The plaintiff relies on the case of *Armstrong v. Ashley*, 204 U. S. 272, 27 Sup. Ct. 270, 51 L. Ed. 482. That was a suit by the receiver of a building and loan company to fasten a lien on the lands of the defendant for money loaned to one Bradshaw, who claimed title to the lands but did not, in fact, have it. The attorney for the association sent a defective chain of title to the association, which omitted the conveyances which vested title in defendant. It was asserted by the plaintiff that the association was not chargeable with the attorney's knowledge of the conveyances, since he purposely and fraudulently concealed his knowledge of them, while actually in collusion with Bradshaw and in order to enable Bradshaw to wrongfully secure the loan. The association, however, was charged with constructive notice of the conveyances from the record, and clearly the mere fact that its investigating attorney either negligently or purposely failed to report his knowledge of them to his principal could not do away with the effect of the constructive record notice with which it was already chargeable, as against the true owner of the property. That there is no analogy between this case, on the one hand, and those previously cited and the one at bar, upon the other, is clear.

The plaintiff also relies upon the case of *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 97, 6 Sup. Ct. 657 (29 L. Ed. 811). The principle of this case is stated in the second paragraph of the syllabus as follows:

"If a depositor in a bank delegates to a clerk the examination of his written-up passbook and paid checks returned therewith as vouchers, without proper supervision of the clerk's conduct in the examination, he does not so

discharge his duty to the bank as to protect himself from loss, if it turns out that without his knowledge the clerk committed forgery in raising the amounts of some of those checks, and thereby misled the bank to its prejudice in spite of due care on the part of its officers."

It clearly appears that the principle relied upon by the court rests upon the existence of a duty the depositor owes the bank to examine his canceled checks and report to the bank any irregularity in them. On page 113 of 117 U. S., on page 663 of 6 Sup. Ct. (29 L. Ed. 811), the court, after quoting from Lord Campbell's opinion in the case of *Cairncross v. Lorimer*, 3 Macq. 827, that "if a party having an interest to prevent an act being done acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have if it had been done by his previous license," applying the principle quoted to the instant case, said:

"This, however, could not be if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance and notify it of errors therein in order that it might correct them and if necessary take steps for its protection by compelling restitution by the forger."

Clearly the liability of the depositor was rested by the court upon the existence of a duty on his part to examine his vouchers and report irregularities in them to the bank. Delegating this duty to a clerk, who purposely or negligently failed to perform it, would not excuse the depositor as against third persons injured thereby in whose favor the duty existed.

The same distinction exists between the case at bar and that of *First National Bank v. Allen*, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80. In that case, as in the *Leather Manufacturers' Bank Case*, there was a failure on the part of the depositor to perform the duty he owed the bank of examining his canceled checks and reporting to the bank the irregularities in them. The delegation of this nondelegable duty to an agent who failed to perform it, regardless of motive, would not as to third persons excuse the principal for his failure.

The case of *Hennessy Bros. & Evans Co. v. Memphis National Bank*, 129 Fed. 557, 64 C. C. A. 125, relied on by plaintiff, was likewise a passbook case, and to be distinguished from this case for the same reason.

The plaintiff relies on the case of *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193, for the principle that, where an agent is the sole representative of his principal in a transaction entrusted to him by the principal, his knowledge is that of the principal, though he is engaged in defrauding his principal. In that case the president of a bank was discounting a note for the bank, in the discount of which he was himself interested, and in so doing defrauded the bank, as the note was accommodation paper of a corporation and not binding upon it. That case is easily distinguished from the case at bar. In it the agent was performing a duty for his principal which was intrusted to

him and which he was authorized to perform for it, viz., the discounting of commercial paper. In the case at bar, Bywater was performing no duty for defendant, but, if plaintiff's theory of the facts is a correct one, had departed from his duty and authority and was engaged in a private conspiracy to defraud by forged and false and fictitious bills of lading, purporting to be defendant's. In the case at bar there were no transactions between the plaintiff and defendant in which Bywater was the sole representative of the defendant. In fact, there were no transactions between them at all. The issue of the bills of lading was a mere fiction and not a transaction on defendant's part. *Friedlander v. T. & P. R. R. Co.*, supra. In the case relied upon, the court said of the case of *First National Bank v. New Milford*, 36 Conn. 93:

"The court, however, doubted whether the whole transaction represented any valid contract, as the agent for both parties intended it merely as a subterfuge, expecting to take up the note without recourse to the maker, but held that if there was a contract of loan the knowledge of its fraudulent nature was imputable to the bank."

The test of liability was made, the existence of a real transaction in which the bank was represented by the defrauding agent.

Of the Alabama case of *Hall & Brown Co. v. Haley Co.* (Sup.) 56 South. 726, it is enough to say that it involved no question of conspiracy to defraud the principal upon the part of the agent, but only the effect of knowledge which the agent had acquired before the beginning of the agency. Any language used by the court in such a case, upon the other question, would be dictum merely.

The cases of *Terrell v. Branch Bank of Mobile*, 12 Ala. 502-507, and *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736, show that the same exception to the general rule prevails in Alabama as in the federal courts. In the latter case, the Supreme Court of Alabama, speaking of the general rule and its exception, said:

"It has no application, however, to a case where the agent acts for himself, in his own interest and adversely to that of his principal. His adversary character and antagonistic interests take him out of the operation of the general rule for two reasons: First, that he will very likely in such case act for himself rather than for his principal; and, secondly, he will not be likely to communicate to the principal the fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law upon the subject."

It seems quite apparent that the exception to the general rule is recognized both in the federal court and in the Alabama court. It does not apply in either forum to cases in which the principal is charged with the performance of a duty to the person injured, the performance of which he undertakes to delegate to an agent, who negligently or willfully fails to perform it. In such case liability upon the principal ensues, not upon the idea of notice, but because the duty the agent failed rightly to perform was the non-delegable duty of the principal, the nonobservance of which he

could not excuse as to third persons by saying that he had intrusted its performance to his own agent.

The case at bar is not of this class. If an inquiry had been made of Bywater by plaintiff as to the validity of the bills of lading involved in the suit before taking them, and Bywater, in response to such inquiry which it was the defendant's duty to have answered, with knowledge of their infirmity, had falsely represented them to be genuine or had fraudulently concealed their infirmity from the inquirers, the defendant, being under a duty to disclose such invalidity to the prospective holder, would have been liable for the failure of its agent, though without knowledge of such infirmities except through him. This was the case of the warehouseman decided by Judge Shelby. *Commercial Nat. Bank v. Nacogdoches Compress & Warehouse Co.*, 133 Fed. 501, 66 C. C. A. 375. On the contrary, in the case at bar no inquiry was made by the plaintiff of Bywater as to the validity of any of the bills of lading which are the basis of the suit. Neither Bywater nor the defendant is shown to have had any knowledge of their existence before they were negotiated to plaintiff, nor was any action required or taken by him or it with reference to them.

The case is therefore not one of a failure on defendant's part to perform a duty owing by it to plaintiff at all, for no duty existed calling for performance by defendant or its agent Bywater.

In this case the plaintiff contended, and there was evidence from which the jury might possibly have inferred, that Bywater and Knight had colluded and conspired together to issue fraudulent bills of lading in defendant's name; no cotton having been delivered to it. It was to meet this tendency of the evidence that the part of the charge excepted to was given. The plaintiff contends that the evidence without conflict showed that Bywater acted not in hostility to defendant, but in its interest, because it says his motive in engaging in the fraudulent conspiracy was to increase the defendant's business. If such a conspiracy existed, the motive which induced Bywater to engage in it is purely a matter of conjecture. It may have been, so far as appears from the record, to increase defendant's business and in this way indirectly benefit himself, or to share in the profits of the conspiracy with Knight. The presumption would be that one who commits a crime does so in his own interest. Whatever may have been Bywater's motive, it is clear that he could not engage in a conspiracy to defraud, the commission of which amounted to a felony, on behalf of his principal but without its knowledge or consent. As well might it be said that an agent who assumed to steal with the purpose of turning over the proceeds of his theft to his principal, but without its knowledge or consent, was acting in its interest. Unless the principal authorized or accepted the benefit of the crime committed by its agent, it could not be said to be committed for its benefit.

The plaintiff also contends that the exception to the general rule is limited to cases in which the agent defrauds the principal, and does not apply to cases in which he defrauds a third person. For

the sake of argument, the limitation may be admitted. A conspiracy to issue bills of lading, purporting to be those of defendant, though a forgery of its agent's signature, and for which no property had been received by it, is a fraud on the defendant, without regard to legal liability of defendant upon bills of lading so issued. The forger of another's name to a promissory note commits a fraud on the supposed maker, though the maker cannot be held upon the forged note.

The plaintiff seeks to exclude this case from the exception to the rule because "notice to the agent of matters lying within the general scope of his authority is notice to the principal, even though the agent may be engaged in committing frauds or crimes." This is but another way of stating the limitation that when an agent is engaged in performing a duty for his principal his knowledge binds the principal in the transaction involved in its performance. If Bywater did conspire with Knight to issue false and forged bills of lading, he had departed from his duty and was acting beyond the scope of his authority, and his acts, if fraudulent, were not those of his principal, and his principal could not be bound by his knowledge. The record does not show that Bywater was charged with or was engaged in the performance of any duty of defendant in respect to the bills of lading on which the suit was based, nor that he had any duty with reference to the issue of bills of lading at all, nor the detection of frauds therein, except the general duty of any employé to report to his master any wrongdoing against his master that he may become aware of.

The plaintiff also contends that Bywater was the alter ego of defendant in that he had sole and exclusive charge of its foreign freight business, and hence his knowledge was its knowledge, though obtained in fraudulent transactions where his interest was adverse to his principal. The record does not bear out any such extent of authority. Bywater had exclusive charge of the solicitation and booking of freight for export with the usual authority in other matters of soliciting agents at important stations for domestic freight, and no more. If his authority was such as to make him the alter ego of defendant, he would have been clothed with authority to direct Knight to issue bills of lading for defendant, and, if so, the question of the effect of his subsequent knowledge upon defendant would be of no importance, since the bills of lading issued by Knight in defendant's name by his direction would then have been defendant's bills of lading and binding upon it, and no resort to notice to fasten liability would be necessary.

For these reasons, the court is of the opinion that there was no error in the part of the charge excepted to both because Bywater being without power to authorize Knight to issue, for defendant, fraudulent and forged bills of lading, his knowledge thereof, whether he was a co-conspirator with Knight or not, could not avail to ratify for defendant that which he was without power to authorize for it; and also because there was evidence tending to show that he was a co-conspirator, and, if he was, then his knowledge,

acquired while the conspiracy was being pursued and while he was engaged in a fraud of his own upon his principal, and when he was performing for the defendant no duty the defendant owed plaintiff, would not be knowledge of the defendant or fasten liability upon it.

The motion for a new trial is denied.

HINCHMAN v. CONSOLIDATED ARIZONA SMELTING CO.

(District Court, D. Maine. August 3, 1912.)

No. 672, Eq. C. C.

1. COVENANTS (§ 70*)—COVENANTS RUNNING WITH THE LAND—SEPARATE AGREEMENT IMPOSING BURDEN ON PROPERTY.

A written agreement was made for the sale of copper mining property for the price of \$1,000,000, of which \$100,000 was to be paid when the deed was made and the remainder by a percentage of the net earnings of the mines. A deed was made without reservation, but at the same time and as a part of the same transaction a separate agreement was executed for the payment of the remaining purchase money in accordance with the agreement of sale. Both agreements provided that they should be binding on the successors and assigns of the parties. *Held*, that they were not mere personal contracts, to be performed by the promisor, although it should part with the property, but constituted covenants which ran with the land, and that subsequent purchasers with notice took subject thereto.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 70, 71; Dec. Dig. § 70.*]

2. BANKRUPTCY (§ 268*)—SALE OF PROPERTY—TITLE OF PURCHASER—UNRECORDED INCUMBRANCE.

Under Civ. Code Ariz. 1901, par. 749, requiring certain conveyances to be recorded in order to be valid as to creditors and subsequent purchasers without notice, but providing that, although unrecorded, they shall be valid as between the parties and their heirs, and as to all subsequent purchasers with notice, a purchaser of mining property in Arizona, sold by the trustee in bankruptcy of a corporation under an order directing the sale of all the bankrupt's right, title, and interest therein, and conveyed by a quitclaim deed, took subject to an unrecorded agreement which bound the bankrupt to pay to its grantor a certain percentage of the net profits from the mines until the purchase money should be fully paid, of which agreement the purchaser had actual notice before the sale was confirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

In Equity. Suit by Charles S. Hinchman against the Consolidated Arizona Smelting Company. On final hearing. Decree for complainant.

Charles H. Burr, of Philadelphia, Pa., and Benjamin Thompson, of Portland, Me., for complainant.

J. Markham Marshall, of New York City, for respondent.

HALE, District Judge. This case comes before the court upon bill, answer, replication and proofs. The complainant is a citizen of Penn-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sylvania; the defendant, a citizen of Maine. The complainant states the case substantially as follows: On September 15, 1906, the Arizona Blue Bell Copper Company, a Delaware corporation, owned certain mines in Yavapai county, Ariz., which are known in this case as the "Blue Bell" mines. On that date the Delaware Company made an agreement with one John L. Elliott for the sale of these mines. The price was to be \$1,000,000—\$10,000 on the execution of the agreement, \$90,000 on delivery of the deed, and the balance of \$900,000 to be paid out of the net earnings of the property, in the manner and on the terms provided in the agreement of sale. On September 24, 1906, Elliott assigned the agreement of sale to the New Jersey Consolidated Arizona Smelting Company, a New Jersey corporation of which he was the vice president. On November 15, 1906, the Arizona Blue Bell Copper Company conveyed the Blue Bell mines to the Consolidated Arizona Smelting Company, a New Jersey corporation. At the same time the Arizona Blue Bell Copper Company received from Elliott, or from the Consolidated Arizona Smelting Company, the additional sum of \$90,000, and the deed was recorded in Yavapai county. It contained, however, no reference to the \$900,000, the balance of the purchase money. On the same day the New Jersey Consolidated Smelting Company made a written agreement with the Arizona Blue Bell Copper Company, providing for the payment of the \$900,000 in accordance, as it is claimed, with the terms of the agreement of sale. The agreement of September 15, 1906, and the agreement of November 15, 1906, were, by the complainant, recorded in the Deed Book of Yavapai county, Ariz., on January 4, 1910. Each of the agreements contained a provision that it should be binding upon the successors and assigns of the parties. In the Elliott agreement, namely, of September 15, 1906, was the following clause:

"Mr. Elliott further covenants and agrees to pay or cause to be paid to the Blue Bell Company, until it shall have received the aggregate sum of one million dollars (\$1,000,000), twenty-five per cent. of the net profits resulting from the operation of the said mining properties. The said payments shall be made quarterly on the 1st days of January, April, July, and October, or as soon thereafter as the net profits [for the preceding quarter can be conveniently ascertained]. The net profits herein referred to shall be net proceeds from the operation of the said mining property after deducting the cost of mining, necessary development work (but not including purchase of new machinery), transportation, sampling, treatment, and smelting, plant superintendence, and all proper charges incidental thereto, but not the rent payable under the said lease of the said mining property. Mr. Elliott will also procure to be executed by the Arizona Smelting Company, a corporation of the state of New Jersey, operating at Humboldt, Ariz., a contract for the smelting of all the ores produced from the said mining property for a period of five years substantially in the form hereto annexed."

The agreement between the Blue Bell Company and the Consolidated Arizona Company, namely, of November 15, 1906, contained the following clause:

"The Consolidated Company hereby agrees to pay or cause to be paid to the Blue Bell company twenty-five per cent. of the net profits resulting from the operation of the said 'Blue Bell,' 'Blue Coat,' and 'Blue Bug' Patented Mining Claims, until the said Blue Bell Company shall have received the aggregate sum of one million dollars (\$1,000,000). Said payments shall be

made quarterly on the 1st days of January, April, July, and October in each year, or as soon thereafter as the net profits for the preceding quarter can be conveniently ascertained. Such net profits shall be the net proceeds from the operation of the said mining properties after deducting the cost of mining, necessary development work (but not including the purchase of new machinery), transportation, sampling, treatment, and smelting, and plant superintendence, and all proper charges incidental thereto, but not including the rent payable under the lease of said mining properties dated 29th December, 1905, to the Arizona Exploration Company."

The complainant says that under these agreements, the covenants providing for the payment of the 25 per cent. of the net profits arising from the operation of the mining properties constituted a covenant running with the land, and are, in accordance with the express provisions of the agreement, binding upon the defendant corporation, which is the successor corporation to the property and assets of the Consolidated Arizona Smelting Company, the New Jersey Company. On April 27, 1908, the Consolidated Arizona Smelting Company, the New Jersey Company, was declared bankrupt in the District Court for the District of New Jersey. On October 6, 1908, an order of sale was entered in said court directing that all the bankrupt's right, title, and interest in and to the Blue Bell mine, a copper mine situated in Mayer, Yavapai county, Ariz., be sold by the trustee in bankruptcy. On November 10, 1908, pursuant to the order of sale, the Blue Bell property was sold to Edwin S. Hooley and another, for and on behalf of such stockholders and creditors of the Consolidated Arizona Smelting Company as might join in a plan of reorganization of said company, issued under date of December 19, 1908, and was subsequently conveyed to the Consolidated Arizona Smelting Company, the defendant corporation, the same having been organized by Hooley and another to carry out the plan of reorganization. The complainant says that Hooley and another and their associates knew of the provisions in the agreements of September 15, 1906, and November 15, 1906, and were fully notified and informed as to such provisions. On December 17, 1908, a rule to show cause was issued upon a petition presented in behalf of the Arizona Blue Bell Copper Company to the District Court in New Jersey, asking to have a decree entered that the sale was subject to the right of said company, as assignees, to receive the \$900,000, the balance of the purchase money. On December 17, 1908, the sale was confirmed by the referee. On December 19, 1908, the court refused the petition because it appeared "that the trustee is selling only his right, title, and interest in and to property against which the petitioner, the Arizona Blue Bell Copper Company, asserts a claim." On December 21, 1908, a settlement was made, and a quitclaim deed was delivered by the trustee to Hooley and another; also a quitclaim deed from the reorganization committee to the defendant corporation, this latter deed being indorsed by the defendant corporation as "a quitclaim deed." The complainant says that all the rights of the Arizona Blue Bell Copper Company to the \$900,000, balance of purchase price passed to him by virtue of the assignments and legal proceedings recited in the bill; that by the decree of the Circuit Court of the United States for the District of Delaware, entered March 29,

1911, the clerk of the Circuit Court of the United States for that district on the same day conveyed to him all the right, title, and interest which the Arizona Blue Bell Copper Company had to receive the balance of the \$900,000 purchase money.

It is not necessary to state all the allegations of the answer. No serious question is made over the facts as stated by complainant. The defendant, however, explicitly denies all the conclusions of the bill. It says that the two agreements were kept off the records in order to defraud the creditors of one Addicks, who was the owner of substantially all the capital stock of the Arizona Blue Bell Copper Company; that these agreements were not binding upon the defendant; that they did not run with the land; that they were absolutely void and of no effect, so far as relates to the defendant corporation.

[1] 1. The first sharp issue in the case is presented by the complainant's contention that the agreement of September 15, 1906, and that of November 15, 1906, relating to the payment of the balance of the purchase money, touched and concerned the land; that they run with the land, and are binding upon the defendant company, the grantee of the land. He urges, too, that the defendant company took the land charged with a burden upon it, and must be bound to assume the burden with the land. The defendant denies this, and says that these agreements do not touch or concern the land; that there was no privity of estate between the New Jersey Company and the Blue Bell Company, which the agreements were intended to support; and that the defendant took the land free from any burden relating to the unpaid purchase money. It will be seen that these agreements to pay the balance of the purchase money out of the profits of the operation of the mines were made apart from the deed itself. There can be no doubt, however, that all the instruments in the case are to be taken as a part of one transaction. Each of the agreements contains a covenant, binding assigns. The learned counsel, both for the complainant and defendant, have discussed with learning and ability the considerations which determine the question relating to whether a covenant "runs with the land." They have quoted from Sir Henry Maine, and from the text of that remarkably brilliant book of Mr. Justice Holmes on "The Common Law." The complainant contends that the question in the case before us arises upon an agreement granting an estate in fee simple, but reserving the right of payment of the balance of the purchase money, in form of a royalty, until the sum should amount to \$900,000, and that this is in the nature of a contract which, under the earliest principles of the common law, "runs with the land"; that the essence of such a covenant is that it must concern the land itself, and must increase or decrease the value of the land. He refers to the old case, *Dickinson v. Hoomes*, 49 Va. 353, and the *Spencer Case*, 1 Smith's Leading Cases, 174, where it is held that when the thing to be done concerned the land itself, and did not amount to a collateral undertaking, the covenant is one which runs with the land. The early Pennsylvania case, *Dunbar v. Jumper*, 2 Yeates (Pa.) 74 (1796) is also cited, where the conveyance of a mill in fee had been accompanied by a covenant of

the grantee, that the grantor and the lawful heir of his body should have the privilege of grinding certain grain in the mill free, and this was held to be a covenant which bound the assignee of the grantee.

It is urged by the learned counsel for the defendant that the covenant involved in this case is not one which touches and concerns the land; that it is a personal agreement, and that there was no such privity of estate shown between the complainant and defendant as is essential to allow the covenant to "run with the land"; that the case presents a collateral contract; that the courts in equity should not enforce it as being such a contract as touches and concerns the operation of the land, and so runs with the land. This question raises a very interesting study of the early cases, and of the history of the common law. It seems to me that there is strong equitable ground for holding that the agreements before me constitute a covenant which "runs with the land"; that a merely personal contract could not have been within the contemplation of the parties; that it could not have been intended by the parties that the original New Jersey corporation should pay the 25 per cent. of the profits after it had parted with the land; that the contract was one which would naturally be performed by the party who owns and operates the land, and takes the ore out of it. *Beasley v. Texas & Pacific Railway Co.*, 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946.

Without reference to the interesting and historic question relating to covenants which run with the land, I am of the opinion that the express covenant in the agreements in the case at bar is decisive of the case. The question seems to me not so much one of *status* as of *contract*. The covenant provides that it shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. In "The Common Law," which has been often referred to by counsel, the two chapters upon "Succession" are full of interest and suggestion. In closing those chapters, Mr. Justice Holmes observes:

"The history of early law everywhere shows that the difficulty of transferring a mere right was greatly felt when the situation of fact from which it sprung could not also be transferred. Analysis shows that the difficulty is real. The fiction which made such a transfer conceivable has now been explained, and its history has been followed until it has been seen to become a general mode of thought. It is now a matter of course that the buyer stands in the shoes of the seller, or, in the language of an old law book, that 'the assign is in a manner quasi successor to his assignor.' Whatever peculiarities of our law rest on that assumption may now be understood."

In the High Court of Chancery (1848) in *Tulk v. Moxhay*, 2 Phillips, 744, 777, Lord Chancellor Cottenham said:

"That the action does not depend upon whether a covenant runs with the land is evident from this, that, if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for, if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

On this point, learned counsel for the complainant cite *Wiggins Ferry Co. v. Railway Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055. In the case before me, there was a grant of land by deed. Certain agreements were made, separate from the deed, but as a part of the transaction. Those agreements provide that the balance of the purchase money should be paid out of the profits of the operation of the mines, and that they should be binding upon the successors and assigns of the parties. Without restating the case, it may be said generally that the agreements for sale show a grant in fee simple, but reserve the right of payment of the balance of the purchase money in the form of a royalty, until the same shall amount to \$900,000. I think upon a fair construction of the evidence it must be said that the defendant is charged with notice of the agreements. Upon the whole case, the defendant must be held to have acquired the land charged with notice of the burden upon it, and it must be bound to assume the burden with the land. Having taken the land with notice of the burden upon it, the defendant should not be relieved from such burden.

[2] 2. Did the defendant derive title, from the trustee in bankruptcy, of the land, without incumbrance? Or did it take only the title held by the bankrupt?

It is urged by learned counsel for the defendant that under the bankruptcy law, and under the recording acts of Arizona, any right which the complainant may have had has been lost by reason of the nonrecording of the agreements.

It is contended, too, that these agreements were deliberately withheld from record, and that the creditors loaned money to the New Jersey Company upon faith of the absolute title conveyed to the New Jersey Company by the Blue Bell Company.

In *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, it was held by the Supreme Court that the trustee in bankruptcy is vested with no better title to the property than the bankrupt had when the trustee's title accrued. The case before me is not affected by the act of June 25, 1910, which substantially gives to general creditors existing at the time of the bankruptcy, the status of lien creditors; for here the bankruptcy occurred and the agreements were recorded previous to the amendment of 1910. There have been brought to my attention the Arizona recording acts (Revised Statutes of Arizona 1901, par. 749), which provide that certain conveyances shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with the Recorder, to be recorded as required by law. The paragraph contains this clause:

"But the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, and without valuable consideration, shall nevertheless be valid and binding."

I have not been able to examine all the decisions of the Texas court, and of some other state courts cited by learned counsel; but it is sufficient to say that, on examination of such of them as I have been able to find, and upon a review of the facts in the case at

bar, I am of the opinion that the defendant must be held to be bound by the agreements in this case. The whole case, taken together, leads to the conclusion that, under the decree of the bankruptcy court, the trustee sold only his right, title, and interest to the property, and that all parties understood that the defendant was taking, by a quitclaim deed, only the property which the bankrupt had. I think it must be held that the grantee took with such notice as to put it on inquiry, at least, as to what, if any, defect in the title existed. The case shows, in my opinion, that notice of the unrecorded agreements was brought home to the defendant prior to the confirmation of the sale. The answer raises the question of fraud on the creditors of Addicks, the principal stockholder of the Blue Bell Company. I do not find that this charge has been sustained by the evidence. I am of the opinion that the defendant took only the title held by the bankrupt; that it took such title with knowledge of the existing burden.

Upon a careful examination of the whole case, I am of the opinion that the title obtained by the defendant was acquired subject to the agreements of September 15, 1906, and November 15, 1906.

Let there be a decree for the complainant for an injunction, and for an accounting as prayed for in the bill. The complainant may file a draft decree in this court on or before August 15, 1912. The defendant may file corrections within 10 days thereafter; the decree to be settled by the court September 2d next. A master will be appointed. The complainant recovers his costs.

STIRLING et al. v. SEATTLE, R. & S. RY. CO.

(District Court, W. D. Washington, N. D. August 22, 1912.)

No. 2,158.

COURTS (§ 492*)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

A suit in a state court by a stockholder against the corporation and others, in which complainant alleged a conspiracy to wreck the corporation and obtain its property, that pursuant thereto, through the fraud of trustees, its income was diverted and its insolvency brought about, and praying for the appointment of a receiver to conserve its property until it could be freed from illegal claims and restored to the corporation, and a subsequent suit in a federal court by the trustees and beneficiaries named as defendants in the first suit to have the corporation adjudged insolvent and praying for a receiver to wind up its affairs, so far involve the same subject-matter and property that the state court, which appointed a receiver, acquired exclusive jurisdiction which it was entitled to retain until it had finally determined the controversy before it, and such jurisdiction was not lost by an appeal from the order appointing the receiver and the giving of a supersedeas bond which under the law of the state merely suspended the order.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1345; Dec. Dig. § 492.*

Conflict of jurisdiction of federal court with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—58

In Equity. Suit by William R. Stirling, Alexander Smith, Augustus S. Peabody, James L. Houghteling, Jr., and Burton Thomas, copartners under the firm name of Peabody, Houghteling & Co., against the Seattle, Renton & Southern Railway Company. On petition of William R. Crawford, challenging the jurisdiction of the court and for the discharge of receiver. Petition sustained.

C. G. Little and Walter S. Fulton, for complainants.
Kerr & McCord, for defendant.

CUSHMAN, District Judge. This suit was brought by certain bondholders and creditors of the defendant, alleging the insolvency of the defendant and praying for the appointment of a receiver to take charge of all of the defendant's property, the ascertainment of claims against the estate for the sale of the property, the payment of the claims, and for general relief.

Upon the same day that the complaint was filed the defendant answered, admitting the allegations of the complaint, and a receiver was thereupon appointed. Thereafter one William R. Crawford, a stockholder of the defendant, asked leave to file a petition and affidavit, purporting to show lack of jurisdiction in this court. The request was denied. Petitioner applied for a writ of mandate in the Court of Appeals of the Ninth Circuit, upon the hearing of which that court ordered the filing in this court of said petition, directing that it be considered and determined.

The petition alleges want of jurisdiction in that, at the time of the commencement of the suit in this court, there was another action pending in the superior court of the state of Washington between the same parties, concerning the same subject-matter, and for the same relief.

The plaintiffs herein answered the petition, admitting the pendency of the action in the state court, but denying that it was similar to the suit in this, either as to parties, subject-matter, or relief sought.

The issue thus made was tried upon affidavits and court records, which show that the suit pending in the state court, which it is claimed ousted the jurisdiction of this, is between William R. Crawford, plaintiff, and the Seattle, Renton & Southern Railway Company, a Washington corporation, William R. Stirling, Augustus Peabody, Alexander Smith, James L. Houghteling, Jr., copartners doing business under the style and firm name of Peabody, Houghteling & Co., Augustus S. Peabody and First Trust & Savings Bank of Chicago, Ill., an Illinois corporation, trustees, and Augustus S. Peabody, trustee, defendants, thus including all the parties to the present suit as defendants therein, together with certain trustees.

The complaint states the incurring of the debts by the railway company, made the basis of plaintiffs' suit herein. That the security for these obligations were held by certain trustees for the benefit of Peabody, Houghteling & Co. That the defendant Peabody, Houghteling & Co. wrongfully refused to purchase certain of the railway company's bonds covered by said security which they had therein agreed

to buy. That thereby the defendant railway company was forced to issue notes to the defendant Peabody, Houghteling & Co., secured by all the stock of its stockholders, save five shares, which were withheld to qualify its trustees.

They were further compelled to give an option on all the stock, require the board of trustees and put in their place agents of Peabody, Houghteling & Co.; that the defendant railway company was further compelled to pledge its net income to be forwarded each month to the Peabody, Houghteling & Co. in Chicago, the fund thereby created to be used for the sole purpose of paying the interest on the bonds and notes owing said firm.

That, at this time, there were pending certain suits in the state court for the reduction of fares on the line of the defendant railway company, which, if successful, would render it unable to pay the interest on its bonds and notes. That the defendant Peabody, Houghteling & Co. agreed to defend these suits and, if necessary, bring and prosecute a suit in this court to prevent this reduction.

That, during the term of the option on the stock, the defendant Peabody, Houghteling & Co. demanded and took over the entire property of the railway company and thereafter exercised complete control of it, claiming full authority to direct its affairs, without reference to the board of trustees, taking upon themselves all corporate powers.

That, from the time said firm took control of the railway company, they failed and refused to set aside the net income, as agreed, for the payment of the interest on the bonds and notes. That ever since that firm has refused to proceed, as agreed, with the suits to prevent the reduction of its fares, and has prevented the railway company from so proceeding; has refused to fix a tariff, as provided by law, that would pay the expenses of operation and interest on the debt.

That in April, 1912, the said firm notified the plaintiff in that suit, William R. Crawford, that the railway company had no money to pay the semiannual interest falling due May 1st. That this was the first that such plaintiff knew that the net income and other money, the proceeds of the sale of the notes remaining in the hands of said firm, had not been set aside for that purpose, as agreed. That, four days later, the annual stockholders' meeting of the railroad company, provided by law, was to be held. That at such meeting the president of the railway company, the agent of the said firm, acting at its instance and under its direction, adjourned the meeting until June 12th, refusing to disclose the condition of the company and forestalling any consideration of its affairs or ways and means to provide for the payment of such interest, and thereafter refused to call any stockholders' meeting for that purpose.

That all this was done by the defendant firm and its agents to procure default in the payment of the interest due May 1st, to render valueless the period of grace allowed after default, under the terms of the agreement of the parties, and to obtain the stock of the company and its property.

That, in violation of the trust deed securing the bonds, the defendant firm, in the furtherance of this conspiracy, had caused its agent, the president of the railway company, to issue to them demand notes in large amounts.

That a large amount of permanent improvements had been made to said railway company's property by said firm and unnecessary equipment bought, in order to dissipate its income and money on hand, thus insuring default in the payment of the interest to them, and that they might become the owners of the railway company's stock and its property.

The plaintiff, with other relief, prayed for an accounting between the defendant railway company and the defendant Peabody, Houghteling & Co., and Peabody, trustee; that all money expended in unnecessary betterments and maintenance be charged to said firm; that said firm be compelled to pay the semiannual interest on the bonds and notes, thereby preventing a default; that a default and forfeiture on account of a failure to pay this interest be enjoined; that the board of trustees of the defendant railway company be adjudged the possession and control of its property; that the defendant Peabody, Houghteling & Co., and Peabody, trustee, be decreed usurpers, having no right to its management, control, or property; that a receiver be appointed to take possession and management of the railway company's property, its books, papers, and files, and to be vested with all the authority usually vested in like cases, the receiver not to allow or permit any of the records or books of the company to be changed or taken from his possession, or permit said firm, or any of its agents, to cancel, transfer, or reissue any stock on the books of the company, to preserve, during the receivership, the status quo of said property and effects, to conserve and preserve, during the receivership, the property and assets of the defendant railway company, and for general equitable relief.

The petition challenging the court's jurisdiction showed that, subsequent to the filing of this bill of complaint, in the state court, there was filed, in the same suit, a supplemental bill of complaint, alleging the failure of the defendant railway to pay a number of plaintiff's debts therein enumerated; that for a long time prior to May 1, 1912, that company had been in imminent danger of insolvency; that ever since May 1, 1912, it had been insolvent. The supplemental complaint prayed for the appointment of a permanent receiver.

The evidence shows the following proceedings in the state court, upon the complaint therein, prior to the filing of a bill of complaint in the suit in this court:

An order appointing a temporary receiver, with an order directed to the defendant railway company to show cause why a permanent receiver should not be appointed, which receiver thereafter qualified and took possession of the defendant railway company's property.

The appearance by the railway company, asking the transfer of the cause to another judge of the same court and an order granting the same.

The filing of a number of affidavits on the part of the plaintiff and the defendant railway company on the question of the continuance of the receivership.

An order made, discharging the temporary receiver on May 8, 1912. An order denying the appointment of a permanent receiver on the same day and the filing of a supplemental complaint by the plaintiff, alleging that the defendant railway company was in imminent danger of insolvency prior to May 1st, and that it had been insolvent ever since that date.

May 10th. A nunc pro tunc order, as of May 8th, denying the appointment of a permanent receiver upon the complaint and supplemental complaint.

May 13th. An affidavit for the publication of summons, directed to the nonresident defendants; that is, all of the defendants other than the defendant railway company.

On the next day, May 14th, the present suit was begun in this court, which is now sought to be dismissed, and a receiver was appointed on the same day, as above stated.

Subsequently, on the 17th day of May, in said suit in the state court, a receiver was appointed.

On the 20th of May, a notice of appeal to the Supreme Court of the state was given by the defendant railway company, and a supersedeas bond was given, superseding the order appointing said receiver.

On May 21st, an order of final discharge of the temporary receiver first appointed.

On May 22d, the filing of notice of appeal by the plaintiff from the orders made on May 8th, refusing to appoint a receiver, and the filing of a bond by the plaintiff on the same day.

The filing by the defendant firm, Peabody, Houghteling & Co., Augustus S. Peabody, First Trust & Savings Bank, trustees, and Augustus S. Peabody, trustee, of a petition for removal to this court.

The receivers appointed in this court still retain the control and management of the property of the defendant railway company, which property is located in King county, state of Washington, and over which the state court had jurisdiction. The suit in the state court is still pending and undetermined.

The foregoing statement shows that the action in the state court was a stockholders' suit, complaining of conspiracies, frauds, wrongs, and breaches of trust upon the part of certain trustees and beneficiaries under the trusts, in which the corporation was being used as an instrument for its own destruction; alleging that the defendants were seeking to deprive the defendant railway company of its property and the stockholders of their stock, and in which it was sought to have the trustees removed, the property of the corporation taken from them and returned to the corporation; that defendants be required to discharge, in certain particulars, their trust, that is specific performance; that the corporate title be quieted against certain asserted claims of the defendants; that a receiver be appointed to take over the property and conserve and administer it, all under the direction of the court pending the return of the property to the corpora-

tion and for the appointment of a receiver under the state statute, on account of its insolvency, which statute provides:

"A receiver may be appointed by the court in the following cases: * * * (5) When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights." Section 575, Pierce's Code (Rem. & Bal. Code, § 741).

An appeal may be taken to the Supreme Court of the state "from any order appointing or removing, or refusing to appoint or remove, a receiver." Section 1048, Pierce's Code (section 1716, Rem. & Bal. Code).

The suit in this court is a creditor's bill, praying the appointment of a receiver and the winding up of the corporate affairs. It is contended by the plaintiff herein that the suit in the state court is neither similar as to parties, subject-matter, or relief sought; that "all of the allegations of the complaint" (in the state court), "as well as the prayer for relief, indicate that the purpose was not to wind up the corporation, but change the personnel of the board of trustees and perpetuate the corporation. The action in the federal court is to destroy the corporation. The action in the state court is to continue it in existence as a going concern. The two actions are wholly and entirely different, separate, and distinct."

If it be alleged in one court or suit that, for certain reasons, a corporation should be destroyed, and answer is made that, for certain other reasons, it should not be destroyed, and if in another court suit is brought and this question is turned about, it being alleged that, on account of the reasons last mentioned, the corporation should be preserved, its destruction prevented, and it be answered thereto that, on account of the reasons first mentioned, it should not be preserved, but destroyed, it is not perceived but that the relief sought and the subject-matter of the suits are the same, or, at least, so far involved as to establish the exclusive jurisdiction of the court first obtaining it.

It is contended that the suit in the state court is not one in rem, but purely in personam. It may not be purely a suit in rem, but enough of its nature has been disclosed by the foregoing statement to show that, if the suit in this court should proceed to the dissolution of the corporation and the disposition of all of its property, and thereafter the plaintiff should prevail in the suit in the state court, the action taken by this court would have deprived him of much of the relief therein sought. There would be no property left to turn over to the corporation. It would have no franchise to protect. All of the elements of the trust would have been dissipated. The responsibility of the trustees and the beneficiaries to answer to a personal judgment, alone, would remain. The defendants, being residents of Illinois, even that benefit might, under certain circumstances, be lost. It is also apparent that, in order to effectually grant and insure to the plaintiff the relief sought by him, it might, in the course of proceedings, become necessary for the court to take charge of the property of the defendant railway company.

Jurisdiction over property acquired by the state court on qualifica-

tion of the receiver is not lost by the giving of a supersedeas pending appeal; but it merely suspends the order of appointment.

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts. *Peck v. Jenness*, 7 How. 612 [12 L. Ed. 841]; *Freeman v. Howe*, 24 How. 450 [16 L. Ed. 749]; *Moran v. Sturges*, 154 U. S. 256 [14 Sup. Ct. 1019, 38 L. Ed. 981]; *Central Bank v. Stevens*, 169 U. S. 432 [18 Sup. Ct. 403, 42 L. Ed. 807]; *Harkrader v. Wadley*, 172 U. S. 148 [19 Sup. Ct. 119, 43 L. Ed. 399]." *Farmers' Loan, etc., Co. v. Lake St. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667.

Jurisdiction over property by the state court, so as to withdraw it from the jurisdiction of the federal court in the same territory, does not necessarily depend upon possession, but is acquired as soon as a receiver has been appointed and has qualified. *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435.

The effect of a supersedeas in the state of Washington is the same as in the state of Texas, the statute of which was under consideration in *Palmer v. Texas*, supra. *Fawcett v. Superior Court*, 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894.

It is contended that this case is controlled by the principle laid down in *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660; but in that case, before there was an attempt to appoint a receiver and take possession of the property by the second proceeding, the first receiver had been discharged and the property restored to the owner, who had given a bond for the forthcoming of the property to answer the judgment. *Palmer v. Texas*, supra. This distinction will more clearly appear from an examination of the case of *Shields v. Coleman*.

"While the validity of the appointment made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property." *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660.

In questions of conflicting jurisdiction, to insure the orderly administration of justice, the substance and not the form should be kept in view. Under the allegations of the complaint in the state court and the prayer for general relief, the proceedings might result in the

winding up of the insolvent corporation. The complaint therein was broader in some respects than the bill of complaint in this court. *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379; *Louisville Trust Co. v. Knott*, 130 Fed. 820, 65 C. C. A. 158; *Mound City Co. v. Castleman et al.*, 187 Fed. 921, 110 C. C. A. 55; *Zimmerman v. So. Relle*, 80 Fed. 417 (C. C. A. Eighth Cir.) 25 C. C. A. 518; *Meritt v. American Steel Barge Co.*, 79 Fed. 228 (C. C. A. Eighth Circuit) 24 C. C. A. 530; *Hatch v. Bancroft Thompson Co. (C. C.)* 67 Fed. 802; *Colston v. Southern Home Bldg. & L. Ass'n (C. C.)* 99 Fed. 305; *Sullivan v. Algrem et al.*, 160 Fed. 366 (C. C. A. Eighth Cir.) 87 C. C. A. 318; *Interstate Ry. Co. v. Philadelphia, B. & T. St. Ry. Co. et al. (C. C.)* 164 Fed. 770; *Buck v. Colbath*, 70 U. S. 334, 18 L. Ed. 260; *De La Vergne Refrig. Co. v. Palmetto Brew. Co. (C. C.)* 72 Fed. 579; 25 Cyc. 1454 et seq.

The petitioner asks that the receiver herein be discharged and the suit stayed, pending the final determination of the proceedings in the state court. *Hennessy v. Tacoma Smelting & Refining Company*, 129 Fed. 40, 64 C. C. A. 54; *I. & M. G. Co. v. E. S. Co.*, 58 Fed. 732, 7 C. C. A. 471.

The plaintiffs may desire to pursue some other course. The receiver may be discharged and the suit dismissed, unless the plaintiffs elect that it be merely stayed, as suggested by the petition.

CRAWFORD v. SEATTLE, R. & S. RY. CO. et al.

(District Court, W. D. Washington, N. D. August 22, 1912.)

No. 2,181.

REMOVAL OF CAUSES (§ 29*)—DIVERSITY OF CITIZENSHIP—ALIGNMENT OF PARTIES.

In a stockholder's suit in a state court against the corporation and others, where the allegations of the bill show that the corporation is fully under the control of its codefendants, it is properly aligned with them for the purposes of the removal statute, and, where it is a citizen of the same state as complainant, the suit is not removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 69, 72, 74; Dec. Dig. § 29.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

In Equity. Suit by William B. Crawford against the Seattle, Renton & Southern Railway Company, William R. Stirling, Augustus Peabody, Alexander Smith, and James L. Houghteling, Jr., copartners under the firm name of Peabody, Houghteling & Co., Augustus S. Peabody and the First Trust & Savings Bank of Chicago, trustees, and Augustus S. Peabody, trustee. On motion to remand to state court. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Morris B. Sachs, for plaintiff.

Walter S. Fulton, for defendants Peabody, Houghteling & Co., and others.

CUSHMAN, District Judge. This action was originally brought in the superior court of King county in this district. The plaintiff is a citizen and resident of the state of Washington. The defendant Seattle, Renton & Southern Railway Company is a corporation organized and existing under the laws of the state of Washington and is a citizen of that state for jurisdictional purposes. The remaining defendants are citizens and residents of the state of Illinois.

Within the time and in the mode prescribed by law, the nonresident defendants petitioned for removal from the state court to the District Court of the United States in the proper district, on the ground that there is a controversy between the plaintiff and the petitioning defendants which is wholly between citizens of different states and which can be fully determined as between them. The plaintiff moved to remand the cause to the state court on the ground that the controversy was not separable.

In analyzing the complaint on that motion, the court said:

"The complaint sets forth numerous contracts and transactions between the railway company and the petitioning defendants, numerous transactions between the plaintiff individually and the petitioning defendants, a conspiracy on the part of the petitioning defendants to acquire title to the property of the railway company and the corporate stock owned by the plaintiff individually, and prays judgment against the petitioning defendants for relief in behalf of the railway company, and for relief in his own behalf as an individual. In other words, the complaint sets forth a cause of action in favor of the railway company and against the petitioning defendants, and a cause of action in favor of the plaintiff and against the petitioning defendants. In the former the plaintiff has no interest, except as a stockholder, and the relief granted, if any, will inure wholly to the benefit of the railway company. In the latter the relief granted will inure wholly to the benefit of the plaintiff; the railway company having no interest directly or indirectly therein."

The court found the two causes of action entirely separable and distinct and denied the motion to remand. Thereafter the plaintiff was allowed to amend his bill of complaint, striking from it any allegations of damage to himself and all prayer for relief purely personal to him.

The motion to remand has been renewed and is now before the court, the mover claiming that the effect of the former decision, being that there was a separable controversy, the controversy held triable in this court now being eliminated, but for which it would have been subject to remand, it now is so subject.

The petitioner for remand opposes, contending that the defendant railway should be aligned with the plaintiff, instead of with the defendants, thus making the controversy one between citizens of Washington and citizens of Illinois and triable in this court. They contend that this phase of the case was not before the court on the prior hearing and rely upon paragraph 20 of the complaint to show that the plaintiff and defendant railway should be aligned upon the same side of the controversy.

In paragraph 20 it is alleged:

"All the capital stock of said defendant railway company was represented at said stockholders' meeting either in person or by proxy, and the following named persons were duly elected trustees of the said defendant railway company for the ensuing year or until their successors had been elected and qualified, to wit, W. R. Crawford, M. B. Sachs, F. J. Friend, D. W. Brown and D. D. Egan. Further at such meeting it was voted by all of said stockholders of said defendant railway company to authorize and direct the said board of trustees of said company to take all actions necessary, in their opinion, to protect the interest of the stockholders and the said defendant railway company; that thereafter on the said day and at the same place W. R. Crawford, F. J. Friend and M. B. Sachs, having duly qualified as trustees of the said defendant railway company, held a meeting for the purpose of organizing the said board of trustees at which meeting the following named persons were duly elected to the offices following their respective names, to wit: W. R. Crawford, president and general manager; F. J. Friend, secretary and treasurer; M. B. Sachs, vice president. At such meeting this plaintiff as the duly elected president of said defendant railway company, was instructed to proceed in whatever manner necessary to obtain possession by the legally constituted board of trustees of the said board of trustees of the said defendant railway company of all of its properties, books, papers, moneys and assets and to protect the interest of said defendant railway company and its stockholders and to take over as general manager of said defendant railway company the active operation of said defendant railway company's properties."

Upon a motion to remand, all allegations of the complaint being taken as true, it is not to be presumed but what the court considered the different paragraphs upon the former hearing. The briefs on file show that, upon that hearing the petitioners argued at length against the remand upon the ground:

"That the Seattle, Renton & Southern Railway Company's interests are not adverse to that of the plaintiff, but are identical with his as fully appears upon the allegations of the complaint."

It would therefore appear that this question was decided against the petitioner on the first hearing, else the controversy would not have been held separable. It is not necessary, however, to put the ruling upon the ground that it has become the law of the case.

The allegations of paragraph 20, concerning the action taken by plaintiff and his associates in seeking to regain control of the corporation, do not stand alone. It is set up throughout the complaint that the officers de facto of the railway company, those in control of the corporate business, its books, and affairs, are agents of the defendant Peabody, Houghteling & Co., selected by the latter company as officers of the former, doing its bidding in all things; that the latter company and the defendant Peabody, trustee, are in absolute control, not only of the property and assets of the defendant railway company, but also the corporate affairs and officers.

The complaint alleges a conspiracy on the part of the defendants to bring about a default in the payment of the interest due from the railway company to the other defendants, thereby maturing such an amount of its debts due them as to enable them to deprive the railway company of its property.

The allegations of the complaint, detailing this conspiracy, the breaches of trust, and oppression practiced by the defendants, in order

to deprive the railway company of its property, to accomplish which the officers and resources of that company are being used by the defendants, the allegations that the stockholders, by their pledging of all their stock and the surrendering of all the affairs, property, money, and income in the railway company to the control of the defendants, the latter's misuse of the power thus gained, if true, show the stockholders to be so enmeshed as to be helpless to aid the corporation within itself, notwithstanding the allegations of paragraph 20, and bring the case within the reasoning of the rule that, where the corporation is under control antagonistic to the stockholder, suing in a stockholder's suit for the ultimate benefit and interest of the corporation, yet it will be aligned with the defendants. *Doctor v. Harrington*, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606; *Venner v. G. N. R. Co.*, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666; *Delaware, etc., Co. v. A. & S. R. Co.*, 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Helm v. Zarecor*, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77.

The allegations are sufficient to show the cause of plaintiff's failure to secure the desired action by the corporate officers and thus bring it within equity rule 94. Though that rule was adopted after the decision in *Hawes v. Oakland*, supra, the rulings of the Supreme Court mentioned above show this case to be within the reason and spirit of the exception to the rule.

The record from the state court, brought up upon removal, shows, in the proceedings therein, that the railway company was opposing the plaintiff and assisting the other defendants both in these matters strictly in that court and in securing the removal of the controversy and the subject-matter thereof to this court. This sufficiently shows that the parties are properly aligned in the complaint. *Venner v. G. N. R. Co.*, supra; *Helm v. Zarecor*, supra.

The motion to remand is granted.

UNITED STATES for Use of PORT BLAKELY MILL CO. et al. v. MASSACHUSETTS BONDING & INS. CO. (JOHN DOUGLAS CO. et al., Interveners).

(District Court, W. D. Washington, N. D. August 8, 1912,

No. 1,949.

1. UNITED STATES (§ 67*)—PUBLIC CONTRACTS—ACTION ON BOND—CONDITIONS PRECEDENT.

It is not a condition precedent to a right to sue on a federal contractor's bond, as authorized by Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), that claimant shall have filed affidavits with the quartermaster's department, and obtained a certified copy of the bond with leave to sue.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 50; Dec. Dig. § 67.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. UNITED STATES (§ 67*)—PUBLIC IMPROVEMENT CONTRACT—BOND—FIXTURES.

Where, in a suit on a federal contractor's bond by materialmen, it appeared that all the materials furnished and for which suit was brought had gone into the permanent structure erected under the contract in question, and were expressly required for the performance thereof, defendant was liable on the bond without reference to whether the materials constituted fixtures.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

3. PLEADING (§ 15*)—FEDERAL CONTRACTOR'S BOND—ACTION—COMPLAINT.

An intervenor's complaint in an action on a federal contractor's bond, after stating that the materials sued for were furnished the contractor and entered into the buildings which were the subject of the contract, that they had not been paid for, that payment was only secured by the contractor's bond referred to in the complaint, and closing with a statement that intervenor referred to all of the allegations in the original complaint in so far as they were not inconsistent with the foregoing allegations and claim of intervenor and made such allegations part of the complaint in intervention, was not demurrable by reason of incorporating such other allegations by reference, instead of by specific allegation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 37; Dec. Dig. § 15.*]

4. PAYMENT (§ 39*)—APPLICATION OF CREDITS.

Where an application of credits had been once so made as to reduce claims for materials furnished by an intervening creditor to a federal contractor to a particular amount, there could be no authority to make any other application.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

At Law. Action by the United States, for the use of Port Blakely Mill Company, a corporation, and for the use of certain others, against the Massachusetts Bonding & Insurance Company, the John Douglas Company, the Brunswick-Balke-Collander Company, and the Rogers & Kohler Company, interveners. Judgment ordered for certain of the use plaintiffs and interveners.

This is a suit brought to recover from the defendant upon a bond for \$53,674, given by it to secure the performance of a contract entered into by E. J. Rounds and M. J. Hursen, copartners, with the United States for the erection of certain buildings at Ft. Ward, in this district. The contract provided that these partners should "furnish all materials and labor and shall construct said buildings." The bond entered into by the defendant provided that, unless the copartnership should fully perform its contract and "promptly make full payment to all persons supplying the labor or materials in the prosecution of the work provided for in said contract," it should be effective. After the bringing of this suit, the interveners above named came into the suit, claiming to have furnished the partnership materials in the construction. Issue was joined by the defendant upon the complaint and complaints in intervention. The cause was referred for the taking of testimony, which has been returned, arguments heard, briefs filed, and the cause submitted to the court for decision, upon stipulation, without a jury. The defendant admits the contract and the giving of the bond, but puts in issue the allegations that materials were furnished for which payment has not been made.

Defendant has settled with the Port Blakely Mill Company, R. T. Davis (or Tacoma Mill Wood Supply Company), Travers & Stewart, and the Philip Carey Company, plaintiffs, leaving for decision the cases made by F. T.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Crowe & Co., Galbraith, Bacon & Co., of the original plaintiffs, and the above-named interveners.

The contract was completed and settlement made with the government July 30, 1910. This suit is brought under Act Aug. 13, 1894, c. 280, 6 Fed. St. Ann. 125, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 10 Fed. St. Ann. 343, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071).

Hastings & Stedman, for plaintiffs.

Peters & Powell, for defendant.

Richard Saxe Jones, for interveners John Douglas Co. and Brunswick-Balke-Collander Co.

Milo A. Root, for interveners Rogers & Kohler Co.

CUSHMAN, District Judge (after stating the facts as above). Upon the argument and briefs, the defendant seeks to avoid liability upon several grounds, among others, because no affidavits were filed by claimants with the quartermaster's department, as required by the statute. This objection goes to all the claims. The statute provided:

"(Contractors for Public Buildings or Work to Give Bond to Pay for Labor and Material—Suit on Bond.) That the act entitled 'An act for the protection of persons furnishing materials and labor for the construction of public works,' approved August thirteenth, eighteen hundred and ninety-four, is hereby amended so as to read as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor or materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final set-

tlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene, as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

It is further objected that the complaint of the intervener John Douglas & Co. does not allege any application made to the quartermaster's department, or the obtaining of any certified copy of the bond, or leave to sue. It is objected that the certified copies offered upon the trial date were dated six or eight months after the commencement of the trial.

[1] There is no reason advanced why these steps are conditions precedent to the right to sue, and, so long as the statute can be construed otherwise, it will be so held. "Another defense, set up in the same manner as the first, is that the United States should have been made a party, and, in connection with this, a further one that the suit cannot be maintained unless the plaintiff has applied, as provided in the statute, for a copy of the bond, and furnished an affidavit that labor or materials have been supplied by him for the prosecution of the work. The latter is the more substantial, as, of course, the suit was begun in the name of the United States to the real plaintiff's use. But the objection is not serious in either form. No suit had been brought by the United States for more than six months from the completion of the work, affidavits were made and copies filed by interveners, and in the circumstances the omission was only a formal defect. The language of the statute that after giving the affidavit the party should be furnished with a certified copy of the contract and bond, 'upon which he or they shall have a right of action,' etc., may be read as meaning 'upon which bond' as easily as 'upon doing which,' and hardly can be construed as making a condition precedent." *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24, 31 Sup. Ct. 140, 55 L. Ed. 72. The court finds that the plumbing materials furnished by this intervener were supplied the contractor; that, although the subcontractor, Mullin & Co., was to do the plumbing work, the contractor was primarily liable to the intervener for the materials furnished. This is explained by the witness Mullin. He says his posing as a subcontractor was to save the union men, whom they wanted to do the work, breaking the letter of one of their rules, prohibiting them working for a gen-

eral contractor. Therefore the contention of the defendant that this claim was a subterfuge to enable the contractors themselves to recover on the bond is contrary to the evidence.

[2] The court finds substantially all the materials furnished to have gone into the permanent structure. It is further considered, under the terms of the contract and bond—all of these materials being expressly required for the performance of the contract—that the defendant is liable, without regard to whether they are fixtures. See, also, *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24, 31 Sup. Ct. 140, 55 L. Ed. 72, wherein it was held that a steamer being constructed under contract for the United States is a public work within the meaning of the act.

[3] The terms of both agreements are sufficient to fix the defendant's liability as a common-law obligation. The question having been submitted to the court without any objection to its jurisdiction, and rising out of the statutory bond in controversy in the suit upon which there was complete jurisdiction, the claim of this intervenor will be allowed at \$637.79, with interest at the legal rate from June 30, 1910. What has been said above disposes of the objections made to the claim of the Brunswick-Balke-Collander Company, and that claim is allowed at \$789.50, with interest as above.

[4] The only objection to the claim of the Rogers-Kohler Company not concluded by the foregoing ruling is that the complaint is demurrable in not stating facts sufficient to constitute a cause of action; the grounds urged being that this intervenor's complaint, after stating that materials were furnished the contractor, which entered into the buildings, the subject of the Ft. Ward contract, that they were not paid for, and payment was only secured by the bond given by the defendant, referred to the plaintiff's complaint, and closed with:

"That this intervenor refers to all the allegations in the original complaint herein, in so far as they are not inconsistent with the foregoing allegations and the claim of this intervenor, and makes said allegations part of this complaint."

The defendant might have been entitled to a bill of particulars as to the paragraphs or allegations referred to. The court does not find any allegations of the complaint inconsistent with the allegations of the complaint in intervention; nor is any reason perceived why reference may not be made to the original complaint and its allegations adopted as in preceding counts in the same pleading. This intervenor's claim is allowed at \$656.30, and interest as above.

The claim of the plaintiff F. T. Crowe & Co. is contested upon the further ground that payments made upon general account were applied, after the controversy arose, so as to reduce other unsecured claims of Crowe & Co. against Rounds & Co., and correspondingly increase its claim against the defendant. The plaintiff Crowe & Co. contends that, in the absence of any plea of payment, this defense should not be considered. Under the issues as framed, there is no merit in this latter contention. The evidence shows that

the plaintiff was not surprised as this part of the controversy had been made the subject of a meeting of the parties interested long before the trial.

While the defendant is not able to show the misapplication of any specific credit, yet, in view of the fact that this plaintiff's claim was originally made for \$1,829.91, and subsequently reduced, on account of a mistake, to \$1,653.15, and further on account of the vagueness in the testimony of the witness Claussen, claimant's auditor, coupled with the failure to give any satisfactory explanation of a statement produced by plaintiff of a balance on account due May 31, 1910, on account of the Ft. Ward contract of \$1,293.88, and taking into consideration that no materials were purchased from claimant after the above date, the court finds that this plaintiff has no preponderance of evidence showing it entitled to any greater amount than that stated, \$1,293.88.

[5] The court concluded that this statement shows an application of credits up to that date, reducing the claim to this amount, which is allowed, with interest as above. The application of credits once having been made to reduce the claim to this amount, there would be no authority to make any other application of the credits.

The foregoing rulings control in the matter of the claim of the plaintiff Galbraith, Bacon & Co., which is allowed at \$3,603.05, with interest as above. The amounts allowed will be further reduced by such dividends as have been realized from the bankruptcy of Rounds & Co. If there is any dispute concerning these credits, the parties will be further heard.

Findings may be prepared in accordance with the foregoing.

ALDER v. EDENBORN.

(District Court, E. D. New York. September 2, 1912.)

1. JUDGMENT (§ 201*)—REFEREE'S REPORT.

Where an action at law is submitted to a referee under a stipulation consenting to a determination of the issues by the referee, a judgment may be entered on the referee's report by the clerk, or an application may be made to the court and opportunity given for hearing of any motions which the court may entertain.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 365, 366; Dec. Dig. § 201.*]

2. COURTS (§§ 339, 356*)—ENTRY OF JUDGMENT—FEDERAL COURTS.

Where an action at law in a federal court is referred, the state practice may be followed in conducting the reference if so stipulated, but the entry of judgment and the hearing on appeal or writ of error will be controlled by the federal statutes and practice in federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 914, 937; Dec. Dig. §§ 339, 356.*]

3. COURTS (§ 406*)—REFERENCE.

A reference to hear and determine on consent is no more than an arbitration or submission by agreement of a statement of facts as found by the referee on which the circuit court is asked to enter judgment, so

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that, in the event of such reference, the referee's findings as to the facts are conclusive on appeal on review of the referee's determination.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1108; Dec. Dig. § 406.*]

4. COURTS (§ 356*)—MOTION FOR NEW TRIAL.

Where an action at law in a federal court is referred to a referee to hear and determine under a stipulation of the parties, no application for a new trial need be made to the referee or to the court, unless the referee has made some decision which the defeated party thinks may be changed if brought to the referee's attention; the referee's findings and decision being reviewable to the same extent whether such motion is made or not.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

5. JUDGMENT (§ 201*)—EXTENSION—ENTRY OF JUDGMENT.

The authority of a federal court to extend its terms in order to protect the rights of litigants and its authority over its clerk and judgments is sufficient to cover the actual entry thereof, even though the court exercises no discretion beyond ordering the judgment to be formally entered by the clerk in the way decided by the referee.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 365, 366; Dec. Dig. § 201.*]

6. COURTS (§ 356*)—STENOGRAPHER'S MINUTES—REFERENCE—FILING—JUDGMENT ROLL.

Where an action has been heard and determined by a referee and judgment entered, the defeated party is entitled to have the stenographer's minutes of the reference filed so as to be available for any proper purpose; the fees for the taking of the testimony having been paid, but a motion to have the stenographer's minutes made a part of the judgment roll would be denied unless the fees were advanced therefor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

7. JUDGMENT (§ 359*)—VACATION—ENTRY.

Where plaintiff had actual notice and was present at the entry of judgment by the clerk on a referee's report, plaintiff was not entitled to have the judgment opened on the ground that he did not have proper notice of the application.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 697; Dec. Dig. § 359.*]

8. REFERENCE (§ 107*)—JUDGMENT ON REFEREE'S REPORT—MOTION FOR NEW TRIAL—REVIEW.

Where judgment has been entered on a referee's report, a motion for a new trial made to the referee is unavailable, and the denial thereof is not reviewable; his conclusion on his view of the facts being reviewable in itself.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 207-210; Dec. Dig. § 107.*]

9. COURTS (§§ 353, 356*)—REVIEW.

A judgment having been entered on a referee's report, no motion for a new trial could be granted by the court which has nothing to do with conclusions of the referee, except to see that a proper judgment is entered on his findings, nor would the denial of such a motion for a new trial be subject to review.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 933, 937; Dec. Dig. §§ 353, 356.*]

10. REFERENCE (§ 103*)—REFEREE'S FINDINGS—REVIEW.

Where an action at law was sent to a referee for hearing and determination, pursuant to a stipulation, if the court should not accept the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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referee's findings and conclusions, it would then order a trial unless a new stipulation was filed.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 188-203; Dec. Dig. § 103.*]

11. REFERENCE (§ 107*)—FINDINGS—MOTION FOR NEW TRIAL—CASE AND EXCEPTIONS.

Where a case is tried before a referee, a motion for a new trial on a case and exceptions as indicated in the rule of 1877 need not be made to the referee, and was not within the jurisdiction of the court unless by consent, since no such appeal is provided for by law.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 207-210; Dec. Dig. § 107.*]

12. REFERENCE (§ 107*)—FINDINGS—BILL AND EXCEPTIONS.

Where a case has been heard and determined by a referee, a hearing presented on bill and exceptions provided by Rev. St. § 700 (U. S. Comp. St. 1901, p. 570), in cases tried by a jury or by the court without a jury, is unavailable.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 207-210; Dec. Dig. § 107.*]

13. COURTS (§ 356*)—JUDGMENT ON REFEREE'S FINDINGS—REVIEW.

Where an action at law is submitted to a referee for hearing and determination, and judgment is entered on the referee's findings, the defeated party can secure a review by writ of error only on the facts as found by the referee and as applied in the judgment on conclusions of law by the referee adopted by the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

At Law. Action by Thomas P. Alder against William Edenborn. On motion to set aside a judgment entered on a referee's report. Denied.

Strong, Smith & Strong, of New York City, for plaintiff.
Martin W. Littleton, of New York City, for defendant.

CHATFIELD, District Judge. This is an action at law, in which this court, in 163 Fed. 655, held that the original complaint outlined a cause of action in equity, while purporting to be a case at law and praying for damages at law. Demurrer was therefore sustained. An amended complaint, setting up a cause of action at law (based upon a rescission by the plaintiff of the contract named), was subsequently held sufficient.

[1] The issue thus framed was sent to a referee by stipulation in writing, signed by both parties and filed. This stipulation named the referee and consented to a determination by him of the issues. Upon his report, a judgment might have been entered directly by the clerk, with the implied order of the court (*Hecker v. Fowler*, 2 Wall. 123, 17 L. Ed. 759), or application might have been made to the court and opportunity given for the hearing of any motions which the court might entertain.

[2] It is evident from the decision in *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334, and *Fourth National Bank of Chicago v. Neyhardt*, 13 Blatchf. 393, Fed. Cas. No. 4,991, that, although the state practice in conducting the reference may be fol-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowed if stipulation be made, nevertheless the rules as to the entry of judgment and of hearing upon appeal or by writ of error will still be controlled by the United States Statutes and the practice of the United States courts.

[3] A reference to hear and determine upon consent is no more than an arbitration or submission by agreement of a statement of facts as found by the referee, upon which the Circuit Court is asked to enter judgment. If the trial had been before a jury or upon written stipulation by the court without a jury, then, under section 649 and section 700 (U. S. Comp. St. 1901, pp. 525, 570), the court's ruling on evidence and the sufficiency of its findings to support the judgment are reviewable upon writ of error. But if the parties consent to a determination of the facts in a different manner, and judgment is entered upon a determination of law based upon the admitted facts, then a review of the decision can raise only its correctness in law, and will not question the rulings on evidence nor the findings of fact.

In the present case the referee has reported certain findings of fact and conclusions of law. He has refused to find a fraudulent intent to commit larceny on the part of the defendant, but has found that he did certain things with knowledge such that his acts were in fraud of the plaintiff's rights. He has intimated in his opinion that some of the statements of this court, in determining the original demurrer, might be understood in a sense contradictory to the order entered after determination of that demurrer, and, perhaps, contradictory to the referee's own ideas as to what is the law in such cases, or to his understanding of the decision in *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441. This court does not know wherein this confusion has arisen, for the findings of the referee and the decision seem to be in entire accord with the court's idea of the case from the outset. If the court did not express itself clearly, and the parties do not agree as to its meaning, it seems to be because the defendant does not wish to admit that such a cause of action can exist, and because the plaintiff has continuously insisted that his original pleading stated the intended cause of action, even though he finally amended it so as to obey the court's direction.

[4] No application was made to the referee, after his findings of fact were signed, for a new trial. Such application was entirely unnecessary unless the referee had made some decision which the defendant thought would be changed if brought to his attention, for his decision and findings would be reviewable to the same extent, whether or not such a motion had been made. Nor was any motion made to the court for a new trial. This occurred either through inadvertence, or upon the theory that such a motion was unnecessary. The clerk of the court, after waiting the ten days provided for by the order of reference, and by a rule adopted in the different districts of this circuit in 1877, proceeded to enter judgment, in the presence of the attorneys for both parties, and upon the theory that the clerk had the right to enter such judgment without direction by the court. The Circuit Court and its rules specifically went

out of existence upon the 1st day of January, 1912. The rules of the former Circuit Court are followed, in a general way, in cases which would previously have been conducted in the Circuit Court, but the particular rule in question was previously called to the court's attention in this present case, and the court understood that the clerk was to enter no judgment in the case except by express direction.

[5] The authority of the court to extend its terms and the necessity to keep the term of court open to take security upon the allowance of writs of error and to protect the rights of the litigants indicate that the court's control over its clerk, and over its judgments, is sufficient to cover the actual entry thereof, even though the court exercises no discretion beyond ordering the judgment to be formally entered by the clerk in the way decided by the referee. *Kilduff v. John A. Roebling's Sons Co.* (C. C.) 150 Fed. 240.

[6] The defendant wishes to appeal, and has made a motion to compel the plaintiff's attorney to file the stenographer's minutes of the reference, and to have them made a part of the judgment roll as well. It appears that these minutes are in the possession of the referee, and the motion should be granted to the extent of providing that the referee shall report them to this court for filing; the bill for taking them having been paid. But the motion to make them a part of the judgment roll should be denied, unless the defendant wishes to advance the fees therefor. The minutes should be available for any proper purpose, but need not, in this case, be made a part of the judgment roll itself, any more than they would have been in the case of a verdict by a jury.

[7] The plaintiff has also made a motion to reopen the judgment upon the ground that he did not have proper notice of the application to the clerk to enter the same, and proper notice of the filing of the referee's report. It appears that he had actual notice and was present at the entry of judgment, and this motion, therefore, cannot be granted upon that ground. But inasmuch as misunderstanding has existed, and inasmuch as the defendant has, through inadvertence of the attorney's clerk in charge of the case, failed to apply for any relief whatever prior to the entry of judgment, it seems to the court to be fair to set aside the judgment, and to consider any motion which he may make.

[8] No motion for a new trial before the referee can now avail, and his denial of the motion for such new trial would not be reviewable. His conclusion, upon his view of the facts, is reviewable in itself, and can be tested upon the record as it exists. *United States v. Ramsey* (C. C.) 158 Fed. 488.

[9] No motion for a new trial can be granted by the court as no trial has been had, and as the court has nothing to do with the conclusions of the referee, except to see that a proper judgment is entered upon his findings. *Roberts v. Benjamin*, supra; *Andes v. Slauson*, 130 U. S. 435, 9 Sup. Ct. 573, 32 L. Ed. 989. Nor would a denial of motion for new trial be reviewable. *Gizzi v. Pittsburg & L. E. R. Co.*, 158 Fed. 410, 85 C. C. A. 520; *Newcomb v. Wood*,

97 U. S. 581, 24 L. Ed. 1085. In the present case, inasmuch as the court entirely agrees with the conclusions and findings of the referee, the result may be the same as if the judgment were allowed to stand, but the defendant is entitled to the pro forma decision by the court under the circumstances. *Atlantic Trust Co. v. Osgood* (C. C.) 155 Fed. 700.

[10] If the court should not accept the referee's findings and conclusions, then it would have to order a trial, unless a new stipulation were filed. *United States v. Ramsey*, supra.

[11] The motion for a new trial on "case and exceptions," as indicated in the rule of 1877, need not be made to the referee, and does not seem to be within the jurisdiction of this court, unless by consent, for no such appeal is provided by law.

[12] A hearing, presented on bill and exceptions, under section 700 of the Revised Statutes, could not be had where there has been no trial by jury or by the court without a jury. *Kearney v. Case*, 12 Wall. 275, 20 L. Ed. 395; *Shipman v. Straitsville Central Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015. If the rule adopted in this district in 1877 avail anything, it must be for the reason that the provisions of the rule were contemplated as a part of the stipulation, and that the state practice is thereby in part adopted; but, if the rule be not followed or taken advantage of, this court cannot see how the parties' rights have been affected by its existence. *United States v. Ramsey*, supra. This court does not consider that such a method of review should be attempted by this court. The only remedy which the court would have would be to put the case down for trial, and try it anew, and this would be contrary, in spirit and in terms, to the provisions of the New York laws, which are, to some extent at least, applicable, and also contrary to the court's idea of the respect which should be paid to the stipulation made by the parties in the action.

[13] Hence, the defendant is in the position of the litigants in *Roberts v. Benjamin*, supra, *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835, and *Parker v. Ogdensburgh & L. C. R. Co.*, 79 Fed. 817, 25 C. C. A. 205, and can appeal by writ of error only upon the facts as found by the referee, and as applied in a judgment entered in accordance with those facts, upon conclusions of law by the referee, which will be adopted by the court. The judgment directed by the referee will be entered, unless the judgment is shown to be inconsistent with his conclusions of law. The term of court has already been extended, and, upon vacation of the judgment heretofore entered, any motion of the defendant for leave to file a bill of exceptions, or for action with reference to the report of the referee, may be submitted.

But, as the court understands the matter at present, such motion will be denied and a new judgment ordered upon proper application.

UNITED STATES v. SEVENTY-FIVE BOXES OF ALLEGED PEPPER.

(District Court, D. New Jersey. January 25, 1912.)

1. FOOD (§ 24*)—MISBRANDING—ADULTERATION—FORFEITURE—SUIT—NOTICE AND HEARING.

A notice and hearing provided for by Pure Food and Drug Act June 30, 1906, c. 3915, § 4, 34 Stat. 769 [U. S. Comp. St. Supp. 1911, p. 1355], is not a condition precedent to the bringing of a suit by the United States for forfeiture of food products transported in interstate commerce for misbranding and adulteration.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. § 24.*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

2. FOOD (§ 5*)—"MISBRANDING"—USE OF WORDS—ORDINARY MEANING.

Under Pure Food and Drug Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354], imposing a penalty on any person who shall ship or deliver for shipment from any state to any other state any article of food or drug which is misbranded, whether a commodity shipped in interstate commerce under the label "Pure Pepper" was misbranded in violation of the act depended on the ordinary and customary meaning given to such words, and not on the technical meaning thereof.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

3. FOOD (§ 5*)—"MISBRANDING"—"PURE PEPPER."

Where boxes labeled "Pure Pepper," and containing a combination of ground black pepper and ground long pepper, were shipped in interstate commerce, and there was evidence that "pure pepper," in the trade and according to its ordinary usage, meant nothing but black pepper, the combination was subject to forfeiture for misbranding.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

Libel by the United States against Seventy-Five Boxes of Alleged Pepper. Libel sustained. Judgment of forfeiture entered.

John B. Vreeland, U. S. Atty.

Willard W. Cutler, for claimant.

CROSS, District Judge. No jury having been demanded, the above-entitled cause came to hearing before the court. On or about June 28, 1911, B. Fischer & Co., the claimants herein, of the city of New York, shipped in interstate commerce from that city to Jersey City, in the state of New Jersey, 75 boxes containing the alleged pepper which the government seeks to condemn as having been misbranded and adulterated within the meaning of the act commonly known as the Pure Food and Drugs Act of June 30, 1906 (34 Stat. 768). The government claims that the article contained in the boxes consisted of a combination of ground piper nigrum (or black pepper), and ground piper longum (or long pepper). The product was labeled by the claimants "Pure Pepper," and bore its guaranty No. 6657 at the time of its shipment.

At the close of the proofs the case was reserved, and counsel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

requested to submit briefs upon the following points deemed to be involved in the disposition of the case:

First. Was a notice and hearing as provided for by section 4 of the act, a condition precedent to the bringing of this suit?

Second. Shall the words "pure pepper," as affixed to and used as a label upon the boxes in question, be given their ordinary and customary meaning or a technical meaning?

Third. Are the words "pure pepper," as so used, in any wise false or misleading under the evidence in the case?

[1] It is probable that the first question would have been the most difficult of solution, owing to the conflicting decisions of subordinate courts, but for the fact that since the hearing and on December 11, 1911, the Supreme Court in the case of *United States v. John Morgan and Alfred Y. Morgan*, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198, held that the notice and hearing referred to in the first point were not a condition precedent to the bringing of a suit of this character.

[2] The second point reserved must be answered in the affirmative. It is difficult to perceive how otherwise justice could be done in any given case, or what practical efficiency the statute would have or what protection it would afford if the public were required to have scientific and technical knowledge as to the derivation and nomenclature of the various food and drug products. The ordinary purchaser, unless he could rely upon the common and generally understood signification of a label, could never be certain of what he was buying. A label should be reliable to the extent that it will not in any wise, or to any extent, mislead such a purchaser. In the case of *Brina v. United States*, 179 Fed. 373, 105 C. C. A. 558, the Circuit Court of Appeals of the Second Circuit, speaking by Judge Lacombe, said:

"The section declared on (section 2) imposes a penalty on any person who shall ship or deliver for shipment from any state, to any other state, any article of food or drug so misbranded. It was proved that the words 'Olio per Insalata' mean 'oil of salad' or 'salad oil,' and the trial judge held and so charged the jury that 'as a notorious fact salad oil prima facie means olive oil,' but allowed the defendant to show if he could that 'it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain, or that other food elements have come to be known as salad oil.' No such proof was introduced, and the ruling is assigned as error. The *Century Dictionary*, *Worcester's*, *Stormont's Imperial*, and the *Encyclopedia* all define 'salad oil' as 'olive oil.' Webster's does not give any definition. We are satisfied that the trial judge quite properly charged, in the absence of any testimony of the sort suggested, that 'salad oil' prima facie imports olive oil; that is what the world has been accustomed to regard salad oil."

So also in *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 536, 23 Sup. Ct. 161, 167 (47 L. Ed. 282), which was a trade-mark case, the court, speaking of a label containing the words "Syrup of Figs," and what should be understood from those words as used, said:

"The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that, when the term is

used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparations, and it is with respect to their knowledge and impression that the character, whether descriptive or fanciful, of the term used, is to be determined."

The extract given from the case last cited was quoted from an opinion by Judge Taft in *California Fig & Syrup Co. v. Frederick Stearns & Co.*, 73 Fed. 812, 817, 20 C. C. A. 22, 33 L. R. A. 56 (C. C. A. Sixth Circuit). Counsel for the government has also cited several cases which have arisen from time to time in different District Courts of the United States, and has furnished extracts thereof from circulars issued by the Department of Agriculture; but, as such extracts were parts of charges to juries and the cases do not appear to have been reported, no further mention will be made of them, except to say that they all follow the above doctrine.

[3] The third question reserved requires an examination of the facts of the case. It has already been stated, and it is not disputed, that the article in question was labeled by the claimants "pure pepper," and that it was composed of piper nigrum and piper longum, or black pepper and long pepper, ground and mixed. The evidence also shows that the mixture contained a larger proportion of long pepper than it did of black pepper, or, to be more definite, that it contained between 50 and 75 per cent. of long pepper, worth at the time of the shipment in question several cents a pound less than black pepper, and that such differences in price usually, but not invariably, existed. The two kinds of pepper, black and long, belong to the same genus, but differ in strength, quality, and characteristics. The testimony shows that black pepper or piper nigrum is known in the market as "ordinary pepper," "common pepper" and as what people usually term "black pepper," and that "pure pepper" means in the trade piper nigrum, and nothing else. The weight of the testimony upon these points and particularly upon the point that "pure pepper" means in the trade nothing else than piper nigrum is overwhelming; while of the evidence in general it may fairly be said that it is but slightly conflicting. The defendants have introduced evidence to show that there are four kinds of pepper in common use, "black pepper," "white pepper," "long pepper," and "red pepper," the first three of which are grouped in one family, known as the capsicum family. It appears, however, that white pepper is piper nigrum whitened by means of a process, and, as red pepper is in no wise under consideration, it is only requisite to consider black pepper and long pepper. The defendants claim that because these two varieties of pepper belong to the pepper family and are so classified in some, but not in all, scientific books, they were justified in labeling a mixture of them "pure pepper," and that such labeling was neither false nor misleading in any particular. But, as above stated, the evidence is clear that "pure pepper" is known to the trade and in the market as black pepper, and nothing else. It also appears that the two

kinds of pepper, black and long, have different qualities, characteristics, and uses. If the defendant's contentions were upheld, they could with impunity sell an article composed entirely of the cheaper and inferior long pepper for "pure pepper" or black pepper, although the purchaser would pay the price of, and be justified in believing that he was buying, black pepper. Speaking generally, "flour" is a generic name. Suppose, however, that wheat flour was generally known in the trade as "pure flour," would a manufacturer be justified under the act in so labeling it, if as a matter of fact, it were composed of a mixture of 50 per cent. of wheat flour and 50 per cent. of rye or buckwheat flour? Numerous illustrations of a like character are instantly suggested.

But the defendants, furthermore, attempt to justify their conduct in the premises because of its alleged conformity with a pamphlet published and circulated by the United States Department of Agriculture, called "Standards of Purity for Food Products," as established and prescribed by that department. But I can find in those standards no warrant for such justification. Substantially all they do is to classify under the title "pepper," *piper nigrum*, *piper longum*, and white pepper, and describe them. Notwithstanding such classification, it would seem that both the public and the department might reasonably assume that, if black pepper and long pepper were mixed or blended in equal parts, the product would be marked or branded as required by the act in question.

The more pertinent parts of that act are as follows:

"Sec. 8. That the term 'misbranded' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device, regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

"That for the purposes of this act an article shall also be deemed to be misbranded:

"In the case of food: * * *

"Fourthly: If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular: Provided, that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases:

"First: In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not as an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second: In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: Provided, that the term blend as used herein shall not be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided further, that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingre-

lient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

It seems to me that the fourth subdivision of section 8, in connection with the second paragraph of such subdivision, covers this case as completely as if specially enacted therefor, and that a mixture of black pepper and long pepper constituted a compound or "blend" within the meaning of the act, and should have been so marked. In view of this conclusion, it is unnecessary to consider whether the article in question was also adulterated as claimed by the libellant.

Upon consideration of all evidence in the case, it is concluded that the "seventy-five boxes of alleged pepper" bore a false and misleading label, and were consequently misbranded within the meaning of the Pure Food and Drug Act.

Judgment of forfeiture will accordingly be entered in favor of the United States, with costs.

PETERSON v. METTLER et ux.

(District Court, W. D. Washington, S. D. August 26, 1912.)

No. 952.

1. EQUITY (§ 409*)—REFERENCE BY CONSENT—FINDINGS OF MASTER.

The findings of a special master to whom a cause has been referred by consent to report the facts with his conclusions thereon are presumptively correct, and will not be disturbed, where made on conflicting evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920-923; Dec. Dig. § 409.*]

2. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFER OF PROPERTY—SUIT BY TRUSTEE.

Evidence that a bankrupt, when insolvent, conveyed valuable property to his brother for an inadequate consideration, that by agreement between them the brother withheld the deeds from record, and that the bankrupt afterward borrowed large sums of money on his representation that he owned such property, *held* sufficient to establish actual fraud, and to entitle the bankrupt's trustee to recover the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

In Equity. Suit by Gilbert E. Peterson, trustee in bankruptcy of Simon Mettler and Anna Mettler, his wife, against Carl Mettler and Mary Mettler, his wife. On exceptions to report of special master. Exceptions overruled, and decree for complainant.

Bates, Peer & Peterson, for complainant.
Burdick & McQuesten, for defendants.

CUSHMAN, District Judge. This suit was brought on the part of the trustee in bankruptcy of the estate of Simon Mettler and Anna Mettler, his wife, to have an alleged preference to Carl Mettler and Mary Mettler, his wife, set aside and recovered to the trust-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tee on the ground that the said conveyances were to defraud creditors.

After issue was joined upon the allegations in the complaint of illegal preference and fraud, and upon the defense of an innocent purchaser for value, the purchase alleged to have been made more than four months prior to the institution of bankruptcy proceedings, by consent of the parties, the cause was referred to a special master to take testimony, "and ascertain and report the facts with his conclusions thereon."

The referee, in part, finds and concludes as follows:

"The defendant Carl Mettler and the bankrupt, Simon Mettler, are brothers, who were engaged for a period of about 15 years in the dairy business. During this period considerable property was acquired by the two brothers and held by them as tenants in common. Some five or six years ago they sold out the business. Since that time they have not been engaged in business together, although they still continued to hold, as tenants in common, the property acquired by them while in the dairy business."

That, in 1909, the bankrupt, Simon Mettler, became interested in a corporation engaged in construction contracts. To assist the said bankrupt in raising money to carry on the work of this corporation, in June and August, 1910, the defendants joined with the bankrupts in deeding certain of the property. These deeds were in effect mortgages—the bankrupts, at the same time, deeding to the defendant, Carl Mettler, other of the lands of the two brothers. The latter deeds were not recorded until in the month of November, 1910. It is to set aside these that this suit is brought. That in August and October, 1910, by means of representations that he was the owner of several parcels of real property, including that already deeded to the defendant, the bankrupt, Simon Mettler, was enabled to borrow \$55,000, which is still unpaid. That no property of the bankrupt came into the hands of the receiver. Simon Mettler was insolvent June 1, 1910. There was evidence of statements made by the bankrupt, in the presence of the defendant Carl Mettler, to the effect that, when he, Simon Mettler, gave these deeds to the defendant, he requested the latter to keep them off the records so his credit would not be ruined.

From the testimony, the master further finds and concludes:

"While the evidence is very long and complicated, and at times contradictory, it cannot be thoroughly gone over without coming to the conclusion that there was fraud, actual or constructive, on the part of Carl in accepting deeds to the property in litigation from his brother, Simon, and keeping the same off record, while the fact that they were not recorded was made use of by Simon to secure large loans with which to carry on the work of the Wells Construction Company.

"* * * The other evidence alone seems sufficient to support the contention of the trustee that Carl was aware of the financial difficulties of his brother and had reasonable grounds to believe that, if the deeds to Carl were withheld from record, others might be induced to advance money in ignorance of the transfer of Simon's property. * * *

"While the evidence tends to show that there was an actual agreement between Simon and Carl to withhold the deeds from record, cases even go so far as to hold that such an agreement is not necessarily present to empower the trustee to set aside the conveyance.

"* * * With the transfer of the property kept off the records for a

most unreasonable time, whether willfully and according to agreement between the two brothers, as appears from the record, or negligently as Carl would have us believe, with no visible change in the possession of the property and with creditors advancing money on the faith of the record and representations of Simon, the way would be open to the deceitful and fraudulent, so that property rights would be insecure. * * *

"While not entirely applicable to this case, inasmuch as it appears Carl knew, or at least had reasonable grounds to believe, that his brother Simon would obtain credit on the faith of the property withheld from record, it may not be entirely inappropriate to recall the old, familiar rule that, where one of two innocent persons must suffer because of the wrongful acts of a third, he whose conduct put it within the power of the wrongdoer to commit the wrong, or occasion the loss, must bear the burden."

After reviewing the evidence on the question of the relative value of the property deeded to Simon and that conveyed to the defendant in consideration therefor, the master finds and concludes:

"According to this, Carl paid for the property deeded to him less than half of the value. While these figures are largely speculative and the estimates of the various witnesses differ to a considerable extent, and are, perhaps, unreliable, yet the totals are so vastly different that it seems safe to at least conclude from these figures that the consideration passing to Simon for his conveyances to Carl was grossly inadequate. This inadequacy, standing alone, would be a matter of little or no importance, but, when coupled with the evidence of fraud contained in this case, it is a matter of importance and weight. * * *

"In the light of all these circumstances, coupled with the evidence of fraud, of knowledge of financial difficulties, of agreement to withhold from record and the actual failure to record, of inadequate consideration, of the failure of Simon to testify, of the loaning of large sums of money on the strength of the public records and representations of Simon, of the relationship of the parties, of actual insolvency at the time of the transfer, and inconsistencies in the testimony of Carl, an interested witness, there must be but one conclusion, that there was fraud, actual or constructive, and that the trustee should be granted the relief prayed for."

The defendants except to the rulings and report of the master upon many grounds. It will only be necessary to discuss two of these. The defendants excepted to the master's excluding the deposition of Simon Mettler upon the hearing. This exception was sustained and the deposition admitted. The findings and conclusions are excepted to on the grounds that they are contrary to law and against the weight of the evidence.

[1] The first question to arise is whether, in view of the reference to the special master having been by consent of parties "to report the facts with his conclusions thereon," this court should now consider the evidence anew. There was evidence to support the master's findings. The most that can be said is that there was a conflict in the testimony. The findings are, therefore, presumptively, correct. *Davis v. Schwartz*, 155 U. S. 631, at 636, 15 Sup. Ct. 237, 39 L. Ed. 289; *In re Senoia Duck Mills* (D. C.) 193 Fed. 711, at 719; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Cook v. Robinson et al.* (C. C. A.) 194 Fed. 755, 759.

It may be contended that this rule is not applicable in this case for the reason that the deposition of Simon Mettler was not considered by the special master; but, in view of the condemnation of Simon Mettler's conduct by the master, the character of his testi-

mony, and the nature of the evidence on which the master based his ruling, it is clear that the findings and conclusion would not have been otherwise had the deposition been considered.

[2] Not to place the decision upon this ground alone, the evidence has been considered and is held sufficient, not only to support the master's findings, but to show that there was actual fraud on the part of the defendant Carl Mettler, in withholding the deeds from record, to enable his brother to extend his credit upon the strength of the reputed and apparent ownership of the property involved. Section 70e, Bankr. Act, 1 Fed. Stat. Ann. 702; *Blennerhasset v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Bush v. Export Storage Co. (C. C.)* 136 Fed. 918, 921; *O'Leary v. Duvall*, 10 Wash. 666, 671, 39 Pac. 163; *Clayton v. Exchange Bank*, 121 Fed. 630, 633, 57 C. C. A. 656; *Post v. Berry*, 175 Fed. 564, 99 C. C. A. 186; *In re Mission Fixture Mantel Co. (D. C.)* 180 Fed. 263; *Adams v. Curtis*, 137 Ind. 175, 36 N. E. 1095, 1097; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; *Bunch v. Schaer*, 66 Ark. 98, 48 S. W. 1071. The findings made by the master in summing up show badges of fraud sufficient in their number and nature to warrant the finding of actual fraud. 20 Cyc. 439-453, and citations. These findings are supported by the evidence.

"All deeds, mortgages and assignments of mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and, when so filed shall be notice to all the world." Section 4441, *Pierce's Code Wash.*; section 8781, *Rem. & Bal. Code Wash.*

The court's attention has been called to the case *In re Hunt*, 139 Fed. 283, which, under section 13 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), providing that the four months period for the transfer of property, within which a transfer of the character defined shall constitute a preference, shall not expire until four months after the recording, or registering of the transfer, if by law such recording or registering is required, holds that the time does not run from the recording under a state statute, by which recording is not required except as against subsequent purchasers or mortgagees in good faith for value.

It is claimed that this holding is opposed to that in *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233, wherein it was decided that a state statute which requires a conveyance or transfer to be recorded, in order to be effectual against any class or classes of persons, is a law by which such recording is "required" within the meaning of the above-mentioned act defining preferences.

In view of the conclusion reached and the finding that actual fraud has been shown, it is not necessary in this case to consider those cases, and determine which, if either, authority would be controlling in the present suit under our statute.

The exceptions to the master's report, other than as above indicated, are overruled.

DUFFIELD et al. v. SAN FRANCISCO CHEMICAL CO.

(District Court, D. Idaho, S. D. September 3, 1912.)

No. 142.

1. MINES AND MINERALS (§ 38*)—ADVERSE CLAIM—SCOPE OF INQUIRY—CHARACTER OF GROUND.

A suit in support of an adverse claim to a mining location authorized by Rev. St. § 2326 (U. S. Comp. St. 1901, p. 1430), is purely possessory in character without reference to the form of action adopted, in which the issue to be tried is which of the contesting claimants is prior in right to the present possession, the court being without jurisdiction to review the determination of the Land Department as to whether the character of the deposit is lode or placer; such determination being final and conclusive on all the departments of the government, including the courts.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

2. MINES AND MINERALS (§ 27*)—MINING LOCATION—ADVERSE CLAIM—TRESPASS—POSSESSION.

Defendant having acquired a prior right to the possession of a mining claim, complainants' subsequent entry thereon was a mere trespass which could confer no right in the land, regardless of the fact that defendant at the time was not in actual occupancy.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 64, 65; Dec. Dig. § 27.*]

In Equity. Suit by Morse S. Duffield and another against the San Francisco Chemical Company. Decree for defendant.

This is a suit brought under section 2326, Rev. St. (U. S. Comp. St. 1901, p. 1430), to determine the conflicting rights of the parties to certain adverse mining locations in the Pruess Mountains, Bear Lake county, Idaho, and to quiet complainants' title to the premises involved. Defendant in a cross-bill asks similar relief against complainants.

The controversy grows out of these facts: The only valuable mineral discovered on the claims in question, and to acquire which the locations of both parties are intended, is calcium phosphate, or rock phosphate, which is found in sedimentary beds or deposits. These deposits, of precisely similar formation and character throughout, extend and form a part of the earth's stratification over an area of country, including that in which the present locations are made, several hundred miles both east and west and north and south, and including parts of the states of Nevada, Utah, Wyoming, Idaho, and Montana. While the deposits present some of the characteristics of lode formation in the broader definition of that term, in others they more nearly resemble placer ground. The successive strata of phosphoric limestone of which the deposits consist are found in place in the mass of the mountains between defining walls of country rock, with outcroppings on the surface at irregular intervals, and are of different color, texture, and specific gravity from the adjoining beds of shale and limestone, and have a dip and strike conforming to the stratification of the sedimentary beds, and the mining is accomplished by blasting and other methods appropriate to lode mining; but, on the other hand, such deposits are not at all in character that of mineralized rock in the geologic sense. They are not found in fissures or crevices in the earth's crust, nor are they to any extent of igneous formation, but are admittedly of sedimentary character apparently having their origin along with and in the same manner as the different strata above and below; nor is the material mined to extract the mineral substance therefrom, but, like coal, limestone, gypsum, or building stone, is used and principally valuable as a whole in its natural state. The exact processes of nature by which the beds or deposits were impregnated with the elements for which they are now

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

valuable is in question, but it is not material. The rock is used as a fertilizer.

The indefinite nature of these deposits in the particulars noted has induced the Land Department to vary somewhat inconsistently in its determination of the question whether they are properly the subject of lode location and to be sold as such, or to be located and sold as placer ground; the department having granted to the defendant a patent under a placer location for a claim in the midst of those here involved on the same deposit or bed, and allowed final entries on a number of other like locations on similar deposits in the same section of the country, whereas it has, on the other hand, passed to patent a number of lode locations on the same character of formation within the general area above described.

Such being the general character of the subject of the claims here involved, the ground in dispute was duly located by the defendant's predecessors as placer in the years 1904 and 1905; and it is stipulated that the defendant and its predecessors have since in due course performed all acts required by law to perfect its several locations as such down to the time of the commencement of this suit. The complainants, with knowledge of the prior locations of defendant and its predecessors, entered upon the land in 1907, and proceeded, against the notification and objection of defendant that they were trespassers, to file lode locations on the same bed or deposit covered by defendant's locations, and, after some threatened litigation between the parties, complainants were suffered by the defendant, without waiving its objections to the validity of their claims, to proceed and do the necessary assessment work; and it is stipulated that, aside from the questions arising out of the alleged trespass of the complainants in making their locations and the claimed prior rights of defendant, they have done the necessary acts to perfect them down to the time of filing this suit. On August 11, 1910, defendant filed its applications for patents upon its several placer locations involved, and thereafter the plaintiffs filed adverse claims thereto, and in due time commenced this action.

C. B. Jack and C. C. Dey, of Salt Lake City, Utah, A. B. Gough, of Montpelier, Idaho, and A. L. Hoppaugh, of Salt Lake City, Utah, for complainants.

Clark & Budge, of Pocatello, Idaho, for defendant.

VAN FLEET, District Judge (after stating the facts as above). The only question seriously mooted in the case is as to the limitations of the court's inquiry in determining the rights of the parties. The theory of the complainants is that to determine those rights it is necessary, and the court has the power, to inquire into and determine the character of the land, the mineral deposit, involved in the controversy—that is, as to whether it is lode or placer in its nature—and that if it is lode, as complainants confidently assert, the placer applications, although prior in date, are absolutely void, and the land must be awarded to the complainants under their later locations. The contention of defendant, on the other hand, is that the character of the land in the particular involved is not a question for the court at all but for the Land Department, and that the court has no power to bind the latter by any decision it might attempt to make on that question, that the sole function of the court in such a suit is to determine the right of possession as between the parties, and this is dependent solely upon the regularity and sufficiency of the steps taken respectively to give one party or the other a prior right to such possession, independently of any question as to whether the character of the deposit involved is lode or placer.

As between these contentions, I am of opinion that the law is with the defendant.

[1] It would seem to be thoroughly well settled, not only by the Land Department, but the courts, that the action authorized by section 2326, R. S. (U. S. Comp. St. 1901, p. 1430), is purely possessory in character. The paramount title in the land, the fee, resting in the government, the inquiry which is submitted by the statute to be tried as between the contending claimants in an adverse suit, no matter what the form of action adopted, which may vary in different jurisdictions, is solely as to those questions which will enable the court to say which of the contesting claimants is prior in right under the law to the present possession; that all other questions, including that of the character of the land in dispute, are committed by the statute to the Land Department as a special tribunal, which alone has authority to decide them, and whose determination is final and conclusive upon all departments of the government, including the courts. 2 Lindley on Mines, § 754; Costigan, Mining Law, 374; Snyder v. Waller, 25 Land Dec. Dept. Int. 7; Henderson v. Fulton, 35 Land Dec. Dept. Int. 652; Alice Placer Mine, 4 Land Dec. Dept. Int. 314; Wolverton v. Nichols, 119 U. S. 485, 7 Sup. Ct. 289, 30 L. Ed. 474; Steel v. St. Louis Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Clipper M. Co. v. Eli M. Co., 194 U. S. 221, 24 Sup. Ct. 632, 48 L. Ed. 944; Id., 33 Land Dec. Dept. Int. 660, 667.

The Secretary of the Interior in the case of the Alice Placer Mine, *supra*, in discussing the effect of the judgment of the court in an adverse suit like the present, held:

"The judgment of the court is, in the language of the law, 'to determine the question of the right of possession.' It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established. * * * The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. Branagan et al. v. Dulaney, 2 Land Dec. Dept. Int. 744. The sufficiency of that proof is a matter for the determination of the Land Department. It follows therefore that further hearing may, if deemed necessary, be ordered, for the purpose of ascertaining with greater certainty the character of the land, or whether the conditions of the law have been complied with in good faith."

In *Steel v. St. Louis Smelting Co.*, *supra*, Mr. Justice Field, speaking of the functions of the Land Department in the disposition of the public lands, employs this strong and explicit language:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment

or limitation. Such has been the uniform language of this court in repeated decisions."

In *Clipper Mining Co. v. Eli Mining Co.*, *supra*, the effect and limitations of the judgment in an adverse suit are very fully considered. That was a case involving conflicting applications between a placer and a lode claimant. Before the bringing of the adverse suit the placer claimant had applied for patent, which had been denied, and this decision of the department was relied on by the lode claimant as a defense to the action. But it appeared that the denial of a placer patent was not put on the ground that the land was not subject to that form of location, but that the department did not have before it at the time sufficient proof of its placer character. The trial court held that, the placer claimant being prior in time and his various steps being in all formal respects regular, he must be awarded the right to the possession without reference to the character of the land. The ruling was affirmed by the Supreme Court of the state, and the case was taken by writ of error to the Supreme Court of the United States. In discussing the effect and scope of its decision sustaining the judgment of the state courts, the Supreme Court says:

"We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives to them the lodes in controversy. In 2 *Lindley on Mines*, § 765, the author thus states the law: 'Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether or no the conditions of the law have been complied with in good faith.'"

And referring approvingly to the ruling of the Land Department in the case of the *Alice Placer Mine*, *supra*, as to the effect on the department of the judgment or decree in an adverse suit, the court add:

"This opinion was cited as an authority by this court in *Perego v. Dodge*, 163 U. S. 160, 168, 16 Sup. Ct. 971, 41 L. Ed. 113, 118. See, also, *Aurora Lode v. Bulger Hill* and *Nugget Gulch Placer*, 23 Land Dec. Dept. Int. 95, 103. The Land Office may yet decide against the validity of the lode locations, and deny all claims of the locators thereto. So, also, it may decide against the placer location, and set it aside; and, in that event, all rights resting upon such location will fall with it."

These cases proceed upon the theory that the question of the character of the land to be sold is not one of law but purely one of fact dependent upon the physical characteristics of the land, to be determined from investigation of its particular properties, and that this investigation and the resultant classification are committed by Congress solely to the judgment of the Land Department, in which it can be in no wise controlled by the courts.

The complainants contend that the principles thus invoked by defendant have application only to the extent of committing to the Land Department the right to determine the character of the land as between agricultural and mineral claimants, and do not obtain in a contest like the present as between mineral claimants. There is no such limitation of the right to be found either in the statute or the cases

construing it; nor is there any obvious reason for such a distinction. The question as to the real character of the land sought to be purchased is no different in principle where it arises as between an agricultural claimant on the one side and a mineral claimant on the other than where it arises between two mineral claimants differing only in their claim as to which class of mineral lands, lode or placer, it is to be assigned. It is no more a question of law or less one of fact in the one instance than it is in the other. It is true that the cases that have heretofore arisen between lode and placer claimants all involve instances where no question arose as to the particular character of the mineral deposit involved, but the controversy grew out of other considerations affecting the legal aspects of the conflicting claims. Here the very question of difference, and the only one apparently giving rise to the controversy, is whether the deposit which the parties seek to acquire by their respective locations is placer in character or lode in character. The case may be said to be *sui generis* perhaps in that respect, but it can make no difference in the application of the principle under consideration. It would therefore be an idle act, a work of mere supererogation, for the court to assume the determination of a question which would exert no binding effect upon the rights of the parties.

In the case of *Webb v. American Asphaltum Co.*, 157 Fed. 203, 84 C. C. A. 651, relied upon by complainants, in which it appears the court assumed to pass upon the character of the land, no question appears to have been made as to its right so to do, and the case cannot be regarded as countervailing the rule established by the authorities above referred to.

It results from these considerations, in view of the conceded facts, that the right to the possession of the premises in dispute must be adjudged to be in the defendant. This being so, the complainants acquired no rights whatsoever in the land by their subsequent locations, and the defendant is entitled to have its title quieted as against those claims.

[2] The defendant having acquired a prior right to the possession, the entry of complainants was a mere trespass which could confer no right in the land, and the fact that the defendant was not at the time in the actual occupancy would make no difference. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735. The complainants assert that they had a right to go upon the land and locate a known lode, not claimed by the placer claimants. But this is assuming the very fact which it is not the province of the court to decide. It would be highly inequitable, should the Land Department hereafter hold that the land in dispute is subject only to lode location, that the complainants should be permitted to take advantage, as giving them prior rights, of locations made under such circumstances. It would be giving them the benefit of a mistake on the part of defendant in a respect as to which the Land Department itself would appear to have been uncertain, and such a result the law will not countenance.

It results that a decree should go in favor of defendant quieting

its title to the disputed premises, adjudging the invalidity of complainants' locations, and awarding defendant its costs; and it is so ordered.

In re CONDON.

(District Court, S. D. New York. August 2, 1912.)

1. BANKRUPTCY (§ 396*)—ACTS OF BANKRUPTCY—TRANSFER WITH INTENT TO HINDER AND DELAY CREDITORS—"FAMILY."

An adult son, for whose support his father is not legally liable, and who does not reside with his father, is not a member of his father's "family," within the meaning of Code Civ. Proc. N. Y. §§ 1879, 2463, which exempt the earnings of a debtor for 60 days, where they are "necessary for the use of a family wholly or partly supported by his labor"; and the payment by a father from his earnings to a son living separate from him of \$600, when the father was in fact insolvent, and knew such fact, or at least that his solvency was doubtful, was a transfer with intent to hinder or delay creditors, which constituted an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (1), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2673-2691; vol. 8, p. 7661.]

2. BANKRUPTCY (§ 396*)—ACTS OF BANKRUPTCY—TRANSFER WITH INTENT TO PREFER.

A statute exempting the earnings of a debtor necessary for the support of his family does not authorize an insolvent to use earnings for the payment of bills for supplies previously furnished; and such a payment, if made with knowledge of his insolvency, or that his solvency was doubtful, constitutes a preference, and an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.*]

3. BANKRUPTCY (§ 396*)—ACTS OF BANKRUPTCY—TRANSFER WITH INTENT TO HINDER AND DELAY CREDITORS.

An insolvent, who, although entitled under the exemption laws of the state to use his earnings so far as necessary for the support of his family, with knowledge of his insolvency, or that his solvency was doubtful, furnished his family with \$1,600 for a month's use, committed an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (1), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), by transferring property with intent to hinder or delay his creditors; and it is immaterial that he may have thought the payment warranted by the statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.*]

In the matter of Martin J. Condon, alleged bankrupt. Hearing on petition. Petition sustained, and adjudication ordered. See, also, 198 Fed. 480.

Tompkins McIlvaine, for petitioner.

Ernest A. Cardozo, for Louis G. Hart.

Ferdinand E. M. Bullowa, for Savoy Trust Co.

Henry G. K. Heath, for alleged bankrupt.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAND, District Judge. I think it quite clear that the earnings of the respondent were exempt to the extent necessary for the use of his family, wholly or partly supported by his labor. Code Civ. Proc. N. Y. §§ 1879, 2463. It must be remembered that these earnings were at the time in a bank account, and therefore were not, under the New York law, subject to execution. *Carroll v. Cone*, 40 Barb. (N. Y.) 220, said in *Baker v. Kenworthy*, 41 N. Y. 216, to have been affirmed by the Court of Appeals; *Meagher v. Campbell*, 12 Misc. Rep. 426, 33 N. Y. Supp. 700; *Duffy v. Dawson*, 2 Misc. Rep. 401, 21 N. Y. Supp. 978. It could be reached only by creditors' bill (sections 1871-1879) or by its more summary substitute (*Lynch v. Johnson*, 48 N. Y. at page 33), "proceedings supplementary to execution" (Code Civ. Proc. §§ 2432-2471). Earnings within 60 days are specifically made exempt from such proceedings, to the extent mentioned. Moreover, the debtor is not compelled to wait until the proper amount is set off to him, but may use it as he thinks best, at the peril of being found later to have used more than he should. *Hancock v. Sears*, 93 N. Y. 79. There can be no doubt that, under the law of New York, the respondent could take so much of his earnings as was in his bank account, and as was necessary to his family's support, and use it for that purpose. It will not be necessary, therefore, to determine whether, if those earnings had ever got into the form in which they were subject to levy by execution, they would have remained exempt.

[1] The first question is whether the sum of \$600 paid to his adult son was necessary for the use of his "family." I can find very little law in New York upon the subject of who is a man's "family" under these provisions. Quite clearly an adult son, though incapable of self-support, has no right to his parents' support. Such duties as exist are the same as those prescribed by the statutes of 23 Eliz. and 5 Geo. I (2 Kent's Comm. star pages 190, 191; In re St. Lawrence State Hospital, 13 App. Div. 436, 43 N. Y. Supp. 608), which provisions are at present in section 914 of the Code of Criminal Procedure. These duties only require a parent to support an adult child in the way which the overseers of the poor may require, and that obviously has no application to an allowance of the size which the respondent was making to his son.

However, it does not, of course, necessarily follow that an adult son may not be a member of the "family," because the father owed him no legal duty of support. There are cases in other states which hold that a legal duty to support others is not essential to make them members of the "family" of the debtor under such statutes; but in all these cases they were living under one roof. *Rolator v. King*, 13 Okl. 37, 73 Pac. 291; *Tyson v. Reynolds*, 52 Iowa, 431, 3 N. W. 469; *Barry v. Hale*, 2 Tex. Civ. App. 668, 21 S. W. 783; *Bell v. Keach* 80 Ky. 42 (obiter). It is not necessary that this should be the case, where a legal duty exists to support the dependents; but I can find no case where there was neither legal duty nor communal living. In New York there seems to be no construction of

the term, unless it be *Blake v. Bolte*, 30 N. Y. Supp. 209,¹ where the term was held to be coextensive with legal duty; but that case on appeal (10 Misc. Rep. 333, 31 N. Y. Supp. 124) was affirmed upon another theory. *Van Vechten v. Hall*, 14 How. Prac. (N. Y.) 436, is hardly an authority either way. In *Fink v. Fraenkle*, 20 Civ. Proc. R. (N. Y.) 402, 14 N. Y. Supp. 140, the court defined a household as "a family living together." It is not necessary here to decide more than that, when neither duty nor communal living exists, there is no family within the meaning of the New York law. Certainly it seems quite clear that a man's creditors may not be held off indefinitely, while he supports adult children who have left his roof and are maintaining separate households.

[2] As to the payment of the Altman bill, the same result follows, because so much of the earnings were not necessary to the family's future support, even if the goods themselves had been. The purpose of the statute, like all such provisions, is to provide for the future. They are designed to prevent the debtor's family from being entirely destitute, until by his earnings he may again get upon his feet. They cannot by any stretch of intention be held to cover the payment of bills already incurred, and the best proof that money taken by the respondent was not necessary to his family's support is that he did not apply it to that purpose. It is commendable enough to want to pay one's debts; but when the debtor selects favorite creditors, whether they be tradesmen or banks, he preferred those he pays, and that he may not do. So far as authority exists, it concurs with this conclusion. *Gillett v. Hilton*, 11 Civ. Proc. R. (N. Y.) 108.

[3] Next, as to the payment to Mrs. Condon, it is quite apparent that it in fact exceeded the necessities of the family, because part of it she gave away upon charitable uses, and over half, she very honestly turned back to the receiver. Surely a debtor may not put generosity to the church ahead of his obligation to his creditors, nor may he give away a round sum to make sure that there may be enough for liberal living meanwhile. Furthermore—and this applies as well to the payment to the son—when a man is in debt he may not provide an allowance to himself of \$12,000 per year and to his son of \$5,000. In case of allowance out of spendthrift trusts, the rule has undoubtedly been liberal, giving the debtor what he was used to. *Kilroy v. Wood*, 42 Hun (N. Y.) 636; *Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363; *Bunnell v. Gardner*, 4 App. Div. 321, 38 N. Y. Supp. 569. But those are quite different cases from this, where the property is the debtor's own, and even in the case of trusts, as against the settlor, the whole income is subject to creditors' claims (*Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395), though the statute (1 R. S. p. 729, § 57) is the same. That case shows that although a third person, when he bequeaths an income to another, may prevent his creditors from taking any part of what is necessary to support him as he has been used to live, yet out of his own estate he may not keep back the same

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 9 Misc. Rep. 714.

amount. A man must consent to live in niggardly fashion if he leaves his debts unpaid, and the hardship which it involves is one of the considerations he must weigh when he incurs the debts. There are few greater scandals in the law than for a man to live handsomely while his creditors get nothing. If he would discharge his debts, let him go through bankruptcy. That is what the law allows. But to continue to withhold from existing creditors enough to live in a way which to 19 men out of 20 seems not only great comfort, but incredible luxury, is intolerable in a community which professes, at least, not to recognize social classes. Even had the respondent actually used in living what he withdrew, I should therefore, in the absence of controlling authority, be unwilling to agree that the sum of \$1,600 was necessary for the use of his family for the ensuing month; that is, until the next installment of salary should come due, out of which he might again reserve what was necessary.

I conclude, therefore, that the payments to Altman, to the son, and to Mrs. Condon were either preferential payments, or transfers which in fact did hinder the respondent's creditors, and the remaining question is only of the intent. As to the transfers as distinct from the preference, there is no dispute that the respondent knew that the property so transferred and the money so paid was his own, and that he intended to put it beyond the powers of his creditors to reach. That would in most cases leave nothing open to controversy; but here it is urged that he had no intent, because he had taken legal advice which assured him of his right to do what he did. It is, of course, well settled that there must be proof in some form of an actual intent, as distinct from the knowledge of the facts from which the consequences of the debtor's act will arise. *Coder v. Artz*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008. That means only this: That although, in general, civil responsibility is imputed to a man for the usual results of his conduct, regardless of whether in the instance under consideration he actually had those consequences in mind, in specific cases like this, the law requires proof of that added element, his mental apprehension of those consequences, before it attaches to his conduct the result in question. This is such a case; but the fraudulent intent which the law requires need not necessarily involve moral obliquity. The ancient phrase "to hinder, delay, or defraud," has always been in the disjunctive, and an intent to hinder or delay is adequate even if it be not an intent to defraud. *Nicholson v. Leavitt*, 6 N. Y. 510, 57 Am. Dec. 499; *McConnell v. Sherwood*, 84 N. Y. 522, 38 Am. Rep. 537; *Dearing v. McKinnon Dash & Hardware Co.*, 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708; *Buell v. Rope*, 6 App. Div. 113, 39 N. Y. Supp. 475; *Warner v. Lake*, 14 N. Y. Supp. 10;² *In re Hughes* (D. C.) 183 Fed. 872; *In re Elletson Co.* (D. C.) 174 Fed. 859.

Certainly Mr. Justice Day, in *Coder v. Artz*, *supra*, meant only to insist upon the necessity of proof of the statutory intent, as gen-

² Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 59 Hun, 628.

erally required under the statute of Elizabeth, and not to make a new rule that proof of an intent to hinder or delay, as distinct from proof to defraud, was insufficient. He had before him a case where the court below had found that there was no intent to hinder, delay, or defraud, and he was contrasting the need of some such proof with the absence of such need to upset a preference. The statutory intent under this statute has always been referred to as "fraudulent"; but as I have shown—and there are many more authorities—proof of a specific intent to hinder or delay has always been held enough.

Now here the respondent intended to hinder and delay his creditors, for that was the very purpose of his acts. He thought he had the right to do so, because he thought that the whole of the property was exempt. That was a mistake as to the extent of his rights, and I suppose it answers the claim that he intended to defraud them, for common usage would limit the word "fraud" to some act which was directed to depriving another of what the actor knew to be his rights. However, it would be a wholly new rule that a conveyance intended to prevent creditors from pursuing their legal remedies was not within the statute, because the debtor supposed he could do it. The case is no exception to the rule that the ignorance of the consequences in law of one's conduct has no effect upon the results which the law attaches to it. The respondent intended the transfers to accomplish what they did accomplish, and the inquiry is irrelevant whether he supposed that the law would permit it to be done. The master was, therefore, quite right in disregarding his own finding of no immoral conduct.

It is, therefore, unnecessary to consider the law as laid down in New York, under which a voluntary conveyance by an insolvent, or by one who becomes such through the conveyance, is absolute proof of the statutory intent. *Erickson v. Quinn*, 47 N. Y. 410; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160; *Cole v. Tyler*, 65 N. Y. 74; *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082. If the suit were to set aside a transfer, the New York law would apply (*Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610), even though no actual fraud was shown. I do not suppose that the same words in section 3 (1) are to have a different interpretation from what they have in section 67e, or that that conveyance would not be an act of bankruptcy which would be voidable by a trustee. Such an interpretation would, of course, violate the whole theory of bankruptcy, which designs to put into this court the administration of the insolvent estate as soon as the bankrupt has made a transfer which his creditors could unravel, and the proceeds of which they could apply to their debts in the state courts. It would contradict the theory of bankruptcy that assets which formerly went to the more active should be administered for the equal advantage of all. That cannot be the law.

As to the preference, there is perhaps more doubt; for the master has not found that the respondent knew he was insolvent, deeming that fact immaterial. He certainly knew that his solvency was doubtful prior to April 5th; but he says he thought that, unless wasted, his

assets would be adequate. Now, it is certainly true that the petitioners must show that the respondent intended to give Altman & Co. more than other creditors would get. That element is not met by showing that he ought to have thought so. However, if he considered the issue doubtful, he considered that there was a chance that what he did would have that result, and nothing can save that from being a preference, except a bona fide belief that, in spite of temporary embarrassment, he would carry the day. It is quite clear that, though the respondent hoped, yet he knew the result was very doubtful, and that he did not make the payment in the effort to carry through his affairs successfully. I do think that, with a full knowledge of the dubiety of his affairs, he may merely select some creditors to prefer, putting the rest to the chance, as he knows it, that he will pull through. Had the creditors known of his doubtful condition, they would under all the authorities, be held chargeable with the facts. His position cannot be better than theirs.

Upon the remaining questions of the amendment of the petition and the status of Brewster as petitioning creditor, the questions raised are irrelevant, because these three acts of bankruptcy occurred within four months of the amendment and of the intervention of Winter Russell.

The size of the payment and of the two transfers is quite ample to allow them to serve as acts of bankruptcy. Size cannot be a material consideration, except in so far as it touches the question of intent; but, if it were, the only cases which suggest size as determinative do so when the payments are trivial. Here the total is \$1,800. Certainly there can be no question that this is a large enough sum to justify action.

The respondent was unquestionably insolvent at the end of March. The contrary is barely suggested. As to the transfers, the burden of proof of solvency was in any case on him. As to the preference, the question was in any case one of fact, which the master has considered most carefully and fully, and nothing is suggested to justify me in disturbing his finding.

Report confirmed, and adjudication ordered.

In re ELLERBEE.

(District Court, N. D. Georgia. June 22, 1912.)

BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTIONS—FALSE STATEMENT.

A bankrupt, in order to purchase goods on credit, made a statement to the sellers on August 13, 1906, representing that he owed \$10,550; that he had stock on hand of the value of \$9,000, accounts, notes, and mortgages that were good, valued at \$8,000, and real estate valued at \$14,000. His petition in bankruptcy was filed December 17, 1906, in which he listed his indebtedness at \$16,046.31 and his real property at \$6,450. There was no explanation of the increase in his indebtedness without any increase in his assets, and the real estate sold at public auction for only \$3,000, with the exception of certain land in Georgia, worth about \$200. *Held*, that such statement was materially false, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made for the purpose of obtaining property on credit, and was therefore a bar to the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

In the matter of bankruptcy proceedings of J. H. Ellerbe. On objections to an application for a bankrupt's discharge. Sustained.

M. J. Yeomans and H. A. Wilkinson, both of Dawson, Ga., for bankrupt.

M. C. Edwards and Jas. G. Parks, both of Dawson, Ga., and Mayson & Johnson, of Atlanta, Ga., for objecting creditors.

NEWMAN, District Judge. The matter now before the court comes on an application for discharge, to which there were objections, and the matter in issue was referred to a special master. The objections were on several grounds, some of which, as disposed of by the special master, it is unnecessary to consider here, for the reason that the case is controlled by the view entertained upon one ground of objection, which will appear from an extract from the report of the special master:

"It is further found that on August 13, 1906, said bankrupt did make to objectors a statement in writing for the purpose of obtaining from them property on credit; that objectors relied upon said statement, and, so relying, on or about August 29, 1906, sold and delivered to said bankrupt property on credit, and a part of the purchase money for said property is still due said objectors. The only question upon which the undersigned is in doubt is as to whether said statement is so materially false as to be a bar to a discharge. Upon this question the following findings are made:

"(a) The bankrupt represented in said statement that his 'stock on hand' was \$9,000; and, objectors failing to show that said stock would not have invoiced practically that amount, it is found that said statement is not materially false as to said item.

"(b) Bankrupt represented in said statement that his 'accounts, notes, and mortgages, good,' were \$8,000; and, the objectors failing to show that he did not own said amount of accounts, notes, and mortgages which were, by him, considered good, it is found that said statement is not materially false as to that item. It therefore appears that the only items in said statement which could in any event be considered so inaccurate as to be construed as materially false are those in reference to bankrupt's indebtedness and the value of his real estate.

"(c) Bankrupt represented in said statement that he owed \$10,550 on August 13, 1906, and in his petition in bankruptcy, filed December 17, 1906, he listed his indebtedness at \$16,046.31, and at said hearing no explanation was made as to how said indebtedness was so increased between said dates without increasing his assets.

"(d) Bankrupt valued his real estate in said statement at \$14,000, and in his said petition in bankruptcy scheduled it at \$6,450; and it appears from the evidence that the greater part of it was sold later at public sale for a very much less amount, to wit, about \$3,000. It was not shown, however, that all of said real estate was sold, as the 200 acres of land in Wayne county, Ga., listed in schedule B (1) of bankrupt's petition, was not shown, at said hearing, to have been disposed of. Bankrupt valued said 200 acres of land, in his said petition, at only \$200.

"Objectors show by testimony that land values in and around Bronwood, in Terrell county, Ga., did not decrease between the 13th day of August, 1906, and the time of the filing of said petition in bankruptcy, but did not make any proof as to the value of said Wayne county property. Said bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

did not explain, nor attempt to explain, in any manner whatever, any of the discrepancies above set out.

"That bankrupt's estimate was inaccurate as to the value of his real estate there can be no doubt; and while the opinion is not entertained that a bankrupt should be so strictly bound by estimates as by statements of fact, yet it is believed that such estimates should not be so grossly inaccurate as to be suggestive of fraud. As to whether the two items last above considered are so materially false as to be a bar to a discharge is left for your honor's decision without suggestion."

The facts set out by the special master as above are not controverted in any way, and it appears from the evidence they could not be; so that the question submitted for determination on this branch of the case is whether, under the facts so stated, the bankrupt made a materially false statement in writing for the purpose of obtaining credit.

That the difference between the amount that the bankrupt said he owed in August and the amount that it appeared he owed the December following was material will hardly be questioned. That the difference between the value of his real estate as shown in the statement and that shown by his schedule in bankruptcy was material is quite apparent; and to take the amount which the property brought at the sale as the real value, it is not only a material difference, but a very material difference. It brought at the sale less than one-fourth of the estimate placed on it in the bankrupt's statement made in August, even counting in the value of the 200 acres of land, valued at \$200, in Wayne county. The evidence shows that there had not been any decrease in the value of land between the time the statement was made in August and the time of the filing of the petition in bankruptcy. The difference between the statement, therefore, and the facts, being material, was the statement materially false in the sense of the bankruptcy act?

The strongest case I have found in favor of the bankrupt in this matter is *Gilpin v. Merchants' Nat. Bank*, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023. It was held there that the District Court erred in finding that the word "false" means no more than "not true," and is used in the statute "in its primary legal sense, as importing an intention to deceive, and such a statement, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue." According to *Remington* (volume 3, p. 751):

"The false statement in writing which is enough to deny a discharge implies a statement knowingly or recklessly made, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby to obtain from the person to whom it was made property upon credit."

According to *Collier* (page 286 [5]):

"The falsity of the statement must be proven; and so it is thought that it should be shown that the debtor knew it to be false, or at least did not know it to be true. The word 'false' means no more than not true. It is not usually necessary to show intention to deceive; but intention is always material as an element of proof. Intention to deceive is, of course, different from a purpose 'of obtaining such property on credit.' The statement also must be material to the transaction. It must have been, if not the moving cause of the sale on credit, a contributing cause; i. e., the seller must to an extent at least have relied on it. A fair test would seem to be: Was the

statement so 'materially false' as to warrant a suit for the rescission of the sale? Numerous decisions in the state courts determining what are actionable false representations may be consulted with profit."

The master was correct in finding:

"That bankrupt's estimate was inaccurate as to the value of his real estate there can be no doubt; and while the opinion is not entertained that a bankrupt should be so strictly bound by estimates as by statements of fact, yet it is believed that such estimates should not be so grossly inaccurate as to be suggestive of fraud."

If the indebtedness of the bankrupt had increased from \$10,550 to \$16,046.31 between August and December, as indicated by the master, there should be some explanation as to how the indebtedness was increased this large amount without a corresponding increase in assets. But, even passing this by, it could hardly be said that the very remarkable overestimate in the value of the real estate could have been a mere mistake of the bankrupt. It must have been overestimated for a purpose, and that purpose, it must be concluded, was to obtain credit.

The special master apparently leaves to the court the legal conclusion arising from the facts he states on this branch of the case, and the court is of the opinion that, under the facts stated, it must be held that the bankrupt made a "materially false statement in writing for the purpose of obtaining property on credit." The testimony shows that W. W. Stovall & Bro., the creditor to whom the statement was made, sold goods to the bankrupt on the strength of this statement, for which he still owed them at the time of the bankruptcy.

The application for discharge must be denied.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. CITY OF
MEMPHIS et al.

(District Court, W. D. Tennessee, W. D. September 17, 1912.)

No. 675, in Equity.

1. CONSTITUTIONAL LAW (§ 115*)—OBLIGATION OF CONTRACTS—MUNICIPAL ORDINANCE.

A city ordinance may be considered a law of the state, within the constitutional provision prohibiting the state from passing laws impairing the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 274-277, 290; Dec. Dig. § 115.*]

2. COURTS (§ 102*)—NUMBER OF JUSTICES—INJUNCTION PROCEEDINGS—"STATUTE"—"OFFICER OF SUCH STATE."

Judicial Code (Act March 3, 1911, c. 231, § 266, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]) provides that no interlocutory injunction restraining the enforcement of any "statute" of a state, by restraining the action of any officer of such state in the enforcement of the statute, shall be issued by any Justice of the Supreme Court, or by any District Court of the United States, or any judge thereof, or by any Circuit Judge thereof acting as a District Judge, on the ground of unconstitutionality, unless the application shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

least one shall be a Justice of the Supreme Court, or a Circuit Judge, and the other two either Circuit or District Judges, and unless a majority of the three judges shall concur in granting the application, etc. *Held*, that the words "statute of a state" were used in such act in their ordinary sense as meaning a law directly passed by a state Legislature, and that the words "officer of such state" meant an officer whose authority extended throughout the state; and hence such act was not applicable to a suit by a telephone company to restrain the enforcement of a city ordinance fixing telephone rates to be charged by such company.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 351, 352; Dec. Dig. § 102.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6635-6638; vol. 8, p. 7804; vol. 7, pp. 6647-6648.]

In Equity. Suit by the Cumberland Telephone & Telegraph Company against the City of Memphis and others. On application for a preliminary injunction brought on for hearing under Judicial Code, § 266. Application remanded for hearing and determination before a single District Judge.

W. L. Granbery, of Nashville, Tenn., and Wright, Miles, War-
ing & Walker, of Memphis, Tenn., for complainant.

Chas. M. Bryan and Leo Goodman, both of Memphis, Tenn., for
defendants.

Before DENISON, Circuit Judge, and McCALL and SAN-
FORD, District Judges.

PER CURIAM. In this matter the District Judge was asked to issue a preliminary injunction to restrain the enforcement of an ordinance of the city of Memphis, fixing the rates to be charged by the complainant Telephone Company. Doubting his authority to hear this application alone, because of the requirements of section 266 of the Judicial Code, the District Judge called in another District Judge and a Circuit Judge to sit with him.

The first matter considered by the court, so constituted, must be the question of power, because, if the section does apply, a District Judge cannot hear the application alone; and, if the section does not apply, the other judges cannot participate in the hearing. The question does not seem to have been passed upon, except in one case, where it was decided, without discussion, that section 266 was not applicable. *Sperry & Hutchinson Co. v. City of Tacoma* (C. C.) 190 Fed. 682.

[1] We agree that this section of the Code is ambiguous, and is capable of a construction which would make it apply to the case before us. It is well settled that a city ordinance may be considered a law of the state, within the meaning of the constitutional provision that no state shall pass any law impairing the obligation of contracts. *N. O. Waterworks v. Louisiana Sugar Co.*, 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607; *Iron Mt. R. R. Co. v. Memphis* (C. C. A. 6), 96 Fed. 113, 126, 37 C. C. A. 410. The same considerations have led to holding that the order of a railroad commission was a "law of the state." *Grand Trunk Ry. v. Indiana R.*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

R. Commission, 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. Ed. 786. So, too, the mayor of Memphis, who is one of the defendants, is, for some purposes, considered to be an officer of the state (*State v. Critchett*, 1 Lea [Tenn.] 272); and hence the restriction of section 266 to "injunctions against state officers" does not necessarily exclude the present case.

[2] However, considering the entire section together, and what is known as to the reasons for its enactment, the majority of the court, as now constituted, considers that this section does not govern the present case. They think that the natural meaning of "statute of a state" is a statute or law directly passed by the Legislature of the state, and the natural meaning of "any officer of such state" is an officer whose authority extends throughout the state, and is not limited to a small district; and they believe that Congress used these phrases with this natural meaning, rather than with the broader and less obvious meaning which trained lawyers might find therein. This conclusion is fortified by the requirement that notice must be given to the Governor and the Attorney General, as being real representative parties in interest. It is true that the entire state, and, through the state, the Governor and the Attorney General, are interested in the validity of every municipal ordinance; but this interest is indirect and remote, and, it is thought, probably was not in the congressional mind.

The argument of convenience is also not without force in determining the congressional intent. The cases of direct attack upon a specific act of the Legislature by seeking to enjoin the general state officers are, presumably, of great general importance, and are not so numerous that it is impracticable to have them heard by three judges. The controversies involving the constitutionality of ordinances, or rules, or by-laws of cities, villages, counties, taxing districts, and other subordinate municipalities are typically less important, and are so numerous that it would be difficult, if not impossible, to have them all heard under section 266 without disorganizing all the business of the circuit. It seems improbable that Congress intended to create a situation which would be so very difficult to meet.

It is understood, also, that the demand for the enactment of this section arose from the instances where the courts had suspended the operation of an act of the Legislature or an order of a state commission, in either case affecting the state at large; and that Congress thought it unseemly for one District Judge to set aside, in a preliminary and more or less *ex parte* way, the deliberate acts of the Legislature, or of a body acting for the entire state. This consideration would not apply with the same force to the more common controversies involving the conflicting claims of a subordinate municipality and of an individual or a corporation.

It is to be observed, further, that counsel on both sides have taken the view that section 266 does not apply, and, accordingly, have not given the statutory notice to the Governor or Attorney General, but have both acquiesced in submitting the application

to the District Judge alone. The question being one of power, we cannot be controlled by the views of counsel; but their action is, perhaps, indicative of the probable meaning to the members of Congress of the various phrases which are found in the statute.

These being the views of the majority of the court, the application will be heard and determined by the District Judge to whom it was originally made.

CHICKERING & SONS v. CHICKERING et al.

(Circuit Court, N. D. Illinois, E. D. December 28, 1911.)

No. 26,159.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—SUIT FOR UNFAIR COMPETITION—
INJUNCTION.

An injunctinal order restraining unfair competition in the use of the name "Chickering" on pianos construed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent Dig. § 108; Dec. Dig. § 95.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. Suit by Chickering & Sons against Clifford C. Chickering and others. On motion by complainants to define and enlarge order granting preliminary injunction. Granted in part.

Holt, Wheeler & Sidley, for complainants.

Rector, Hibben, Davis & Macauley (Edward Rector, of counsel), for defendants.

KOHLSAAT, Circuit Judge. Complainants move the court to decree that the injunctinal order of the court, heretofore entered, be extended to and made binding upon the defendant to the supplemental bill herein. This relief is proper, and it will be so ordered.

Complainants further move the court to define and, if necessary, enlarge the injunction, so as to give complainants the effective protection which they claim the order was intended to afford. Defendants oppose this latter motion upon the grounds: (1) Because complainants come into court with unclean hands, in that they have made and are making false representations, to the effect that their piano is still being made by Chickering & Sons and Messrs. Chickering & Sons; (2) because the motion amounts to an attempt to retry the application for the original injunction and broaden same; (3) in the face of the intimation of the Court of Appeals that the order was too broad; and (4) the further fact that the cause is practically ready for final hearing; (5) and the holding of certain Supreme Court decisions rendered since the entry of the injunctinal order; (6) and because the construction asked is inconsistent with the terms of the injunctinal order; and (7) because defendants have been pursuing their present course unmolested for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

more than nine years; and (8) because this is attempted with a view to injure defendant in advance of a final decree.

The court finds that the point first named is, under the facts of this case, not well taken, and constitutes no bar to this application. The court further finds that, so far as the motion involves injunctive relief not granted in the original order, it should and will not be now entertained, in view of the time which has elapsed since the injunctive order was entered and the condition of the record with reference to final hearing; that, as to the complainants' contention that whatever appears on the fall-board of defendants' piano constitutes the name of the piano, the court is not prepared at the present time to go to that extent; that the use of the words, "Chickering Bros., Chicago," upon the fall-board of defendants' piano, without other means of advising a purchaser that the piano was and is not the piano of the original Chickering & Sons, exhibited adjacent thereto and as prominently as the name "Chickering Bros., Chicago," is exhibited, was and is not a compliance with clause 2 of said original injunctive order, and constitutes a violation thereof; that it is the meaning and intent of said clause 2 that every use of said name of "Chickering," or "Chickering Bros.," on the fall-board or elsewhere on their piano, or in advertising, should and shall, in close proximity thereto, be accompanied by equally prominent words, or other means, which shall be sufficient to advise any intelligent person dealing with defendants that the piano is not that of complainants; that the use of the term, "the only Chickering making pianos," is an evasion and a violation of clause 5 of the order enjoining defendants "from making use of, on or in connection with the manufacture or sale of pianos, the statement, 'The only piano made by a Chickering,' or any statement similar thereto, or from stamping, stenciling, or impressing upon their said pianos said statement, or any statement similar thereto."

Complainant may prepare a supplemental decree in accordance herewith.

A. STEIN & CO. v. LIBERTY GARTER MFG. CO. et al.

(District Court, S. D. New York. September 20, 1912.)

TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where complainant owned a valid trade-mark in the name "Paris" as applied to garters, and there was evidence that defendant's use of the word "French" in the same connection produced confusion among retail purchasers, and also that defendant's connection with the defendant in a prior suit relating to similar alleged infringement was such that it might have had the question as to confusion of goods and as to similarity of names settled in that suit, complainant was entitled to a preliminary injunction restraining defendant's use of the word "French" as applied to garters in competition with plaintiff's trade-mark.

[Ed. Note.—For other cases, See Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. § 59.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by A. Stein & Co. against the Liberty Garter Manufacturing Company and others. On motion for preliminary injunction. Granted.

Philipp, Sawyer, Rice & Kennedy, for complainant.
Abr. A. Silberberg, for defendants.

LACOMBE, Circuit Judge. The facts upon which complainant charges infringement of its trade-mark and unfair competition are substantially the same as those shown in the former suit of the same complainant against Louis Grosner. When application was made in that suit for a preliminary injunction, the court was inclined to the opinion that, although the word "French" looked very much unlike the word "Paris," the use of the former as a brand for garters might very easily result in confusing the goods sold under that brand with those manufactured by complainant and sold to purchasing users as "Paris" garters. This impression was strengthened by the many similarities in the dress of the goods of both parties as packed for sale. Some of these similarities were no doubt the natural result of packing such goods conveniently for market, but there were (and are) others which apparently have been adopted, not from any necessity or mere convenience, but solely to imitate peculiarities of complainant's packing. Nevertheless it seemed wiser to postpone decision of the question till final hearing in order that such testimony as complainant offered touching such confusion might be submitted to the test of cross-examination.

After the complainant's record in that case was complete, defendant Grosner offered no testimony, and judgment against him was entered by default. The record now submitted seems quite clearly to indicate that the relations between the defendant in the former suit (Grosner) and defendants here, who since 1909 have (individually or through corporations which they control) been making and selling these "French" garters, were such that the latter could, if they so wished, have had all question as to confusion of goods through similarity of names settled in the former suit. There is no reason, therefore, for again postponing the decision of the question till final hearing. Complainant has shown its ownership of a valid trade-mark in the word "Paris" as applied to garters, and there is evidence showing that the use of the word "French" in the same connection does produce confusion among retail purchasers. Especially persuasive is the affidavit of Frank in rebuttal showing instances where defective "French" garters have been returned by retailers to the manufacturer of "Paris" garters, presumably under the impression that the two names referred to the same goods. Complainant may therefore take an order for preliminary injunction against the word "French" as a brand for garters. The operation of the injunction will be suspended for 30 days in order to give opportunity to make the necessary changes in labels and advertisements.

SPENCER v. LOWE.

In re TYLER-LOWE MERCANTILE CO.

(Circuit Court of Appeals, Eighth Circuit. August 26, 1912.)

No. 3,609.

1. BANKRUPTCY (§ 340*)—CORPORATIONS—NOTES TO OFFICERS.

Where the president of a mercantile corporation advanced money to it and received the corporation's notes signed by himself as president and by the secretary under the corporate seal, such notes were prima facie a liability of the corporation in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

2. BANKRUPTCY (§ 339*)—CLAIMS—OBJECTIONS—SUFFICIENCY.

Objections to claims of creditors in bankruptcy should be in writing, and sufficiently explicit to indicate to the claimant the nature and character thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. § 339.*]

3. BANKRUPTCY (§ 312*)—CLAIMS—RIGHTS OF CLAIMANT—ESTOPPEL.

Where the president of a bankrupt corporation had loaned money to it on notes, he was not estopped to claim the allowance thereof against the corporation's assets in bankruptcy because of statements of assets and liabilities made at various times which did not include the notes, in the absence of any evidence that he had knowledge of their contents, or that credit was extended to the corporation, and the position of creditors changed on the faith thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496-500; Dec. Dig. § 312.*]

4. CORPORATIONS (§ 152*)—DIVIDENDS—DIVISION OF PROFITS BY STOCKHOLDERS.

Stockholders of a solvent corporation, including the directors, may meet and agree to a division of profits without the formality of declaring a dividend, such a division being equivalent to a dividend, and the same having been credited to individual stockholders on the books of the corporation, and, subsequently having been withdrawn in whole or in part, those who had not withdrawn the same were entitled to recover their share from the corporation as dividends, though its articles provided that the directors should have power to declare dividends to be paid out of profits when in their judgment it was proper to do so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*]

5. CORPORATIONS (§ 152*)—DIVIDENDS—PROFITS—ACCOUNTS RECEIVABLE.

Though a corporation created for the purpose of merchandising may not declare dividends except out of net profits, book accounts against parties to whom merchandise had been sold in the ordinary course of business, and concerning which there is no question, may be included in the assets of the company in determining whether or not there has been a net profit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*]

6. BANKRUPTCY (§ 468*)—FAILURE TO APPEAL—EFFECT.

Where a creditor of a bankrupt was allowed only a small portion of the claim filed, but did not appeal, he could not be awarded more on an ineffective appeal by objecting creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. § 468.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 198 F.—61

Appeal from the District Court of the United States for the District of Colorado.

In the matter of bankruptcy proceedings of the Tyler-Lowe Mercantile Company. From a judgment of the District Court reversing a referee's order disallowing in part the claim of John W. Lowe, and allowing the claim in the sum of \$4,864.12, certain creditors prosecuted an appeal in the name of Fermor J. Spencer, trustee. Affirmed.

Hugh McLean (E. T. Murphy, on the brief), for appellant.

Andrew W. Gillette (Henry H. Clark and Newton W. Crose, of counsel), for appellee.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. John W. Lowe was originally a farmer in Missouri. Before leaving that state and early in 1901 he bought a half interest in a stock of goods of M. F. Tyler at Ft. Collins, Colo. May 1, 1901, the Tyler-Lowe Mercantile Company was incorporated with a capital stock of \$30,000 to take over the business. Shares of stock for \$100 each were issued fully paid and nonassessable. Stock to the amount of \$15,000 was issued to Mr. Tyler, \$14,000 to John W. Lowe, \$500 to Fount L. Lowe, and \$500 to James E. Lowe. Mr. Tyler was the first president. The stockholders remained unchanged until February 1, 1904, when Mr. Tyler sold \$10,000 of his stock to Frank Loveland, with an agreement that his remaining \$5,000 should be taken up within a year, which was done by the Lowes. After the sale by Tyler, John W. Lowe became president of the company. January 28, 1907, Mr. Loveland sold out to the Lowes, and from that time the stock was owned one-half by John W. Lowe and one-fourth each by Fount L. Lowe and J. E. Lowe. Fount L. Lowe was about 20 years of age in 1901, and was secretary and bookkeeper of the corporation until its failure. The business was very prosperous until some time in 1907, when it began to run behind and lost heavily until July 27, 1910, when the corporation was adjudged an involuntary bankrupt, and Fermor J. Spencer was appointed and qualified as trustee. All the parties interested in the store were active in its management, John W. Lowe having moved to Ft. Collins shortly after his purchase, but he never took any part in the details of bookkeeping. It is undisputed and indisputable that he loaned the corporation on its notes October 30, 1908, \$1,500, November 17th \$3,000, and February 3, 1909, \$1,500. It is not claimed these notes have ever been paid, but a set-off is claimed. Mr. Lowe made other loans not represented by notes which in the view taken of this case it is unnecessary to enumerate. He filed a claim for the amount of the notes and for his account. To his claim the Wheeler and Motter Mercantile Company filed the following objections:

"Comes now Wheeler & Motter Mercantile Company, a corporation organized and existing under and by virtue of the laws of the state of Missouri, a creditor and party in interest in the estate of the Tyler-Lowe Mercantile Company, and objects to the allowance of the claim of John W. Lowe filed herein for the sum of eleven thousand nine hundred thirty-nine (\$11,939.73)

and $73\frac{3}{100}$ dollars on the following grounds; that said claim is not listed for said amount in the schedules of liabilities filed herein as sworn to by an officer of the bankrupt corporation; that at divers times said bankrupt corporation have issued financial statements purporting to give the amount of its liabilities, and in such statements no amount is stated as owing John W. Lowe; that the books of the bankrupt corporation do not show that the Tyler-Lowe Mercantile Company to be indebted to the said John W. Lowe in the sum aforesaid; that the said John W. Lowe has received moneys at different times from said bankrupt corporation sufficient to offset any claim that he may have against the estate of said bankrupt, the Tyler-Lowe Mercantile Company. Wherefore your objector prays that a hearing be had, and that the claim of John W. Lowe against the estate of the Tyler-Lowe Mercantile Company be disallowed."

The claim was allowed by the referee in the sum of \$6,760.50, being the amount of the notes, but was rejected as to the account. Later upon application of the Wheeler & Motter Mercantile Company and other creditors a rehearing was granted, and the claim was wholly rejected. On review the District Court reversed the referee, and ordered him to allow the claim in the sum of \$4,864.12. The trustee having determined not to appeal, the majority of the creditors were permitted to do so, but no appeal has been taken on behalf of John W. Lowe. The amount allowed is less than the amount of the notes, and for this reason many of the questions which would otherwise be material need not be considered.

[1] These notes are signed by the corporation by its president and secretary, and are under the corporate seal. They were given for moneys indisputably advanced at the time, and are prima facie a liability of the bankrupt. The books of the corporation were never well kept, but it appears that during the years when the business was conducted at a profit the supposed profits were annually credited to the individual stockholders, but ordinarily no dividends were voted by the stockholders or directors. February 3, 1902, a formal dividend of 10 per cent. was voted by the directors. On February 1, 1904, at the meeting of the board of directors, Mr. Tyler moved that a dividend be declared of \$24,745.68, seconded by Mr. Lowe. There is no record of any vote upon this resolution, but the same day there was credited to each of the stockholders substantially his share of the amount named in the resolution less the amount theretofore credited him. February 1, 1906, the stockholders adopted a resolution that the profits for the year be divided and credited to the different stockholders. On February 1, 1907, profits were credited to each of the stockholders, but there is no record of either board of directors or stockholders voting a dividend. On February 1, 1908, 1909, and 1910, losses were charged to all the stockholders. The amount charged on February 1, 1908, to John W. Lowe was \$2,425.17; on February 1, 1909, \$7,019.99; on February 1, 1910, \$2,760.46. It appears, however, that no meeting of February 1, 1910, was ever in fact held and the minutes of it were written up by the secretary in anticipation of one being held.

[2] In the argument for appellant it is first insisted that John W. Lowe is estopped to prosecute his claim. An examination of the objections of the Wheeler & Motter Mercantile Company reveals that

no suggestion of estoppel was made therein. The rules of pleading are not so strict in reference to claims in bankruptcy as in other cases. *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584. And it has been held that objections to a claim need not be in writing. *Embry v. Bennett*, 162 Fed. 139, 89 C. C. A. 163; *Orr v. Park*, 183 Fed. 683, 106 C. C. A. 33. In *Re Royce Dry Goods Co.* (D. C.) 133 Fed. 100, Judge Phillips said:

"There is nothing in the act or the rules in bankruptcy directing the form of such objections. They should be in writing, and the specifications doubtless should be sufficiently explicit to indicate to the claimant the nature and character thereof."

The additional question remains whether when a party puts his objections in writing he can afterwards in an appellate court rely upon wholly different objections not shown to have been urged in the court below.

[3] It will not be necessary to pass upon these questions here. The estoppel rests upon an alleged concealment of the real financial condition of the corporation by the following means: First. By written credit statements issued to the objecting creditors on February 1st and February 4, 1910, which purported to give the company's liabilities, but did not include John W. Lowe's alleged claim. Neither of these statements was signed by John W. Lowe. It is not shown that he had any knowledge of their contents, and they did not without such evidence operate as an estoppel upon him. This is altogether aside from the question of any showing of change of conditions upon the faith of them. Second. By the report to the Secretary of State filed March 2, 1910, in which the total indebtedness was stated at an amount which admittedly did not include the claim of John W. Lowe. Suffice it to say that it does not appear that any credit was extended to the corporation after this statement became known to the creditors or that they changed their position in reliance upon it. It does not appear that any of the creditors acted upon this statement to their injury after they heard of its existence. Third. By a list of creditors of the Tyler-Lowe Mercantile Company exhibited to representatives of the creditors in March, 1910, in which list the claim of John W. Lowe was not included. This statement was not made by John W. Lowe, and he denies all knowledge of it. Fourth. By the bill of sale signed by John W. Lowe in May, 1910, in which it was alleged that a complete list of the creditors was given, but which it is admitted did not show any claim upon the part of John W. Lowe. There is no showing that any credit was extended by any of the creditors with knowledge of this statement. Not only did the creditors plead defenses, and not plead estoppel, but no estoppel is shown. It is contended, however, that Lowe was not entitled to have any part of his claim allowed because of certain offsets as shown by the books, and in this connection it is insisted that none of the dividends or profits credited to John W. Lowe could stand because they were not voted by the board of directors.

More than \$11,000 was thus credited to M. F. Tyler and all paid

to him. More than \$3,000 was thus credited to Frank Loveland and ultimately he received payment in full. The Lowes received merchandise and cash as against their several credits, but their accounts were never closed. Stockholders' meetings were held annually, and in every instance were attended by all of the stockholders and all of the directors. At these meetings the profits to be apportioned were agreed on by common consent and the credits made by the secretary were authorized and approved by the stockholders and directors, but no notations thereof were made on the minutes. Tyler and Loveland were paid those credits in full. Article 5 of the by-laws of the corporation provided:

"Dividends. The board of directors shall have power to declare dividends upon the capital stock of this company to be paid out of the money in the treasury or property belonging to the company not needed for other purposes, when, in its judgment it would be proper and for the best interests of the company."

[4] It is laid down in a number of standard text-books that, in the absence of other authority, it is the duty of the board of directors, and not that of the stockholders, to determine whether or not a dividend shall be declared. We have carefully examined all of the authorities cited in support of this text, and the only cases which so hold are *Grant v. Ross*, 100 Ky. 44, 37 S. W. 263, and *Hamblock v. Clipper Lawn Mower Company*, 148 Ill. App. 618, both of which pass upon the question of whether stockholders can vote a dividend in this country without discussion, and upon the citation of authorities in which the question was not involved. On the other hand in *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576, it is held that there may be a division of profits among stockholders without the formality of declaring a dividend. Such a division of profits is the equivalent of a dividend, and to the same effect is *Central of Georgia Railroad Co. v. Central Trust Co.*, 135 Ga. 472, 69 S. E. 708, 717, and in *Southwestern Railway v. Martin*, 57 Ark. 355, 21 S. W. 465, a report was made by the president showing profits and the amount each stockholder would be entitled to and a resolution was offered that profits be distributed according to said report. The minutes failed to show the adoption of the resolution, but the books showed payments to the other stockholders aside from the plaintiff as if the resolution had been adopted, and it was held that an action by the plaintiff would lie for his dividends. In the case of *Barnes v. Spencer & Barnes Company*, 162 Mich. 509, 127 N. W. 752, 139 Am. St. Rep. 587, the court says:

"Though the record does not show that, as formal action was taken as would be shown by the records of a carefully conducted corporation, we think it cannot be said that dividends were not authorized and declared. It must be remembered that no question of the right of creditors is involved. See *Cook on Corporations*, 534; *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576; *Rorke v. Thomas*, 56 N. Y. 559; *Reading Trust Co. v. Reading Iron Works*, 137 Pa. 282, 21 Atl. 169, 170; *McKusick v. Seymour*, etc., 48 Minn. 172, 50 N. W. 1116. *Penn. Iron Works v. Mackensie*, 190 Mass. 61, 76 N. E. 228: 'A resolution will be construed as equivalent to a dividend where any other construction would amount to an illegal prefer-

ence among the stockholders.' *Redhead v. Iowa National Bank*, 127 Iowa, 572, 103 N. W. 796: 'A dividend may be legal, even though not formally declared, it being paid by common consent, and hence cannot be recovered back on that ground after being actually paid.' *Berryman v. Bankers', etc., Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695: 'The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. No formal declaration is necessary, either by the stockholders or board of directors, and a distribution of profits by a unanimous consent without corporate action is legal.' *Groh's Sons v. Groh*, 80 App. Div. 85, 80 N. Y. Supp. 438. A division of profits is a dividend, even though not called such and not considered such by the directors or stockholders. *Cook on Corporations*, p. 1445, and cases cited. A scrip dividend is resorted to where company has profits not in cash. *Cook*, Par. p. 1446."

In *Northwestern Marble & Tile Company v. Carlson*, 116 Minn. 438, 133 N. W. 1014, where the board of directors adopted a resolution, "Moved by Darelus, seconded by Hedwall, that a dividend of 6 per cent. be declared on the common stock, payable in common stock or in cash, at the option of the stockholder, at such time as the finances of the firm will in the judgment of the board of directors warrant," it was held that, upon a showing that the finances of the company would warrant it, recovery could be had by a stockholder in the absence of any further resolution upon the part of the board of directors. See, also, *Stoddard v. Shetucket*, 34 Conn. 542.

We hold that when all the stockholders, including all the directors of a solvent corporation, meet and agree to a division of profits, and they are credited to the several individual stockholders upon the books of the company, and subsequently some of the stockholders withdraw their shares in whole or in part, that is the equivalent of a dividend. The claimant was therefore entitled to the dividends credited to him which did not impair the capital stock.

It is contended that these would be illegal because in making up the statement of the condition of the company they took into consideration a small amount of bills receivable.

[5] Where a corporation is created for the purpose of merchandising, while it has no power to declare dividends except out of net profits, it does not follow that its book accounts against parties to whom merchandise has been sold in the ordinary course of business and concerning which there is no question may not be included in the assets of the company in determining whether there has been a net profit or not. There is no evidence that any of the dividends credited to the stockholders did in fact impair the capital.

We next come to the question of the charging of losses. There was no reference to this at the stockholders' meetings in 1908 and 1909, and the evidence quite clearly shows that the claimant never knew that any losses were charged to him. The alleged meeting of 1910 was never in fact held, and the evidence fairly shows that there was due to the claimant substantially the whole of the amount claimed by him, but even if the charges of losses made in 1908 and 1909 stand there was still due Lowe exclusive of interest on his notes according to their terms in excess of the amount awarded him by the court below.

[6] As the District Court allowed him but \$4,864.12, and as he has failed to appeal, and no further relief can be granted him, the decree is affirmed.

MORGAN GARDNER ELECTRIC CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,573.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

See, also, 159 Fed. 951.

Glenn S. Noble, of Chicago, Ill., for appellant.

William K. Richardson, of Boston, Mass., and Edward Rector, of Chicago, Ill., for appellee.

PER CURIAM. Appeal dismissed, on motion of counsel for appellant.

UNITED STATES v. DE FAUR et al.

(Circuit Court of Appeals, Seventh Circuit. April 24, 1912.)

No. 1,656.

In Error to the District Court of the United States for the Northern District of Illinois.

See, also, 187 Fed. 812, 109 C. C. A. 572.

Edwin W. Sims, of Chicago, Ill., for the United States.

Timothy J. Fell, of Chicago, Ill., for defendants in error.

PER CURIAM. Judgment entered reversing pursuant to stipulation.

SMYTHE v. SUPREME LODGE, K. P.

(District Court, N. D. New York. September 23, 1912.)

1. INSURANCE (§ 693*)—CORPORATE ACTS—EVIDENCE.

The testimony of the secretary of an insurance order that he has the custody of its minutes and records, and that a pamphlet introduced in evidence contains a true copy of a new constitution and general laws of the order relating to insurance which were adopted and promulgated by the Supreme Lodge on a certain date, does not establish either their adoption or promulgation, where the witness does not claim to have any personal knowledge of the facts, the records are not introduced in evidence, and there is no testimony that the matter contained in the pamphlet is a copy of anything therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. § 693.*]

2. INSURANCE (§ 719*)—MUTUAL BENEFIT INSURANCE—INCREASE OF ASSESSMENTS—ASSENT OF MEMBER.

Where, at the time of the making of a contract of insurance between a fraternal order and a member, the constitution of the order contained a table of the monthly assessments required to be paid by each member insured, graded according to age at the time of the contract, a copy of which was furnished to the member, together with a printed statement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signed by the board of control, representing that the assessments remained the same through life, an agreement by the member in his application that, "I will punctually pay all dues and assessments for which I may become liable and that I will be governed, and this contract shall be controlled, by all the laws, rules and regulations of the order governing this rank now in force or that may hereafter be enacted by the Supreme Lodge," does not amount to a consent that the Supreme Lodge may by a subsequent enactment so amend the constitution and fundamental law of the order as to largely increase his assessments, and, in the absence of an explicit consent thereto, the member cannot be bound by such action, which impairs vested rights secured to him by the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

3. INSURANCE (§ 719*)—MUTUAL BENEFIT INSURANCE—POWER TO INCREASE RATES—GENERAL PROVISION AUTHORIZING AMENDMENT OF LAWS.

A general provision in the constitution of a fraternal order which insures the lives of its members that the constitution and general laws may be amended by a specified vote of the Supreme Lodge cannot be so construed as to authorize amendments which materially increase the premiums or assessments to be paid by members under existing contracts, where no power to increase such rates is specifically reserved in the contracts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

4. INSURANCE (§ 719*)—MUTUAL BENEFIT INSURANCE—CONTRACT.

Where a member of a fraternal insurance order on making his application and contract of insurance was furnished by the officers of the order with copies of its constitution and by-laws relating to insurance, upon which he relied, he cannot be held bound by the provisions of a later constitution and by-laws, which, although adopted prior to his contract, were not disclosed to him, and which materially affect his contract rights.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

Mutual benefit insurance contracts as affected by subsequent provisions and amendments of charter, constitution, or by-laws, see note to Supreme Council A. L. H. v. Champe, 63 C. C. A. 285.]

In Equity. Suit by Arthur V. H. Smythe against the Supreme Lodge, Knights of Pythias. On final hearing. Decree for complainants.

This is an action in equity to enjoin and restrain the defendant from canceling, or attempting to cancel, a policy of insurance issued by it and delivered to the plaintiff, and on which plaintiff has paid assessments for many years, but on which the defendant now demands the payment of increased assessments. The plaintiff also asks judgment that, in case the defendant shall have canceled said policy prior to the judgment or decree of the court in the premises, it be adjudged to restore same and continue same in force at the same rates of assessment and monthly payments as specified in the policy and fixed at the time the policy was issued.

R. J. Sanson and H. V. Borst, both of Amsterdam, N. Y., for plaintiff.

John J. McCall and W. E. Ward, both of Albany, N. Y. (J. Goodrich, of Indianapolis, Ind., of counsel), for defendant.

RAY, District Judge (after stating the facts as above). The true and correct name of the defendant is Supreme Lodge, Knights

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Pythias, and the pleadings, etc., by stipulation in open court on the trial were amended accordingly. The case was removed from the Supreme Court of the state of New York into the United States court. The plaintiff is a resident and citizen of the county of Montgomery, state of New York, and the defendant is a corporation organized and existing under an act of Congress making it a corporation of the District of Columbia, and was and is engaged in the business of insurance of its members of and through the endowment rank of said corporation. On the 7th day of November, 1889, the plaintiff was, and for some time prior thereto had been, a member of such corporation in good standing, and he has continued such ever since, and now is a member thereof in good standing.

The said corporation had a constitution and by-laws providing for and relating to the establishment of "an endowment rank"; the constitution in section 4 of article 1 defining the powers of the Supreme Lodge providing:

"To grant warrants to members of the order of Knights of Pythias, duly qualified, upon proper application, for establishment of sections of the Endowment Rank, and to enact laws and regulations, of general application, to establish and govern the same."

Section 6 of the said article also provides:

"To create, hold and disburse the funds of the Endowment Rank, under such regulations as it may deem necessary."

Section 8 of the same article says:

"To issue certificates and provide for the payment of same under the laws, rules and regulations embodied in the constitution in the sum of one thousand dollars (\$1,000), two thousand dollars (\$2,000), or three thousand dollars (\$3,000), as may be applied for under the laws of the Endowment Rank."

Article 2 provides for the formation of sections, and article 3 relates to membership therein and qualifications for such membership. Article 4 of the constitution reads as follows:

"Article IV. Monthly Assessments and Forfeiture of Certificates of Endowment. Section 1. Each member of the Endowment Rank shall, on presenting himself for obligation, pay to the secretary of the section, in accordance with his age and the amount of endowment applied for, a monthly assessment, as provided in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank."

Then follows a "table of monthly assessments," giving age of the member and the sum to be paid monthly under each class of certificates.

Article 11, relating to "Amendments," reads as follows:

"Art. XI. Amendments. These laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias of the World, by a two-thirds vote."

There are "general laws for the government of sections of the Endowment Rank," which provide, among other things, for officers and specify their duties, and article 12 thereof provides for "amendments" thereto as follows:

"The provisions of these general laws may be altered or amended at any regular session of the Supreme Lodge Knights of Pythias of the World by a two-thirds vote."

I have quoted from and referred to "constitution and general laws of the Endowment Rank Knights of Pythias of the World, adopted at the fourteenth session of the Supreme Lodge held at Toronto, Ont., July 13, to 23, inclusive, 1886," as these were the ones given to the plaintiff herein at about the time of his application and the issue to him of his certificate.

Under and pursuant to said constitution and laws, a section (No. 279) was duly established at Amsterdam, N. Y., and the complainant, Arthur V. H. Smythe, duly applied for membership and an endowment certificate or policy of \$3,000 by a written application dated October 26, 1889. He was born December 27, 1852, and his age at nearest birthday was then 37 years. The application blank filled out and signed by him and filed with and accepted by the defendant showed on its face in "table monthly assessments" that the monthly assessment would be \$3. On the 7th day of November, 1889, "certificate of membership, fourth class, No. 23,868" was executed by J. A. Huisey, president of board of control, and W. B. Kennedy, supreme secretary of the Endowment Rank, and November 26, 1889, the same was delivered to the complainant, Arthur V. H. Smythe, who signed the following agreement indorsed thereon, viz.:

"I accept this certificate of membership subject to all the conditions therein contained.

Arthur V. H. Smythe.

"Dated at Amsterdam, this 26th day of November, 1889."

Same was duly attested by the signature of Jacob L. Fredendall, secretary of section 279 E. R. The said certificate of membership so issued and delivered to the complainant reads as follows:

"No. 23,868. Certificate of Membership. Fourth Class. \$3,000.

"Endowment Rank of the Order of Knights of Pythias.

"This certifies, that brother A. V. H. Smythe received the obligation of the Endowment Rank of the Order of Knights of Pythias in section No. 279 on Nov. 2, 1889, and is a member in good standing in said Rank, and in consideration of the representations and declarations made in his application bearing date of Oct. 26, 1889, which application is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing this Rank now in force, or that may hereafter be enacted and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to his children as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank, upon due notice and proof of death, and good standing in the rank at the time of death, and surrender of this certificate.

"Provided, however, that the interest of any beneficiary as designated by said brother, or the interest of his or her heirs, shall cease and determine in case of the death of said beneficiary during the lifetime of such member, and in that case the benefit accruing under this certificate shall be paid as provided for in article XII, section I, of the Endowment Rank constitution.

"Provided, that if at the time of the death of said brother the proceeds of one assessment on all members of the Endowment Rank, shall not be sufficient to pay in full the maximum amount of endowment held under this certificate, then there shall be paid an amount, less ten per cent for expenses, equal to the proceeds of one full assessment on all remaining members of the Endowment Rank, and the payment of such sum to the beneficiary or beneficiaries, mentioned herein, shall be in full of all claims and demands under and by virtue of this certificate. And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

"In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

"Issued this 7th day of Nov., 1889, P. P. XXVI at Chicago, Illinois, and registered in Book 2 Folio 178.

"[Seal.]

J. A. Huisey, President Board of Control.

"Attest: W. B. Kennedy, Supreme Secretary of the Endowment Rank.

"I hereby accept this certificate of membership subject to all the conditions therein contained.

"[Signature of Member] Arthur V. H. Smythe.

"Dated at Amsterdam, this 26th day of November, 1889.

"Attest: Jacob L. Fredendall, Secretary Section No. 279, E. R.

At or about the time of his application, and in any event with his certificate or policy, there was delivered to the complainant a printed representation or statement signed, "Board of Control, Endowment Rank, Knights of Pythias," which contained the following:

"The Endowment Rank
is under supervision and direction of a
Board of Control
elected by the

Supreme Lodge, Knights of Pythias of the World.

"It is the only beneficial insurance department of the Knights of Pythias.

"Applicants may obtain an endowment of \$1,000., \$2,000., \$3,000., \$4,000., or \$5,000.

"Beneficiaries may be either persons related to or dependent upon the member for support. A change of beneficiary, in accordance with law, may be made at any time and as often as desired.

"A member is the absolute owner of his certificate of endowment, and controls its disposition as stated above.

"Endowments are exempt from payment of debts of the member, being paid direct to the beneficiary, whose interests are protected by law.

"The system of the Endowment Rank is based upon actual cost of insurance during expectancy of life, divided, for convenience, into fixed monthly payments during the life of the applicant in accordance with his age at date of applying for membership. These payments do not increase with increasing age, but always remain the same during good standing of the member.

"To qualify, an applicant for admission to the Endowment Rank, he must not be over fifty (50) years of age, a member in good standing of a subordinate lodge Knights of Pythias, and pass a satisfactory medical examination, which must be approved and accepted by the board of control."

This also contained a "Table of Monthly Payments" showing \$3 to be the monthly payment of a member 37 years of age at the time of application and admission.

The complainant continued to pay, not only his lodge dues, but his monthly assessment of \$3, and also extra assessments down to

1901, or 1902, when he received a pamphlet (Exhibit E), which informed him that thereafter his monthly assessment would be \$4.80, and this he paid thereafter down to January 1, 1911, when he received from the insurance department of the defendant (formerly board of control) a notice which contained the following:

"Name, A. V. H. Smythe. Certificate No. 23,868. Section No. 279. Amount of certificate, \$3,000. Amount of present monthly payment, \$4.80. Born, 12-27, 1852. Age at nearest birthday, January 1, 1911, 58 years.

"Indianapolis, Ind. 12-13, 1910.

"Dear Sir and Brother:

"The Supreme Lodge, Knights of Pythias, in regular convention assembled, on the 10th day of August, A. D. 1910, by section 468, Supreme Statutes, relating to the insurance department, enacted and provided that:

"(1) (Paragraphs B and C.) Every member of the fourth class on January 1, A. D. 1911, shall be rated according to his attained age and occupation and amount of benefit provided for in his certificate, in accordance with the table of rates therein provided and his monthly rates thereafter to be as provided for by said table, unless the member shall elect to take some one of the options provided for in said section 468. If you do not elect to take one of the options and desire to continue the amount of your present certificate for the remainder of your life, then, beginning with the month of January, 1911, and for each month thereafter, your monthly payment will be \$14.70. If you accept one of the following options, the above paragraph will not apply to you.

"The options are as follows:

"(2) (Paragraph D.) You may surrender your present certificate and accept a certificate in lieu thereof and for the amount thereof, which will insure you for the term of five (5) years for the monthly payment of \$7.95, or for the term of ten (10) years for the same amount for the monthly payment of \$9.30. At the end of the five (5) or ten (10) years period, whichever you elect to accept, the certificate will terminate and you will no longer be insured under it. If you should die while the certificate is in force and before its determination, the amount thereof will be paid your beneficiary.

"(3) (Paragraph E.) Or you may elect to continue making the same payment which you now pay each month, to wit, \$——, from and after January 1, 1911, and upon surrendering your present certificate, a new one will be issued to you for the amount of the old certificate, but it will terminate on the —— day of ——, A. D., 19——; your present rate being sufficient to give you life insurance protection until said date, but no longer. If you die within that time, the amount of the certificate, if in force, will be paid to your beneficiary, but it will expire on that date, and you will no longer be insured under it.

"(4) (Paragraph F.) Or if you so elect, you may have your present certificate scaled down to such a sum as the rates that you are now paying will provide insurance for the whole period of your life, regardless of when your death occurs, and your rate under this plan will be just what it is now, that is, \$4.80 per each month, but the amount of your certificate will be \$978.00 instead of its present amount, and if kept in force until your death, regardless of when death occurs, the amount thereof will be paid your beneficiary.

"(5) (Paragraph G.) Or if you elect to retain the present certificate that you have and are unwilling to accept any of the other options, you may have a lien placed against your certificate, the amount of such lien to be deducted at the maturity of the certificate, whenever the same matures by your death, and you may continue to pay the same rate that you are now paying, to wit: \$4.80 per each month. Under this option the lien will be \$2,022.00 and will be deducted from the face of your certificate at maturity, leaving the balance of \$978.00 to be paid to your beneficiary.

"(6) (Paragraph H.) Or you may elect to continue the full amount of your insurance protection for the whole period of your life and to be rated as of your age at nearest birthday January 1, 1911, and if you are unable to make the payment of \$14.70 that will be due from you under said certificate

as each monthly payment from and after January 1, 1911, and will satisfy the board that you are unable to pay the whole of said monthly payment in cash, then you may pay in cash the sum of \$7.95 for each month and the sum of \$6.75 for each month will be charged against your certificate, together with 5 per centum per annum as interest, which said sums not so paid by you with the interest, whatever they aggregate at the time of the maturity of your certificate, will be deducted from the face amount thereof. You may, if you choose, relieve your certificate of this lien, or any portion thereof, at any time, by paying the amount of same or any portion thereof.

"(7) Or you may, if you choose, transfer the whole or any portion of your insurance from the fourth to the fifth class, such transfer to be made without expense to you and without medical examination, but in the event of such transfer you will be rerated at your attained age and in accordance with the plan in said fifth class to which you elect to transfer.

"You are required by said enactments of the Supreme Lodge to elect in writing on or before the first day of January, 1911, which of the options you will avail yourself of, and in the event you fail to make such election, your rates on January 1, 1911, will be automatically raised, as is stated in the first paragraph hereof, to the sum of \$14.70, which sum will be due from you for each month thereafter, beginning with the month of January, 1911.

"If you desire any further information with respect to any of these options, it will be cheerfully furnished you.

"The sole purpose of the Supreme Lodge in taking the action noted above was to provide sufficient funds so that every and the last certificate may be paid at maturity and that each member may bear his just and equitable portion of the cost of raising the requisite funds for such purposes.

"From and after January 1, 1911, every certificate in the fourth class will be annually valued the same as certificates in the fifth class, and the surplus that may be accumulated will be distributed in the same way as it is done in the fifth class, by the waiving of assessments, and all fourth class certificates, after they have been in force for three years after January 1, 1911, will be incontestable for suicide, the same as are the certificates in the fifth class.

"Please sign one of the elections herewith enclosed, all blanks of which have been filled out, and return it to the Board of Control at once. Do not sign more than one election."

"Fraternally submitted,

"Board of Control,

"By Union B. Hunt,

"President Insurance Department."

This was accompanied by blank forms of acceptance of "options" tendered. The complainant did not accept either of said options, but each month thereafter duly tendered to the secretary and treasurer of his lodge, the officer authorized to receive assessments, the sum of \$4.80, which such secretary and treasurer refused to accept, informing the complainant that he was instructed by the Supreme Lodge not to accept. Inasmuch as by the constitution and by-laws a certificate or policy will end and become of no force and effect unless the legal assessments are paid, this action was brought December 31, 1910, in effect, to compel the defendant to accept the monthly assessment of \$4.80 and continue this certificate or so-called policy in force.

The case turns, as I view it, on the power of the Supreme Lodge under its constitution to increase this monthly payment or assessment from \$4.80 per month to the sum of \$14.70 per month, and, in default of payment thereof, treat and consider the said certificate as of no force or effect. The defendant, under the plaintiff's objections, has been allowed to give evidence tending to show that this increase of

monthly assessment on the older members, those who have held policies for a long time paying the assessments fixed at the time they became members of the endowment class, is necessary in order to provide a fund sufficient to pay the full amount of the policies or certificates issued prior to and since that time. It may be remarked here that the increased assessment after 1901 was to create a "surplus fund," and its payment in no way amounts to a concession by the complainant that the defendant had any legal right to increase his monthly payment or assessment, and, in case of refusal to pay the increased assessment, cancel the policy or treat it as of no effect.

The application for the certificate and membership in the endowment class contains the following:

"Read carefully the following declaration and agreement and observe its import:

"I declare that I am not now a member of the Endowment Rank, Knights of Pythias, and have not been rejected as an applicant thereof. I declare, furthermore, that all of the above statements are true to the best of my knowledge and belief, and that I have not concealed or omitted to state anything regarding my health, past or present, affecting the expectancy of my life; and that I hereby consent and agree that any untrue statement made in this application, or to the medical examiner, or any concealment of facts touching my health, or expectancy of life, or for failure or neglect to pay any or all assessments and dues as prescribed by the laws of the Rank or Order, or for other causes, or voluntarily severing my connection with the Order, shall work a forfeiture to all my rights, and the rights of my heirs and beneficiaries to all benefits and privileges accruing to members of this Rank.

"I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed, and this contract shall be controlled by all the laws, rules and regulations of the Order governing this Rank, now in force, or that may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or submit to the penalties therein contained. To all of which I willingly and freely subscribe.

"Dated at Amsterdam, N. Y., this, the 26th day of Oct., 1889.

"[Signature of Applicant] Arthur V. H. Smythe."

[1] The defendant contends that the constitution and general laws delivered to the complainant as above stated were promulgated August 20, 1886, and were not the ones then in force, but that same were thereafter and at a meeting of the Supreme Lodge held at Cincinnati, Ohio, June 12 to 23, 1888, inclusive, repealed, and that a new set of constitution and by-laws were then adopted and promulgated effective August 1, 1888. The defendant claims to have established this by the deposition of Mr. Walter O. Powers, General Secretary of the insurance department of the Supreme Lodge, Knights of Pythias, who testified in his deposition taken May 10, 1912, as follows:

"Question. You may state your name, age, and place of residence. Answer: (a) Walter O. Powers. (b) Age 37. (c) Indianapolis, Ind.

"Question. What is your occupation? Answer: I am the General Secretary of the insurance department of the Supreme Lodge, Knights of Pythias.

"Question. How long have you occupied that position? Answer: Since November 15, 1910.

"Question. Previous to that time, if you were connected in any capacity with the insurance department, Supreme Lodge, Knights of Pythias, state in what capacity and for how long. Answer: For eight years previous to my selection as Secretary of the insurance department I was in charge of the certificate department of the insurance department.

"Question. State what are your duties as General Secretary. Answer: My

duties as General Secretary are to keep and have charge of all of the books and records of the board, to receive all funds and deposit the same daily in the proper depository and liquidate the accounts of the insurance department; to conduct the general correspondence with Section Secretaries and members, and prepare and present to the executive committee all claims against the insurance department.

"Question. Are you acquainted and familiar with the books and records of the insurance department? Answer: I am, not only by reason of my employment in the office since 1903, but also by reason of the fact that I have since my election as Secretary made a careful and exhaustive examination of the records and books of the insurance department.

"Question. State what records, if any, of the Supreme Lodge you have in your custody as General Secretary. Answer: I have in my office and under my care and custody the official records and minutes of the Supreme Lodge, Knights of Pythias, so far as the same pertains to the insurance department and of all the Biennial Reports and accounts made by the insurance department to the Supreme Lodge since the year 1878. * * *

"Question. Have you examined a copy of the plaintiff's Exhibit C, purported to be the constitution and general laws of the Endowment Rank, Knights of Pythias? Answer: I have.

"Question. When, if you know, was the constitution and general laws set out in that pamphlet promulgated. Answer: On August 20, 1886.

"Question. Were these laws at any time thereafter repealed? Answer: They were.

"Question. When? Answer: At the session of the Supreme Lodge held at Cincinnati, Ohio, June 12 to 23, inclusive, 1888, at which session a new set of constitution and by-laws was promulgated, effective August 1, 1888.

"Question. Have you in your possession, Mr. Powers, the original minutes, records, and journal of the Supreme Lodge, Knights of Pythias, showing the adoption and enactment of the constitution and by-laws governing the insurance department at the June session, 1888, of the Supreme Lodge, Knights of Pythias? Answer: I have. (Counsel for defendant now hands to the notary a pamphlet, and asks notary to mark the same 'Defendant's Exhibit A.' The notary marks the pamphlet 'Defendant's Exhibit A.')

"Question. I hand you, Mr. Powers, the pamphlet marked 'Defendant's Exhibit A,' and ask you to state if you know what it is and what it contains? Answer: This pamphlet marked 'Defendant's Exhibit A,' contains a true and correct copy of the constitution and by-laws adopted by the Supreme Lodge, Knights of Pythias at the June session, 1888, which constitution and by-laws were promulgated and became effective August 1, 1888. The pamphlet contains all of the constitution and all of the by-laws in force and effective from and after August 1, 1888.

"Question. By what vote was this constitution and by-laws adopted? Answer: By a unanimous vote—107 ayes, no nays.

"Question. What was the total vote of the Supreme Lodge at its session in 1888? Answer: There were 107 representatives present and authorized to sit at this convention, each being entitled to one vote."

It is contended on the one hand and denied on the other that this establishes the adoption and promulgation of a new constitution and general laws prior to the date the complainant made his application and received his certificate. It is quite certain that, if adopted, they were not promulgated to the section to which the complainant belonged or to him. But complainant contends that this evidence of Powers, if admitted, does not establish either the adoption or promulgation of this alleged "new set" of constitution and general laws.

Section 1 of article 4 of the alleged new constitution and laws, relating to "monthly assessments and forfeiture of certificate of endowment," reads the same as section 1 of article 4 of the con-

stitution and laws given to the complainant and above quoted, except that in the new constitution there is added the words "unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World." In the constitution and laws given to the complainant there is no clause or provision authorizing the board of control to re-rate the tables of the fourth class, but the alleged new constitution and laws in article 8 has the following:

"Sec. 17. The board are hereby empowered and directed to re-rate the members transferred from the first, second and third classes under resolutions passed by the Supreme Lodge at the session of 1884 permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third classes. The board is instructed to re-rate this class of membership so as to require them to hereafter pay as of their age when becoming members of the fourth class, said re-rating to take effect at such date as the board shall prescribe, on and after the 1st day of August, 1888; and the board is further empowered to re-rate the present tables of the fourth class, applying it to all members, should such action become necessary for the proper protection and perpetuity of the Rank."

Article 10 of the alleged new general law, rules, and regulations reads:

"Amendments. The provisions of these general laws may be altered or amended at any regular session of the Supreme Lodge of the Endowment Rank, Knights of Pythias of the World."

It is evident that the witness Walter O. Powers, who was only 12 or 13 years of age in 1888, has no personal knowledge of what transpired in the Supreme Lodge in 1888, when it is claimed the new constitution and laws were enacted and promulgated. His statement cannot be accepted as evidence that they were either enacted or promulgated. But he says he has control and possession of the records. If so, why were the records not offered in evidence and read in evidence? Those records have not been proved or produced before the court, or even offered or read in evidence. Powers does not even say that Exhibit A (the alleged new constitution) is a copy of anything found in the records.

When the complainant, Arthur V. H. Smythe, took out his certificate, he was furnished a copy of the constitution and general laws and a table of assessments on which he relied, and on which he had the right to rely in paying his money, his regular assessments, thereafter, and also a pamphlet, the authenticity of which has not been denied, stating that his assessments would always remain the same, and would not be increased with added years. His contract was that he should and would pay regular assessments as per the table found in the constitution given him, viz., \$3 per month. He was also to pay extra assessments for special purposes.

This corporation is organized under a law of Congress, and the corporation assumed to do business, and did do business, in the state of New York, where the subordinate lodge or section was located, the membership and certificate applied for and executed by the complainant. It is contended by the defendant that, under these circumstances, the decisions of the Court of Appeals in the

state of New York are not controlling, but that those of the Supreme Court of the United States and of the federal courts are, and that under them the complainant has no cause of action; that the Supreme Lodge had the right to amend its constitution and general laws at any time in the manner provided in the old constitution and increase assessments of the old members, re-rate them, as was done in 1910, and that all the members who had taken certificates prior to that date and paid at the old rates in force at the date of their applications and certificates are bound by such actions of the Supreme Lodge. The contention, on the other hand, is that this is a New York contract and governed by the decisions of the highest court of the state.

In *Wright v. Knights of Maccabees of the World*, 196 N. Y. 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838, the application for the certificate or policy and such certificate provided that on the death of the holder an assessment on the membership should be paid to the beneficiary named on condition that the holder should have in every particular complied with the laws of the order in force, or that may hereafter be adopted, and the application provided that the laws of the order "now in force or that may hereafter be adopted shall form the basis of this contract." Seven years later the by-laws were so changed without the consent of the certificate holder as to increase the assessment which such holder refused to pay. It was held that such amendment did not affect or bind the member, and that he was not obligated to pay the increased assessment. Vann, J., all concurring, in giving the opinion of the court, said:

"The question presented for decision is whether the reservation by the defendant of a general power to amend its by-laws, without specifying in what respects, authorized it to amend them in all the particulars above mentioned. In other words, can such an association amend a specified clause under a general power?"

The learned judge then proceeds:

"The amendments involve, not only a substantial increase in the rate of assessment, but also a substantial decrease in the amount of benefits. While the member is now required to pay more than twice as much as before, he is to receive, in return, materially less than before. He is deprived altogether of the benefit to which he was entitled upon reaching the age of 70, and is deprived of a material part of the benefit to which he was entitled in case of disability. While it was specifically provided that he should 'pay at the same rate of assessment thereafter,' the rate of assessment is now more than doubled. The benefits were specified, and the rate was specified, and can such a contract of insurance be so amended by the insurer, under a general power, as to take away from the insured without his consent an essential part of what he specifically contracted for? If the defendant had stated in the body of the certificate that it reserved the right to amend by increasing assessments and reducing benefits, the plaintiff would have had notice of what he might expect, but, in that event, it is doubtful whether he would have taken out the insurance, yet the defendant is forced to claim that the contract now has precisely the same meaning and effect as if it had been drawn in that form. The general reservation doubtless authorized the defendant to amend its by-laws so as to cover subjects not therein specifically provided for and even in other respects, which would not essentially impair the contract as made. But the subjects of assessments and benefits were specifically

provided for, each being defined in express terms, so that the member knew what he was bound to pay and what he was entitled to receive. After he had acted upon those specifications in the contract by paying at the rate provided thereby for seven years, the plan of insurance was changed from term to life, while the assessments were so advanced and the benefits so reduced as to make a new contract of much less value to him than the old. * * * 'While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature as well as the association, for the obligation of every contract is protected from state interference by the federal Constitution.' See, also, *Parish v. New York Produce Exchange*, 169 N. Y. 34 [61 N. E. 977, 56 L. R. A. 149]; *Langan v. Supreme Council American Legion of Honor*, 174 N. Y. 266 [66 N. E. 932]; *Simons v. American Legion of Honor*, 178 N. Y. 263 [70 N. E. 776]; *Dowdall v. Catholic Mutual Benefit Ass'n*, 196 N. Y. 405 [89 N. E. 1075, 31 L. R. A. (N. S.) 417]. * * *

"I am personally of the opinion that the amendment increasing the rate of assessment is also void, for I can see no difference in principle between reducing benefits and increasing the amount to be paid for benefits. The plaintiff entered into the contract on the faith of the promise by the association that he should 'pay at the same rate thereafter so long as he remains continually in good standing in the order,' which he had the right to assume and the defendant knew that he would assume, was a covenant not to increase the rate. The certificate states that 'he is entitled to all the rights, benefits and privileges' provided by the laws of the order, which are thus made a part of the certificate. Hence the right to pay at the old rate was one of the rights provided for and that he contracted for. It was a vested right, immune from change by amendment, in the absence of a specific reservation of power to amend in that particular. On the average, such contracts would be impaired by doubling assessments, to the same extent as by cutting off one-half of the benefit. The price to be paid by the plaintiff for insurance is as essential a part of his contract as the amount of insurance to be paid to him by the defendant on the maturity of the policy. Whether the one is increased or the other proportionately decreased makes no difference in principle, or in the final result. By either method the pecuniary value of the contract, which is property, would be reduced one-half. * * * I think that an increase in the rate of assessment falls under the same condemnation of the law as a reduction in the amount of benefits. A judgment requiring the defendant to perform according to the contract as made, and not as amended, yet requiring the plaintiff to pay according to the contract as amended and not as made, would contain inconsistent provisions, one of which would necessarily violate the principle upon which the other was founded."

In *Dowdall v. Supreme Council of the Catholic Mutual Benefit Association*, 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417, the syllabus is:

"The defendant, a mutual benefit life insurance association, issued to plaintiff a certificate of membership therein, upon the condition that he should 'in every particular while a member of said association comply with all the laws, rules, and requirements thereof.' Plaintiff also received a printed book containing the constitution and by-laws of defendant. One of the articles of the constitution provided, in substance, that all members should be assessed according to their age when admitted. The question presented is whether, by subsequent amendment of the constitution or any of the rules or regulations made after the issue of the certificate, defendant may increase the rate of a single assessment against plaintiff. Held, that the covenant on the part of plaintiff that he would comply with all the laws, rules, and requirements of the association refers only to such as existed at the time he entered into his contract, and that any changes or

alterations thereafter made therein, or additions thereto, seeking to modify or alter said contract do not bind him."

In *Rockwell v. Knights Templars & Masonic Mutual Aid Association*, 134 App. Div. 736, 119 N. Y. Supp. 515, the court held:

"While every corporation has a right to make and change its by-laws in a manner not inconsistent with law, it cannot impair the obligation of outstanding contracts, or impose upon a party contracting with it obligations which he never assumed. The fact that a party contracting with a corporation is a member thereof does not entitle the corporation to impair the obligations of the contract by a change in its by-laws. The courts will not permit a party to change the terms of his contract because it proves unwise or unprofitable."

Kellogg, J., in giving the opinion of the court and citing *Ayers v. Order of United Workmen*, 188 N. Y. 280, 80 N. E. 1020, said:

"It is repugnant to the idea of a contract that one of the parties may, at his election, from time to time change the amounts which he is to receive from the other party under the contract and the consideration which he is to render to the other contracting party, and, if it is possible to make such contract, the language used must permit of no other construction. *Ayers v. Order of United Workmen*, 188 N. Y. 280 [80 N. E. 1020]. The period and rate table indorsed upon the plaintiff's policy became a part of it, and there is no suggestion in it, or in the policy itself, that that table may be changed. The by-laws deemed material by the defendant were made a part of the policy by indorsing them on the back thereof, and there is no suggestion therein that the defendant had the right to change its by-laws, and, in fact, it had no by-law permitting such change. Every corporation has the right to make and change its by-laws in a manner not inconsistent with law, but such right does not give it the power to change its written contract, or impose upon a party contracting with it obligations which he never assumed. It is said that the defendant is a member of the corporation, and is therefore an insured and an insurer at the same time. But every contract has at least two parties who stand as separate entities; each dealing with the other at arm's length. The fact that one of the contracting parties is a stockholder or member of a corporation does not permit the corporation by an alleged change of its by-laws to alter the terms or effect of contracts which it has already made. The fact that a contract proves unprofitable, or will bring ruin upon one of the contracting parties, is no reason why the courts can permit the party who has made such an unwise contract to change its terms at will, and make for itself a more profitable contract. A member of a copartnership who purchases property of the firm in good faith cannot be required to pay a greater consideration than that agreed upon for the reason that the contract is unprofitable to the firm, and that he is a member of the firm and is interested in its welfare."

In that case, as here, it was said that as the defendant was a foreign corporation, the decree of the court, if pronounced, could not be enforced, and of that contention the court said:

"It is argued, however, that the court is powerless to compel the nonresident officers of the defendant to perform the contract and to treat the plaintiff as a policy holder. That objection refers only to the manner of enforcing the judgment after it is rendered. The court may be powerless to punish the nonresident officers for contempt if they do not observe its judgment, but while the defendant continues to do business in this state there will be little difficulty in the enforcement of a proper judgment against it."

[2] I find it difficult to understand how it can be held that a person who takes out a certificate or so-called policy of insurance in a

fraternal benefit association or society agreeing thereby to pay a certain specified sum monthly, specified therein or thereon (and also certain special assessments for specific purposes if necessary), his application and certificate referring to the constitution and laws of the order which are presented to and accepted by him with his certificate and accompanied by a written statement or representation that his assessment will always remain the same, has assented to an increase of such monthly assessment, an increase of his burden under the contract, or a change in the terms of his contract, by agreeing that he "will punctually pay all dues and assessments for which he may become liable and that he will be governed and that the contract shall be controlled by all the laws, rules and regulations of the order, governing the members of that rank, now in force or that may hereafter be enacted." It cannot well be questioned that such a corporation as this defendant may expressly reserve the right and power to increase the monthly assessments, but this must be so explicitly and clearly stated in some part of the contract or in some paper forming a part of the contract that the member insured is fully informed or advised that the terms of the contract he is entering into may be changed by the insurer in that respect. *Beach v. Supreme Tent K. of M.*, 177 N. Y. 100, 105, 69 N. E. 281, 283. In that case Judge Cullen, one of the ablest judges ever on the bench of this or any government, said:

"It is quite easy for fraternal organizations, such as the defendant, if they deem the provisions for benefits to their members tentative only and desire to have them subject to such modification as the business of the orders may require, to express that in the certificate. So, in the present case, if the certificate had provided that the payments therein specified should be subject to such modification as to amount, terms, and conditions of payment and contingencies in which the same were payable as the endowment laws of the order from time to time might provide, the amendments would be applicable to existing members. But I think that nothing less explicit than this appearing in the certificate itself should be effectual for such a purpose. Fairness to persons joining the order required such plain dealing."

See, also *Langan v. Supreme Council Am. L. of H.*, 174 N. Y. 266, 66 N. E. 932. In *Ayers v. Grand Lodge of Ancient Order of United Workmen of State of New York*, 188 N. Y. 280, 285, 286, 80 N. E. 1020, 1021, the court held:

"While a 'mutual benefit fraternity,' or fraternal insurance society, may so amend its by-laws as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature as well as the association, for the obligation of every contract is protected from state interference by the federal Constitution."

In the opinion it is said:

"It is well established by these authorities 'that a general power reserved either by statute or by the constitution of a society to amend its by-laws does not authorize an amendment impairing the vested rights of members.' An amendment of by-laws which form part of a contract is an amendment of the contract itself, and, when such a power is reserved in general terms, the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the

one in whose favor the reservation is made. It would be not reasonable, and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only and would leave him at the mercy of the former, and we have said that human language is not strong enough to place a person in that situation. *Industrial & General Trust, Limited, v. Tod*, 180 N. Y. 215, 225 [73 N. E. 7]. While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature as well as the association, for the obligation of every contract is protected from state interference by the federal Constitution. Article 1, § 10."

Fredendall, the secretary of section No. 279 E. R., at Amsterdam, who attested and delivered the certificate or so-called policy, was the agent of this defendant. *Supreme Lodge, Knights of Pythias, v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762; *Whiteside v. Supreme Conclave (C. C.)* 82 Fed. 275; *Knights of Pythias v. Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333. The last two cases cited and approved in 177 U. S. at page 274, 20 Sup. Ct. 611, 44 L. Ed. 762, and *Campbell v. Knights of Pythias*, 168 Mass. 397, 47 N. E. 109, disapproved in the same case, 177 U. S. at pages 275, 276, 20 Sup. Ct. 611, 44 L. Ed. 762. In Indiana the same general doctrines as stated in the New York cases are held. *Court of Honor v. Rausch (Ind.)* 95 N. E. 1018. It is there said:

"The certificate under consideration was issued to the insured more than five years before his death. It has long been settled not only by the courts of this state and others that amendments to by-laws, which may be adopted by societies such as appellant, cannot in any way change the terms of contracts previously made, so as to impair or modify the obligations created in contracts of insurance. Compliance with future by-laws has reference to such by-laws as may be adopted at some future time pertaining to the duties of the members, but cannot affect the rights granted such members by virtue of the contract of insurance."

There is a long line of cases in the Court of Appeals of the state of New York all to the effect above stated on all the material propositions involved in this case. We turn now to the decisions of the federal courts.

Defendant's counsel cites *Supreme Lodge of Fraternal Union of America v. Light (C. C. A., 8th circuit)* 195 Fed. 903, as the last word on this subject, and as an authority that ought to be followed by this court. In that case the constitution of the order prohibited its members from engaging in the occupation of saloon keepers, bartenders, or manufacturers of intoxicating liquors. By a subsequent amendment it was provided that any member who should "enter upon the manufacture or sale of malt, spirituous or vinous liquors to be used as a beverage, in the capacity of proprietor, stockholder, agent or employé should forfeit all rights as a member either social or beneficial." The court held that this amendment was germane and reasonable and binding on an existing member

whose contract was expressly subject to such by-laws or rules as might thereafter be adopted by the Supreme Lodge. The amendment prohibited a member from becoming the agent of a manufacturer of intoxicating liquors in that business and also prohibited a member of the order from becoming a stockholder in a corporation or company engaged in such business. In short, if a member of the order who had paid money and had vested rights in benefits should become the agent to purchase grain or machinery for a manufacturer of intoxicants or should voluntarily or by operation of law become the owner of stock in a company or a corporation engaged in manufacturing intoxicants, he was to forfeit all his rights, both social and beneficial. Conceding that a manufacturer of intoxicating liquors is exposed to perils and risks, or to temptation and danger prejudicial to health and longevity which the lodge would not insure against, I am so blind that I cannot see how holding stock in a company or a corporation engaged in manufacturing intoxicating liquors exposes the holder of such stock to any "temptation and danger prejudicial to health and longevity." I cannot agree with the Circuit Court of Appeals, Eighth Circuit, that "there was nothing radically new in the amendment of 1902" (the one referred to), nor can I concur in its statement that "it was not inconsistent with existing provisions of the members' contracts, but in substantial accord with them," when such amendment went to the extent of divesting the vested beneficial rights of an old member if he became the agent of a manufacturer of intoxicating liquors or purchased or became the owner of stock in a company or corporation engaged in that business. The court in the case cited holds the true rule to be:

"That a member of a fraternal beneficial organization who accepts membership subject to such by-laws and rules as the Supreme Lodge may thereafter adopt is bound by any reasonable legislation thereafter adopted."

It then proceeded to hold that it is reasonable legislation to amend a constitution and by-laws prohibiting its members from "engaging in the occupation of saloon keepers, bartenders, or manufacturers of intoxicating liquors" so as to prohibit its members—members prior to such amendment—from becoming the agents of such manufacturer or stockholders in a company or corporation engaged in such manufacture and destroy their vested pecuniary and beneficial interests if they did. However much the courts and judges may differ as to the reasonableness of such legislation, if we accept the rule stated as the true one, we must inquire whether it was reasonable legislation for the defendant here to increase the monthly assessment of this complainant and all similarly situated, and who had paid in his money for some 22 years on the representation that such assessment would not be increased and in accordance with the provisions of the only constitution and laws of which he had any knowledge or information, from \$3 per month or \$4.80 per month to \$14.70 per month, or, at his option, reduce the value of his policy or certificate at maturity from \$3,000 to \$978. The complainant has now paid in about \$900, and, if (under this

alleged new or amended set of constitution and laws) he should accept the option offered and continue to pay at the old rate, he would pay in (assuming he lives a few years only) considerable more than his children would get under the certificate. It would amount to putting his money for 20 or more years in monthly installments into the hands of this corporation for its own uses on its promise to refund to his children a part of the principal at his death. Such a proposition, if made or suggested to those who became members in 1888, or at a later date, would not have been accepted or even considered. The old members in good health and with a fair prospect of life will not consider the propositions offered or accept same except on compulsion, and then only with the hope of eventually saving a part of the money heretofore paid in without interest. It will effect a freeze-out of the old members, who for years have paid in their money for the benefit of new members, and, of course, operate to prolong the life of the corporation, if effective. I regard the increased assessment unnecessary and unreasonable.

In *Fullenwider v. Supreme Council of Royal League et al.*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239, it is held, three of the seven judges dissenting, that a certificate of membership which provides that the members shall be bound by the laws, rules, and regulations then in force or which may thereafter be enacted by the society, sufficiently reserves the right in the society to subsequently amend then existing by-laws and increase the rates then fixed by such by-laws; the certificate itself not mentioning any rate of assessment. In that case the by-laws fixed the rates to be paid which constantly increased with the age of the holder and ranged from \$1.34 at 21 years of age to \$3.44 at 45 years of age. The amended by-law increased the rate to be paid by the complainant at his then age from \$2.62 to \$4.52, and the court held that this was a reasonable amendment or change of assessment. The court said:

"It is apparent that the new by-law was adopted in the manner provided for in the laws of the society, and was not an unreasonable enactment. It was enacted under a right to amend the by-laws reserved expressly in the contract, and hence it cannot be claimed it in any manner impaired any vested right."

Caldwell v. Grand Lodge, etc., of California, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 17 Ann. Cas. 356, cited by the defendant here, in no way sustains its contention. In that case Baker took a beneficiary certificate in the order payable to the Humboldt Savings & Loan Association as trustee of his estate. As a condition he agreed that compliance on his part with all laws, regulations, and requirements which are or may be enacted by said order "is the express condition upon which I am to be entitled to participate in the beneficiary fund," etc. While this certificate was outstanding the laws were so amended as to require that one designated as beneficiary should be a member of the family, or related by blood, or "who shall be dependent upon

him." After this amendment went into effect and became operative, Baker revoked his beneficiary, said Humboldt Savings & Loan Society, and named Mrs. Caldwell. Mrs. Caldwell was in no way related to Baker, was not a member of his family, and was not dependent upon him. There was nothing in the original contract that gave Baker the right to change the beneficiary at any time without the consent of the Grand Lodge. Mrs. Caldwell after the death of Baker demanded payment of this certificate, which was refused. The court held:

"Where the original by-laws allowed any person to be named by the member as a beneficiary, a change in the by-laws of the order requiring one to be designated as a member of the family, or related by blood, or 'who shall be dependent upon him,' is reasonable; and after it went into effect the member had no right to name a beneficiary any other than one of the classes therein designated. * * * Where the member subsequent to the change in the by-laws surrendered his former certificate, the beneficiary in which might have been protected as against such change, and took a new certificate, designating such married woman as 'dependent upon him,' by force of the amendment such designation justified the order in issuing the certificate, and was a representation upon the truth of which the validity of the contract depended, and amounted to a warranty."

The court in its opinion said:

"It is, however, contended that as Baker became a member of the order at a time when its by-laws permitted him to have the certificate issued in favor of any person a subsequent change in the by-laws limiting the classes of persons to whom such certificate could be issued was an impairment of his contract, and thereby void as to him, and as to the certificate actually issued in favor of this plaintiff. It is unquestionably true that in a policy of life insurance a designation of a beneficiary valid in its inception remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated, in the contract. *Courtois v. Grand Lodge*, 135 Cal. 557, 67 Pac. 970, 87 Am. St. Rep. 137; *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603. But such is not the proposition here presented. This principle would have been applicable if refusal had been made by the order after the passage of its amended by-law to pay the certificate in favor of the Humboldt Savings & Loan Society, which was a valid certificate in favor of that institution at the time of its issuance. In this case Baker surrendered that certificate, and, while the amended by-law was in force, caused a new certificate to be issued to a person who under the by-law was not entitled to it. Baker had not been compelled to designate a new beneficiary; but, having voluntarily undertaken so to do, could he or could he not designate a beneficiary not contemplated by the by-law then in force? We entertain no doubt that this he could not do."

The new by-laws did not purport to change the contract as it then existed. That contract was voluntarily surrendered and a new one taken in its place after the new laws went into effect, and it was, of course, subject to the by-laws in force at the time it was taken.

Messer v. Grand Lodge United Workmen, 180 Mass. 321, 62 N. E. 252, does not support the defendant's contentions here, as there the certificates were silent as to the rates to be paid. The contract was that the members should have all the rights and privileges of membership with a right to participate in the beneficiary fund to the amount of \$2,000 to be paid at death on condition that

the member complies with all the laws, rules, and requirements of the order. The defendant was organized and existed under a statute of the state of Massachusetts. The statute was amended to expressly authorize the corporation to collect assessments from the members at different rates according to the age of the members. The contention was that the corporation could not do this and could only collect assessments at a fixed rate, the same for all members of the order without reference to their age. No question of interfering with vested contract rights was involved. The case of *Reynolds v. Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776, is a case quite in point, and at variance with the New York cases. If good law it sustains the contentions of the defendant here. As the case was determined largely on the force of the statutes of the state of Massachusetts, it is not decisive except in so far as it interprets those laws and determines the rights of the parties under them. *Gaines v. Supreme Council of Royal Arcanum* (C. C.) 140 Fed. 978, is not an authority either way. Judge Clark denied an injunction on the ground it was a question of Massachusetts law, and dismissed the bill without prejudice to a new suit in the state of Massachusetts. I am cited to *Wright v. Minnesota Mutual Life Insurance Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832, as sustaining the defendant's contention here. However, I find nothing in the facts of the case or in the opinion of the court that in any way tends to sustain that position. On the contrary, the facts stated show that every right of all the old members was protected and preserved, and that, in effect, they were allowed to continue to pay in the old way, and that their beneficiaries were to be paid on the basis of the original plan or contract. Wright became a member of the company in 1892. In 1898 amended articles of association and by-laws were adopted. Now, quoting from the case:

"The amended articles declared that the by-laws shall contain provisions which shall operate to preserve, continue, guard, and protect all of the existing rights and privileges of and promises and pledges to persons who were members at the time the amended articles became operative. Under the new articles a form of policy was issued, known as the 'guaranteed option policy.' These policies were issued to new holders, and members under the assessment plan were permitted to transfer their membership so as to receive such policies, which required the payment by the insured of a stipulated annual premium in advance."

In 1901, as authorized by an act of the Legislature, the company accepted the provisions of the act "making the company a regular reserve company with a policy on which a stated premium is paid and a fixed sum is payable at death to the beneficiaries of the assured." The act referred to provided amongst other things:

"That nothing herein contained shall impair or operate to impair the obligation of any contract," etc.

The by-laws of the new company reorganized under the act provided:

"Sec. 1. To the extent necessary to provide and continue the rights and privileges of any member holding a mortuary assessment certificate, and to

preserve and secure the fulfillment of all contract obligations to him, and to continue and perpetuate in the company the power and authority to levy assessments and to do and perform all and everything necessary or expedient to enable it to carry out the mortuary assessment contracts in accordance with the terms thereof and with the law and present by-laws in such case made and provided, the present and existing by-laws shall continue in full force and effect."

In short, all old contracts were to be carried out and performed according to their terms on the old plan if the holder desired, and there is not a line or word in the case that indicates that such a corporation may increase assessments at will, as was done here. Both the Legislature and reorganized company seemed to have assumed that it could not lawfully be done. The court repeatedly states that the existing contracts were not changed, and that contract rights were not interfered with. I am also cited to *Polk v. Mutual Reserve Fund Life Association of New York*, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222, as authority for the defendant's contention here. But I fail to find in that case anything that supports the contention of the defendant which stated in the language of its counsel is that:

"A fraternal beneficiary society has the right to increase its rates and change its plan of insurance as necessity may require for the purpose of enabling it to meet its obligations to its members."

In the *Polk Case*, *supra*, the company was originally incorporated under chapter 267 of the Laws of New York of 1875. There was a reserved power in the Legislature to alter, amend, or repeal charters, etc. Section 52 of the Insurance Law of New York (chapter 38, General Laws of 1892, and amended by chapter 722, Laws of 1901) provided for the "reorganization of existing corporations and amendment of certificates." The court says:

"Following strictly the provisions of this section the association accepted the provisions of the insurance law, amended its charter, and became entitled to all the privileges of the law as if it had been originally incorporated thereunder."

The court then refers to the change made, and says:

"The effect of this was to broaden the business from that of merely cooperative and assessment life insurance to life insurance of every kind. It is conceded that what was done was within the authority conferred by the statute, and the subject for our consideration is whether any of the rights secured to the complainants by the Constitution of the United States has been impaired. * * * We answer this and the other questions upon the assumption, therefore, that the old corporation was still in existence, under a new name and with added powers, but with unchanged membership, and bound to perform all its existing obligations. Upon this view it is impossible to say that any of the contract obligations of the association to the complainants have been impaired by the reorganization. This was the view apparently accepted by the company, who, in its notice to its members, said: 'This reincorporation while insuring the stability of the company makes no change in your policy.'"

Then at page 327 of 207 U. S., at page 71 of 28 Sup. Ct. (52 L. Ed. 222), the court continues:

"The other two questions certified inquire whether the law under which the reincorporation was made, or the reincorporation and changes in power made under its provisions, are in violation of the fourteenth amendment to

the Constitution of the United States. These questions do not require separate or detailed consideration. As applied to the facts of this case, they are practically dealt with in the discussion which has preceded. It is not suggested that any rights secured to the complainants by the fourteenth amendment were violated in any other manner than by the reincorporation of the association without the consent of its members, the change in and addition to its powers, and the consequent effect upon the contract rights of the complainants and upon their relation to the corporation. But it has been shown that the contract rights of the complainant have not been affected by the reincorporation, and the same reasoning that leads to the conclusion that the changes in the charter powers, made under the reserved powers of the state, do not violate the contract clause of the Constitution, are apt to show that they do not violate the fourteenth amendment. In fact, the only suggestion of a violation of the fourteenth amendment made to us is that the reincorporation, under the circumstances of this case, deprived the complainants of their vested rights and privileges and property rights under their contracts, without due process of law. Since the incorporation has deprived the complainants of no vested rights, privileges or property, the contention fails."

I had never supposed that, when the Legislature of a state enacts a law authorizing the incorporation of insurance companies and the right to alter, amend, or repeal is expressly reserved in the act itself or by constitutional provision, it may not do so, and, if the law under which the incorporation took place is amended so as to confer new powers and privileges, I can see no objection to the corporation availing itself of the amendment. So long as fixed and vested rights are not interfered with, no member can complain of such action, and these cases in the Supreme Court of the United States not only recognize this principle, but are careful to point out that all contract rights were protected and preserved, and that no existing contract was impaired. There is no suggestion in either case that such a corporation, even to preserve its existence, may increase the amount of the assessments to be paid by the assured and definitely fixed by the contract of insurance without his consent and exact same on the penalty of forfeiting his contract and all benefits earned and paid for. Order of United Commercial Travelers of America v. Smith, 192 Fed. 102, 112 C. C. A. 442, is not in point, as it relates to an amendment to the constitution merely defining "injuries through external, violent or accidental means" to exclude any death, disability, or loss resulting from infection except when the same resulted from an open wound, and any death, disability, or loss of which there was no external and visible mark on the body, the dead body not being such a mark, except in case of drowning or asphyxiation. The former constitution provided that injuries through external, violent, or accidental means should not extend to any bodily injury of which there should be no external or visible signs. In *Green v. Supreme Council of Royal Arcanum et al.*, 144 App. Div. 761, 129 N. Y. Supp. 791, the court held:

"Where a contract between a member and a fraternal benefit insurance association provides for the payment of a fixed sum upon the death of the member, and that assessments shall be at a specified rate, neither the conditions upon which the same shall become payable can be altered, nor can the sum to be paid be reduced, nor the amount of the specified assessment increased without the consent of the member, which rule is not altered by the fact that the contract may reserve a power to amend the

by-laws in purely general terms. But if there be reserved in such contract a power to amend the laws governing the association reasonably designating the subjects thereof, so that a person when applying for membership is fairly advised that the terms of the contract he is about to make may be altered in the respects referred to, subsequent changes in the by-laws may be made, if reasonable, and the change must be deemed to have been assented to by the member."

[3] In the case at bar we fail to find any reservation of power to amend in the contract of insurance which in any way designates the subjects to which amendments shall relate. The language is, "these laws may be altered or amended" and "the provisions of these general laws may be altered or amended," etc. Under this language, giving it full effect, if one line or word could be amended, all could be, and the contract changed in its entirety. In the case last cited the benefit certificate expressly stated that the member should comply with the laws that "might thereafter be enacted to govern the relief fund." This the court construed as sufficiently explicit in providing for an amendment which increased the assessments to make the relief fund.

It is not questioned in the New York cases to which attention has been called at some length that under such general language the by-laws of a corporation or of an association may be amended in those respects which go to the general management and control of the company and the government of its internal affairs. When it comes to so amending by-laws, which are a part of the contract of insurance, as to materially affect and change the obligations of such contract and destroy rights or seriously impair rights vested, we have a different question. This subject of amending by-laws, and what may and may not be done under a general power, was ably, learnedly, and, I think, wisely and reasonably, discussed by Parker, Ch. J., in *Parish v. New York Produce Exchange*, 169 N. Y. 34, 45, 61 N. E. 977, 56 L. R. A. 149, where many cases are cited and in part quoted. In *Railway Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902, the charter of the corporation fixed the capital stock, and then expressly stated that such capital stock "may be increased from time to time at the pleasure of the said corporation," and also expressly stated that:

"All the corporate powers of the said corporation shall be vested in and exercised by a board of directors and such officers and agents as such board shall appoint."

The court held that the powers thus granted to the board of directors referred to the ordinary business transactions of the corporation only, and did not authorize such board to increase the capital stock. I think courts should and will hold that by-laws are made primarily for governmental purposes and the proper regulation and conduct and management of the affairs of the corporation or association, and not for the purpose of either making contracts or unmaking or changing or impairing the obligation of contracts already existing. By what percentage of the membership of these fraternal associations would it be understood that a consent to change or amend the by-laws of the company would carry a consent to change his pecuniary obligation to the association or corporation under a written contract with

it? It is said in some of the cases as a reason for holding that a general power to amend the by-laws carries the power to increase the fixed assessments of the member that to hold otherwise would work a hardship on the new members as they would be carrying the burden of low rates of assessment paid by old members. But is it not true that the new members come in voluntarily and assume the burdens, if any, of carrying out old contracts according to their terms? There are other decisions on this question, many of them in conflict, which will be found cited in the cases to which attention has been called. I have respect for all and for the courts pronouncing them, but cannot follow them all. This court is bound by the decisions of the Supreme Court of the United States and those of the Circuit Court of Appeals in the Second Circuit. I find no controlling case in either of these courts. I think the cases in the Supreme Court of the United States to which attention has been called, fairly construed, are in perfect harmony with the cases in the Court of Appeals of the state of New York which accord with my own views of the law, or what the law ought to be. I cannot assent to the proposition that for the reason an insured member of one of these fraternal beneficial associations occupies the dual position of insurer and insured, it is said, but incorrectly, he is therefore under an obligation and impliedly promises to provide means for making all contracts good. If we adopt this contention and carry it to its legitimate conclusion, the government of a state, or of the United States, may for the general good of all its people, when in its judgment necessary, change its contract with the citizen so as to impose on him onerous pecuniary obligations he never undertook to perform. He is bound to do what he promised to do in his contract with the government, but no more, and the government has no right to claim more or prescribe changes in his contract through its Legislature or judicial departments. Should a clause be inserted in the contract whereby the citizen, a party to such a contract with the government, should in general terms agree to be bound by all laws of the United States then in force or that might thereafter be enacted, would he be held to consent thereby to a change in the terms of his contract with the government made by some special act of Congress? I think such a construction would be unreasonable, oppressive, and unconstitutional. True he would be represented in Congress, true he would be interested in having all contracts of his government performed and the life and existence of his government prolonged and its credit preserved, but I am of opinion that this or these considerations would not authorize Congress to provide by law that every citizen of the United States holding a government bond for \$100 or more should accept 10 per cent. thereof in full payment, or pay into the treasury of the United States 90 per cent. of his holdings in order that all bonds outstanding of the same issue and of all subsequent issues should be fully paid. In New York towns and counties are declared to be corporations and their citizens may contract with them. They, if taxable, pay their proportion of all taxation, but their contracts are as sacred from attack by a vote of the people of the town, unless a special provision is contained therein as

are those made with a citizen of some other town or county. I dissent entirely from all the cases holding that the terms and obligations of a contract of insurance between one of these fraternal corporations and one of its members may be in any manner changed by an amendment to its constitution or by-laws, unless the power is specified in and granted by the law creating the corporation, under a general consent in the contract to be bound by all by-laws then in existence or that may thereafter be adopted.

[4] If defendant had proved by competent evidence that the alleged constitution and by-laws of 1888 had been duly adopted and put in force and were in force when the complainant made his application and received his certificate, the question would be in the case whether or not special power to increase assessments was sufficiently reserved thereby. The fact that the defendant offered in evidence no records of the Supreme Lodge, or excerpts therefrom, and failed to prove or offer evidence that the alleged new constitution and laws of 1888 were ever in the hands of its officers or members, or any of them, with the certain proof by complainant and the agent of defendant, Fredendall, that the constitution and laws of 1886 are the only ones they ever saw, and are the ones given to complainant and sent the agent by the corporation for distribution to members and distributed by him, satisfies me that such alleged new constitution and laws never became operative, at least so far as complainant is concerned. It is true that a member of one of these societies is presumed to know and be bound by the constitution and by-laws in existence, but the presumption may be rebutted by showing that the corporation itself gave to the member other constitution and by-laws on which he acted. To hold that a corporation may distribute to its members one set of constitution and by-laws for their information and guidance on which such members act, and then hold them to the provisions of another set, would violate every principle of justice.

Complainant's Exhibit D is the statement sent out and received by complainant headed: "Important. The Only Pythias Insurance." It contains the table referred to headed: "The following table of monthly payments shows the cost under each age and amount of endowment applied for." This table under the age 37 and amount applied for \$3,000 shows monthly payment to be \$3. This Exhibit D also contains the statement: "These payments do not increase [the words 'do not increase' italicised] with increasing age but always remain the same during good standing of the member." Mr. Powers, defendant's witness, was asked:

"When, if you know, was plaintiff's Exhibit D published and sent out, if it ever was published and sent out by the Supreme Lodge, Knights of Pythias, or by the board of control? Ans. In the year 1894."

This to me is entirely inconsistent with the claim that in 1888 an amendment to the constitution and by-laws had been adopted, and was then in force, permitting and authorizing an increase of the monthly assessments. I conclude that the complainant is entitled to a decree substantially as prayed for in his bill of complaint. The form may be settled at Auburn during the week of October 1, 1912.

MONTANA, W. & S. R. CO. v. MORLEY et al., Board of Railroad Com'rs of Montana.

(District Court, D. Montana. March 30, 1912.)

No. 1,009.

1. CARRIERS (§ 40*)—CAR EQUIPMENT—EXTENT.

A carrier is not required to keep a car equipment sufficiently extensive to meet the maximum output of freight offered by shippers for transportation at any part of the year, but is only required to furnish car facilities to shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122; Dec. Dig. § 40.*]

Duties and liabilities of carriers as to furnishing facilities for transportation, see note to Harp v. Choctaw, O. & G. R. Co., 61 C. C. A. 414.]

2. CARRIERS (§ 12*)—RATES—REGULATION—REMUNERATIVE RATE.

Where a freight rate has been made for the future, and a reasonable time has passed in which application of the rate to the business transacted can be made to ascertain whether it will be remunerative, the actual operation of the rate will be considered in determining whether it is remunerative or confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

3. CARRIERS (§ 18*)—RAILROAD RATES—REGULATION—CONFISCATORY RATES.

Judicial power will not interfere with the enforcement of a railroad rate made by a state railroad commission under legislative authority, unless it is clearly proven that the rate is so unreasonably low as to be confiscatory, and therefore a violation of the carrier's rights guaranteed by the fifth amendment of the federal Constitution.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

4. CONSTITUTIONAL LAW (§§ 242, 298*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—CONFISCATORY FREIGHT RATES.

A freight rate established by the state railroad commission, which will not admit of the carrier's earning such compensation as under the circumstances is just to it and to the public, deprives such carrier of its property without due process of law, and denies to it the equal protection of the laws in violation of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 691, 847; Dec. Dig. §§ 242, 298.*]

5. CARRIERS (§ 18*)—FREIGHT RATES—REGULATION—ESTABLISHMENT.

While the establishment of intrastate freight rates is primarily for the determination of state authorities, the question whether rates fixed by state authority are so unreasonably low as to deprive the carrier of its property without just compensation is a subject of judicial inquiry in a court of competent jurisdiction.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

6. CARRIERS (§ 12*)—FREIGHT RATES—REGULATION—REASONABLENESS—DETERMINATION—ELEMENTS.

Whether an intrastate freight rate is reasonable or confiscatory depends on the valuation of the railroad company's property, the income derived from the rate, and the proportion between the two.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

7. CARRIERS (§ 12*)—RAILROADS—FREIGHT RATES—VALUATION OF RAILROAD—DEPRECIATION.

In valuing a railroad to determine the reasonableness of a freight rate, a reasonable amount should be deducted from the reproductive value for depreciation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

8. CARRIERS (§ 12*)—FREIGHT RATES—VALUATION OF RAILROAD—GOOD WILL.

Where a railroad company, owning a monopoly of transportation between certain points, the tonnage of which consisted largely of coal transported from the mines to a junction with a transcontinental had never been able to pay interest on its bonds, had accumulated only a very limited equipment, and had not prospered to any material extent, it was not entitled to an addition to its reproductive value in determining the reasonableness of a freight rate for added value as a going concern.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

9. CARRIERS (§ 12*)—RAILROAD RATES—VALUATION OF RAILROAD—BONDED DEBT.

In ascertaining the valuation of a railroad to determine whether certain rates were reasonable or confiscatory, the bonded debt of the road was neither a complete nor accurate criterion of the value of the property.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

10. CARRIERS (§ 12*)—FREIGHT RATES—REASONABLENESS—EVIDENCE.

Evidence held to require a finding that the intrastate coal rate of 35 cents a ton, fixed by the Montana Board of Railroad Commissioners for transportation of coal originating on and destined for points beyond the line of the Montana, Wyoming & Southern Railroad Company, was unreasonable and confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

11. CARRIERS (§ 18*)—RATES—REGULATION—ESTABLISHMENT OF RATES.

In a suit to restrain the enforcement of intrastate freight rates established by a state railroad commission, the court's jurisdiction ends on finding that the rates fixed are unreasonable and confiscatory; the court being without jurisdiction to fix rates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

In Equity. Suit by the Montana, Wyoming & Southern Railroad Company against E. A. Morley and others to enjoin the enforcement of an intrastate coal rate fixed by the Board of Railroad Commissioners of Montana. Injunction granted.

Royal E. T. Riggs, of New York City, and John G. Skinner, of Red Lodge, Mont., for complainant.

Albert J. Galen, Atty. Gen. of Montana, William L. Murphy, Special Asst. Atty. Gen. of Missoula, Mont., and J. A. Poore, Asst. Atty. Gen. of Montana, for defendants.

HUNT, Circuit Judge. This is a suit in equity brought on October 3, 1910, by the Montana, Wyoming & Southern Railroad Company against the Board of Railroad Commissioners and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Attorney General of the state of Montana. The object is to enjoin the enforcement of a coal rate fixed by the Board of Railroad Commissioners of the state at 35 cents per ton for coal to be transported beyond the lines of the complainant's railroad. A temporary restraining order was granted, issues were framed, and by order of the Honorable Carl Rasch, then judge presiding in the Circuit Court of the United States in and for the District of Montana, reference was made to the master to take the testimony and find the facts. The theory of the bill is that the rate is so low as to be unreasonable and confiscatory and violative of the fourteenth amendment to the Constitution of the United States.

The Montana, Wyoming & Southern Railroad owns and operates a steam railroad beginning at Bridger, Carbon county, Mont., and extending in a southerly direction, following Clark's fork of the Yellowstone to Belfry, thence in a westerly direction, terminating in the coal fields at Bear Creek, Carbon county, Mont. The main line is a fraction over 25 miles in length, but the spurs and sidings aggregate 5 miles more. The road was constructed by the Yellowstone Park Railroad Company and operated from about May, 1905. Its capital stock was \$3,000,000 par value, of which \$2,478,000 was issued and outstanding, the bonded indebtedness of said company having been \$912,000, first mortgage, 5 per cent. 30-year gold bonds. The Yellowstone Park Railroad Company never paid interest on its bonds, and was in default. The Montana, Wyoming & Southern Railroad Company is incorporated with a capital stock of \$5,500,000 par value, of which \$1,000,000 par value is issued and outstanding. On September 1, 1909, the company made a first mortgage of all of its property to the Empire Trust Company of New York, to secure an issue of bonds aggregating \$5,000,000, bearing interest at 5 per cent. per annum, of which \$900,000 of bonds were issued and are now outstanding. On November 1, 1909, the company also made a car trust agreement, and delivered \$50,000 of its bonds, receiving therefor 57 box cars of the capacity of 80,000 pounds each. The first mortgage bonds of the par value of \$900,000, the equipment bonds of the par value of \$50,000, and 9,990 shares of the capital stock of the complainant company amounting to \$999,000, all were delivered to a bond and stock holders committee of the Yellowstone Park Railroad Company, in consideration for the sale and transfer to this complainant of the entire property of the Yellowstone Park Railroad Company, as of September 1, 1909, and also for the sale and transfer of the 57 box cars, referred to.

On July 25, 1907, the Railroad Commission of the State made an order effective August 15, 1907, establishing a rate of 50 cents per ton of 2,000 pounds as the proportional rate on through shipments of coal in car loads from points on the then line of the Yellowstone Park Railroad, and now of complainant, to points beyond its line, and thereafter, prior to January 1, 1909, the Commission reduced the rate from 50 cents per ton to 45 cents per ton, as the proportional rate. In April, 1909, hearings were had before the Commission,

on complaints against the prevailing freight rates, and an order was made on July 9, 1909, providing that on and after August 1, 1909, the local rate from points on the Yellowstone Park Railroad to Belfry and Bridger, Mont., should be 50 cents per ton, and requiring the Yellowstone Park Railroad Company to accept as a proportional rate 35 cents per ton on coal in car loads destined to points beyond its own line. After complainant acquired the property as of September 1, 1909, it asked for a rehearing, which was granted; but on February 10, 1910, the Commission denied complainant's application for an increase of rate. It appears that the Montana, Wyoming & Southern Railroad relies upon transportation of coal for its principal tonnage, that commodity furnishing 89 per cent. of the total revenue tonnage of the company. This tonnage originates on the complainant's road in the Bear Creek coal fields and is hauled to Bridger. The operation consists of hauling empty cars from Bridger to Bear Creek up grades from Belfry to Bear Creek, placing empty cars at some five coal mines, assembling cars when loaded, and hauling the loaded trains to Bridger. Owing to the grades between Belfry and Bear Creek, the haul is limited to 18 empties up the grade, and 40 loaded cars downgrade, and the conditions at the mines are such that an engine traveling in assembling cars considerably increases the mileage in addition to the haul from Bear Creek Junction to Bridger. The road owned 3 locomotives, 1 passenger coach, 5 flat cars, 5 bunk cars, 25 gondolas, 1 derrick car, 1 motor car, 2 cabooses, and 57 box cars. The master made full findings, summarizing the results of the operation of the complainant road, wherein he showed that the "corporate income" as appearing on the books from September 1, 1909, to September 1, 1910, was \$32,474.05, during which period the interest on the bonded indebtedness on the first mortgage bonds and equipment bonds accrued to the amount of \$47,083.34. A detail of the finding is as follows:

| | |
|--|--------------|
| Revenue from transportation..... | \$107,260 68 |
| Miscellaneous revenue from transportation..... | 192 00 |
| | <hr/> |
| Revenue from other than transportation..... | \$107,452 68 |
| | 2,932 38 |
| | <hr/> |
| Total operating revenue..... | \$110,385 06 |
| Operating expenses..... | 68,659 18 |
| | <hr/> |
| Net operating revenue..... | \$ 41,725 88 |
| Taxes accrued..... | 3,310 52 |
| | <hr/> |
| Operating income..... | \$ 38,415 36 |
| Miscellaneous income..... | 87 89 |
| Hire of equipment, Dr..... | 6,029 20 |
| | <hr/> |
| Corporate income..... | \$ 32,474 05 |

He found that the percentage of total operating expenses to total operating revenues in that year was 62.19 per cent.; that the business of the corporation was skillfully and economically man-

aged; that during the year complainant provided for depreciation on its equipment, ties, rails, and bridges, by properly maintaining a charge to operating expenses depreciation accounts to the amount of \$10,394.15; that the annual depreciation on the complainant's property, in addition to said sum of \$10,394.15, and for which provision should be made out of operating expenses, is \$12,694.55; and that, if the additional sum of \$12,694.55 had been properly charged in the said year (1909-10) to earnings, the corporate income for the year would have been the sum of \$19,779.50. It was also found that the average cost of service per ton of commodities of all classes transported, after proper allowance has been made for depreciation, is 32.1 cents per ton; that a reasonable and just return on the value of the complainant's property was not less than the sum of 10 per cent. per annum; that the value of the complainant's real estate, based upon the average value per acre of the surrounding country used for agricultural purposes, was \$44,362; that the cost of reacquiring such real estate and right of way at the time set forth in the complaint would have been twice the value of the property which it had acquired for right of way, and $1\frac{1}{2}$ times the value of property sought to be acquired for terminals by reason of consequential damages necessarily paid to landowners, cost of condemnation proceedings, commissioner fees, etc.; and that the real estate should therefore be valued at \$78,207. He found that the cost of reproduction of grading for roadbed and spurs was \$110,028.50; that the cost of reproduction of bridges and trestles was \$11,256; of culverts and waterways, \$4,500; of cattle guards, road crossings, signs, and riprap, \$3,290; of fences, \$4,125; of telephone lines, \$3,525; of switches, \$11,025; of reproduction of track per mile and the mileage, \$214,222.96; that the value of buildings was \$21,875; and of water stations, \$3,000. It was found that the cost of reproduction of real estate, grading, trestles, culverts, waterways, cattle guards, road crossings, signs, riprap, fencing, telephone, switches, track, and buildings was as follows:

| | |
|----------------------|---------------------|
| Real estate..... | \$ 78,207 00 |
| Grading | 110,028 50 |
| Trestles | 11,256 00 |
| Culverts | 4,500 00 |
| Cattle guards | 3,290 00 |
| Fencing | 4,125 00 |
| Telephone | 3,525 00 |
| Switches | 11,025 00 |
| Track | 214,222 96 |
| Buildings | 21,875 00 |
| Water stations | 3,000 00 |
| Total | <u>\$465,054 46</u> |

The master also found that complainant should be allowed, as a proper, necessary, and usual cost of reproduction, 10 per cent. on \$465,054.46 for contingencies; that it should also be allowed 10 per cent. on \$511,559 for engineering, superintendence, organization, fees, and legal expenses; that it should be allowed loss of in-

terest during construction at the rate of 5 per cent. on the sum of \$562,715.89; that it should be allowed also a reasonable discount on securities issued as security for money borrowed which was placed at 15 per cent. on the amount of \$562,715.89. The value of the equipment of the complainant was found to be \$101,000, and the supplies on hand, \$5,200. The master deducted \$50,289.78 from the cost of reproduction anew in order to arrive at the value of complainant's property in its condition as it existed in September, 1909, to February, 1910. After these figures had been made, it was found that the value of the physical property of the complainant, used in its business, was \$731,661.28. In addition to tangible property values, value was allowed, by reason of the organization of the complainant, its location, and because of the fact that it is transacting business. This added value was put at \$135,000, which brought the total value of the property at the time of the commencement of the suit to \$866,661.28. The master found that, after proper deduction for depreciation from the income of complainant \$32,474.05, the corporate income from September 1, 1909, to September 1, 1910, was \$19,779.50, or 2.24½ per cent. return on the valuation of \$866,661.28.

In reducing the rate upon coal transported by the complainant railroad, it was the opinion of the Railroad Commission of the state, as expressed in its report dated February 10, 1910, that the carrier named was not equipped to handle the available business which the coal companies of the Bear Creek field were prepared to give it. This, the Commission said, was "owing to the very poor condition of its power * * * and the further fact that the company neither owns nor controls any cars whatever suitable for interchange with other lines of railroad, but is dependent entirely upon the disposition or ability of the Northern Pacific Railway Company to supply the equipment for their use, resulting in an exceedingly uncertain car supply, which places the mines much at a disadvantage, not knowing what to expect, and therefore unprepared to work to their maximum capacity, even on days when there are enough cars, as it is impossible to maintain a full complement of miners who under these conditions could only at best work intermittently." A remedy was then suggested in this language:

"This whole question, as found by the Commission, can be remedied by the proper equipment of the road, to the extent that it can assure the mine owners sufficient and continuous service, thus enabling the latter to extend their operations to the maximum capacity, and furnishing the said Montana, Wyoming & Southern with a much greater tonnage for transportation over its line of railroad. If this were done, there is no question but that the present rate of 35 cents per ton would be amply remunerative to pay all fixed charges, interest, etc. In fact, the following comparison of rates on the Northern Pacific should serve to dispose of any doubt on that point. The M., W. & S. gets not less than 35 cents per ton on every ton of coal handled. The rate per ton per mile, figuring 1.591 cents, while the Northern Pacific, taking into consideration the long, short and intermediate hauls to all stations within the state, averages on Bear Creek coal .689 cents per ton per mile. It will be readily seen that even with the reduced rate of 35 cents

the M. W. & S. receives 131 per cent. higher rate than the Northern Pacific on a ton mile basis."

Thus, in due course of trying the issues, it became material to inquire into the adequacy of equipment to give service to the coal shippers, and to the service conditions between September 1, 1909, and September 1, 1910. Considerable evidence was adduced upon the point before the master, and his finding is that complainant during the time mentioned gave reasonably prompt and efficient service to shippers, except during December, 1909, when extraordinary conditions prevailed, over which this complainant had no control. Examination of the testimony shows that the difficulty in December, 1909, and to an extent also in January and February, 1910, was car shortage. It appears that it is between September and February that the coal mines are most busy, and as a consequence it is during these months that the demand for cars is greatest. It was also clearly shown that the Northern Pacific Railroad, upon which it is conceded the complainant depended largely for car supply, failed to furnish enough cars to the complainant at Bridger during the months named, and that at times said company delayed moving loaded cars delivered to it at Bridger. But it appears that such conditions were due to heavy snowfalls, cold weather, and during part of December to a strike on the line of the Northern Pacific, which interfered with traffic movement of coal shipped over complainant's road. It is proved that the winter of 1909-10 was very severe. It is not disputed that on December 1, 1909, the complainant company had 63 cars of coal, which had been delivered to the Northern Pacific at Bridger; nor that there were 83 cars loaded with coal in the Bridger yards on December 2d, and that the Northern Pacific delayed moving these loaded cars until about the 6th or 7th of the month, when 55 of the 83 cars were taken out. It is also in evidence that on December 22, 1909, the Northern Pacific notified the complainant company that no cars destined to Butte or beyond would be received. This seems to have been due to strike conditions. In December, 1909, complainant ordered 1,080 coal cars from the Northern Pacific, but was only able to secure 642. The then manager of the complainant made every effort to secure additional cars, but did not get them. In January, 1910, complainant was also unable to obtain a full supply of cars, but owing to storms the cars were not supplied. It is shown that the cars which the Northern Pacific delivered to complainant at Bridger were, as a rule, promptly taken up to the mines by the complainant company. Now, inasmuch as the complainant necessarily depended on the Northern Pacific Railroad for an adequate number of cars and for the movement of any and all cars beyond Bridger, and inasmuch as it was delay in movement of freight and cars that caused the main difficulties, possession of a larger number of cars than were furnished, no matter who owned them, would not have bettered the condition; hence the question of ownership of car equipment during December, 1909, and January, 1910, loses real importance in the case.

[1] In *Logan Coal Co. v. Pennsylvania Railroad Co.* (C. C.) 154 Fed. 497, the following language of Judge Holland is pertinent to the situation involved:

"It is true the defendant company is required to furnish sufficient facilities at all times to transport the merchandise of shippers along its route; but it occurs in the bituminous coal mining industry in certain of the winter months of the year that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not required to keep a car equipment sufficiently extensive to meet the maximum output at any part of the year, but that it is only required to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year."

The concession referred to in that case was made with correct understanding of the law which applies herein. After February, 1910, when the output at the mines decreased, there was adequate car service. It is of moment to recall that the mines had limited storage capacities, and on this account were dependent upon immediate supply of cars to ship the coal mined. And while there was in fact lack of cars to meet the unusual demand to transport the output in December and January, still the conditions were because of lack of movement and so largely due to the weather, to strikes in part, and to the Northern Pacific delays because of weather and strikes, that complainant ought not to be made to suffer.

[2] Again, the prediction of the Commission to the effect that better equipment and service would be followed by extension of operations and increased tonnage even at the reduced rate has not been fulfilled, for the actual experience of months of operation after the rate was reduced, during 10 months of which time there was full opportunity to move all coal mined because of ample facilities and service, has demonstrated that the coal shipments materially decreased; it appearing that between September 1, 1908, and September 1, 1909, 264,680 tons were transported, while between September 1, 1909, and September 1, 1910, there were only 251,163 tons carried.

Naturally, the Commission was called upon to act upon what then appeared to it to justify a reduction for the future. Its action was legislative in character, and, as the rate was for transportation wholly within the state, primarily the state authorities had to determine the matter. The state Commission could not accurately determine in advance what the effect of the reduction of the rate would be, but could only use its best judgment on the evidence before it, and consider whether the new rate would result in such an increase of volume of business as would make it profitable or not. But the rate having become effective for a long time, and being attacked in judicial proceedings, the court is in a better position because it has the aid of a statement of the business actually done since the rate was made effective. The rule is well established that where a rate has been made for the future, and a reasonable time has passed in which application of the rate to the business transacted can be made to ascertain whether upon the basis of the rate it will be remunerative, then a new situation is presented, and a judicial question is involved which the courts will

determine by settling the rights of the parties as they appear upon the existing facts. *Chicago & Northwestern Railroad v. Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744. To conclude on this branch. As the case is presented by the evidence before the master, I am constrained to hold that the complainant carrier has shown that it was not guilty of breach of duty in respect to furnishing or moving cars, and should not be held responsible for the failure on the part of another carrier, the Northern Pacific, to have furnished or moved cars promptly at the times hereinbefore referred to; and, in the light of experience of the 12 months after the order of the Commission was in effect, it is clear that the opinion of the Commission that shipments of coal would increase under the reduced rate was not correct, hence was erroneously used as a basis of action for the future rate.

[3] But, notwithstanding these things, judicial power will not interfere with the enforcement of the rate unless complainant has clearly proven that it is so unreasonably low as to conflict with the constitutional rights of the carrier, as guaranteed by the fifth amendment to the Constitution of the United States; that is to say, unless it is confiscatory. *Texas & Pac. Ry. Co. v. R. R. Commission of Louisiana*, 192 Fed. 280, 112 C. C. A. 538.

[4] In *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the Supreme Court held that a regulation, made under the authority of a state enactment establishing rates for the transportation of property by railroad that will not admit of the carrier's earning such compensation as under the circumstances is just to it and to the public, deprives such carrier of its property without due process of law, and denies to it the equal protection of the laws, and therefore becomes repugnant to the fourteenth amendment of the Constitution of the United States.

[5] The doctrine was also there announced that, while rates for the transportation of property within the limits of a state are primarily for determination by the authorities of the state, the question whether rates fixed by the authority of the state are so unreasonably low as to deprive the carrier of its property without just compensation is one not to be conclusively determined by the law-making power of the state, or by regulations adopted under the authority of the state, but may become the subject of judicial inquiry in a court of competent jurisdiction.

[6] It comes therefore to this: Whether the property of the complaining carrier has been taken and will be taken without right by the continuance of the order of the Commission depends upon the valuation of the property, the income derived from the new rate, and the proportion between the two. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 228, 29 Sup. Ct. 67, 53 L. Ed. 150. So it becomes necessary to get at the fair value of the complainant's railroad.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 52, 29 Sup. Ct. 192, 53 L. Ed. 382, the Supreme Court held that the value of the property there involved (which was real estate) was to be determined as of the time when the inquiry was made regarding the rates, and that, if the property which physically entered into the consideration of

the question of rates had increased in value since it was acquired, the company was entitled to the benefit of such increase.

Inasmuch as there are no circumstances which except the present case from the rule just cited, the court will regard the situation as it existed in February, 1910, when the Railroad Commission made its order. The complainant asked the master to accept the estimates testified to by Mr. Morris A. Zook. Mr. Zook is evidently a man of education and of unusually large experience as a civil engineer in railroad construction; and he has also devoted attention to the economics of railroads. He has been called upon to participate in the physical valuation of some of the most important railroad systems in the country, notably the New York, New Haven & Hartford. Mr. Zook proceeded upon the assumption that, in order to ascertain the value of the property of the complainant company, estimated cost of reproduction became a fundamental element. This assumption conforms with what can now be said to be the general view of the Supreme Court of the United States, as well as of distinguished economists who have written upon and testified to the subject. Nebraska Rate Case (*Smyth v. Ames*) 169 U. S. 546, 18 Sup. Ct. 418, 42 L. Ed. 819. But it is in applying the rule that difficulties occur.

Mr. Zook made the total cost of reproduction \$891,614.31. Allowing for a depreciation of three years, he deducted \$59,556.03, which left his estimate of the value of the physical property of the road upon reproduction basis at \$832,066.32. He thereupon gave this testimony:

"Q. Now, Mr. Zook, in your opinion, is the cost of reproduction of a railroad, which maintains an organization and is a going concern, a proper measure of the value of that railroad? A. No, sir.

"Q. What additional elements, in your opinion, should be taken into consideration in valuing a railroad? A. Well, value is determined by use, and without use we have not any value. The element which enters into its value is the value as a going concern.

"Q. What elements go to make up its value as a going concern? A. As a going concern, the value of its organization, the value of its strategic position, the value of the development of the business and property along its line, the value of its earning capacity on a fair basis.

"Q. What do you mean by a fair basis as an earning capacity, upon what rates? A. What would be a fair return for services rendered is the earning capacity.

"Q. Would the rates allowed for similar services in other localities have any figure, in your mind, as to establishing a fair rate, from the standpoint of cost of services only? A. I think that the rates should be as good as those allowed for similar services in other localities.

"Q. Now, in your opinion, how much is the value of the Montana, Wyoming & Southern Railroad Company enhanced by its being a going concern, taking into consideration the elements you have mentioned, over and above what it would cost to reproduce its physical property? A. That is a matter of judgment, and I have assumed it to be equal to \$150,000.

"Q. How do you arrive at that figure? A. That is taking a three-year period at \$50,000 per year, \$50,000 to be about the earning capacity for that three-year period.

"Q. That is per annum? A. Yes, sir.

"Q. And adding the value of \$150,000 to the figure you have already mentioned, what amount does that give you? A. That makes a total of \$982,058.18."

On cross-examination, witness said that he took the three years as a basis because that was the usual period allowed in order to ascertain the present worth of the value of a going concern, and that he reached the conclusion that the company should do a business of \$50,000 a year by examination of their reports of earnings for two years prior to 1910, which disclosed that they were earning between \$40,000 and \$50,000 per year. Witness was asked if, under the rates being charged for coal, 35 cents per ton on the amount of tonnage furnished to the road, it was unable to pay interest charges, fixed charges, and operating expenses, how he could put the value that he did upon the road as a going concern? He said he did not take into account the fixed charges; that, if 251,000 tons were used as a basis at 45 cents per ton, gross earnings would be \$112,950. Allowing 60 per cent., or \$67,770, for operating expenses, there would be left \$45,180 for earnings.

Division of Mr. Zook's statements gives us these elements in estimating value: (1) Reproducing the road as a physical thing; (2) use as a going concern; (3) strategic position; and (4) earning capacity.

It is convenient to examine these elements seriatim.

Real estate: The master's finding of \$78,207 as the value of the real estate for railroad purposes appears to be sustained by evidence and to have been arrived at by consideration of the fair value of the land taken and the damages to the residue in consequence of a part of the tract having been taken for railroad purposes. The rule adopted was that for the use of the railroad twice the value of acreage property should be paid and $1\frac{1}{2}$ times the value of the property for station and grounds in the vicinity of towns.

Grading: The estimate of the value of grading as found by the master was \$110,028.50. There was a serious conflict in the estimates of the value of the grading due principally to discrepancies in the estimated quantity of cubic yards of earth which had been removed, and to the price per cubic yard which should be allowed for cost of removal. Mr. Zook allowed for 340,500 cubic yards at 30 cents a cubic yard, while Mr. Crookes, an engineer of experience and ability, called in behalf of respondent, estimated 242,122 cubic yards at 15 cents a cubic yard. Mr. Zook's estimate of loose and solid rock was also larger than Mr. Crookes'. The differences between these engineers arose because of the difference in methods of measurement; but Mr. Zook, when he made his estimates, had a profile map with him, showing the original contour of the ground, while Mr. Crookes did not have. They varied also in estimates of shrinkage and fills. Mr. Zook included in his estimates grading upon certain spurs and in certain yards, and grading to several of the various mines to which spurs ran, while Mr. Crookes appears to have made no estimate upon these latter matters. Mr. Zook spent 10 days in making his estimates and described with care the

manner of observation and physical measurement which he had employed in estimating the value of this and other railroads. The master's finding as to the quantity and character is well sustained by the evidence, and the price allowed by the master for the yardage is also sustained, and just.

Trestles: The estimate of \$11,256 for trestles, based upon 938 linear feet at \$12 a foot, was correctly found.

Culverts and waterways: The finding of the master of \$4,500 as the value of culverts and waterways appears to be just, as does the estimated value of \$500 for cattle guards, \$170 for road crossings, \$120 for signs, and \$2,500 for riprap. These several findings have been worked out of the conflicting evidence of the engineers, and are all well sustained by substantial evidence.

Fencing: The item of fencing was placed by the master at \$4,125. This appears to be fair.

Telephone: The master allowed \$3,525 as the value of the telephone line belonging to the complainant corporation. Here again the master seems to have adopted a conservative valuation, based upon $23\frac{1}{2}$ miles at \$150 per mile. Mr. Zook's estimate upon this item was \$200 a mile, while Mr. Crookes' was \$125 per mile.

Switches: For switches the master allowed for 49 complete switches, at \$225 each, the sum of \$11,025. There was a discrepancy between the estimates of the engineers with respect to this item, due in part to the labor charge calculations and to guard rail costs. The master's finding will not be disturbed.

Track: The findings of the estimated cost of reproduction of track per mile were based on 20 miles with 60-pound rails; 5 miles of sidings with 60-pound rails; and 5.1 miles of track with 72-pound rails. The master allowed for 20 miles of track with 60-pound rails at \$6,982.90, \$139,658; and for 5 miles of 60-pound rail at \$6,982.90, \$34,914.50; and for 5.1 miles with 72-pound rails at \$7,774.60, \$39,650.46. This mileage appears to have been correctly calculated, and the allowances made by the master conform more closely to the estimates of Mr. Crookes than to those of Mr. Zook. They appear to have been based upon the evidence of actual cost of reproduction of track.

Estimates include all spikes, cross-ties (2,822 ties to the mile, at 62 cents), tie plates, track laying and surfacing, and ballasting (\$500 per mile). The engineers did not agree upon the item of ballasting. The complainant's road was referred to as mud ballasted, and appears not to have been thoroughly ballasted, as railroad authorities would regard it. An estimate of \$1,200 per mile to ballast the road properly was made by some of the witnesses; the weight of the testimony going to show that it would be necessary to obtain earth for proper ballasting from places other than the sides of the embankments of the road. Mr. Zook estimated \$500 per mile as the cost of proper earth ballasting, but thought that the labor cost of getting earth at that rate would be no less than for gravel. The findings of the master are fully supported.

Buildings: The value of the buildings, placed at \$21,875 by the

master, is sustained; so, too, is the item of \$3,000 as the estimated cost of reproduction of water stations.

We have therefore as a fair estimate of the cost of reproduction the sum of \$465,054.46.

Contingencies: To this sum, according to the testimony of the engineers for both parties, there should be added 10 per cent. for contingencies, or \$46,505.44. By "contingencies" are meant such things as could not reasonably have been foreseen at the time of making original estimates by engineers.

Engineering, superintendence, etc.: There should also be included in the cost of reproduction an item for engineering, legal expense, and superintendence. As there is no substantial conflict in the testimony as to the propriety of this allowance, it can be included at 10 per cent. Witnesses divided it as follows: Engineering, 5 per cent.; legal expenses, 3 per cent.; superintendence, 2 per cent. This allowance may therefore stand as 10 per cent. upon \$511,559.90, or \$51,155.99.

Interest: The master allowed, as a necessary and usual cost of reproduction, 5 per cent. upon the sum of \$562,715.89, or \$28,135.79, as loss of interest during construction. This would include 5 per cent. upon the use of money for the practical total cost of reproduction, and allow a year for construction itself, or allow an average of 5 per cent. for the money used if construction extended over longer period. Complainant's evidence upon the point is to the effect that such a road could not be built with the same facility that one less isolated could be; that lack of organization, lack of transportation facilities, lack of ready material, would make reproduction slower and more expensive. Inasmuch as the justice of allowance of interest during construction is admitted, the basis of the master's finding is reasonable, and his estimate must stand. *Pioneer Telephone & Telegraph Co. v. Westenhaber et al.*, 29 Okl. 429, 118 Pac. 354.

Discount on securities: The master allowed 15 per cent. on \$562,715.89, or \$84,407.38, as a necessary and usual item of cost of reproduction. There was no evidence offered on behalf of the Railroad Commission tending to dispute the conditions which the witnesses for the complainant said existed generally throughout investing communities, namely, that a railroad, such as the one under investigation, is only able to make its financial arrangements by regarding as a part of the construction cost to which it is subjected a discount representing the difference between the amount derived from the sale of its bonds and the amount which the bonds must eventually cost the company. Recognition of discounts on securities, based upon the considerations just expressed, has been made by the courts. Of course, there never could be any allowance whereby a corporation can be allowed to capitalize its own lack of credit; but where the bonds are sold at a reasonable discount, and bear a low rate of interest, it would seem to be the equivalent of selling the bonds at par with a high rate of interest. Here the 15 per cent. seems to be reasonable, the testimony showing that upon such a discount the bonds are put upon an equality in marketable conditions with the bonds of some of the very largest and most successful railroads in the country.

Equipment: There should also be included in the estimate an allowance for equipment, which, under the evidence, may be taken as found by the master, \$101,000; also, for supplies on hand, \$5,200.

[7] Depreciation: Following the doctrine of *City of Knoxville v. Knoxville Waterworks*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, the master made reasonable depreciation allowances. The reason for such findings is that it is fair to deduct from the estimated cost of reproduction anew an amount which will represent the wear and tear on the property since it was put into operation. Depreciation accounts find their foundation in efforts to equalize profits during different years, so as to avoid requiring the total cost of improvements to appear as an expense of the year when such improvement proves unserviceable. The systems of estimating depreciation may differ, but the principle of the allowance for depreciation rests upon the foundation already stated. It goes without more than mention that ordinary wear and tear and decay are the principal causes for depreciation, although other factors which enter into the matter are that what is in use becomes out of date because of improvement in scientific knowledge or improved methods. Accountants and students, as well as practical railroad men, recognize the necessity for a railroad company to provide for a depreciation fund or account. The Interstate Commerce Commission, in the performance of its great services to the public and to railroad carriers as well, provides that depreciation accounts of equipment shall be kept by railroad carriers, and that there shall be included within such accounts "a monthly charge of one-twelfth of ——— per cent. per annum of the original cost (estimated if not known) record value or purchase price" of equipment, to provide a fund for replacement when retired.

The master allowed what appeared on the carrier's books, namely, \$10,394.15, made up of these items: Equipment, \$2,555.63; rails, \$1,487.76; ties, \$5,279.04; and bridges and trestles, \$1,071.72. This was depreciation on the books between September 1, 1909, and September 1, 1910. But he allowed the additional sum of \$12,694.55 depreciation, which he found ought to have been properly charged between September 1, 1909, and September 1, 1910, to earnings, and for which provision should have been made out of operating expenses by complainant, in order that its property might not become depreciated in efficiency or value. The additional allowance was based upon testimony that the entries in the books as just heretofore stated did not truly represent the depreciation account. One expert witness said he would allow, as proper depreciation of equipment \$4,955, and proper depreciation and reserve for ties, rails, bridges, and buildings, \$18,153.70. In this way he arrived at the difference between what was charged and what he said ought to have been charged, or \$12,714.55. There is a slight discrepancy in these figures and those found by the master (\$12,694.55), due probably to clerical error. Equipment depreciation was based upon 20 years' life for a locomotive and 5 per cent. depreciation for each year, or \$1,450 for each year, with a salvage of \$180 per year, or net depreciation, \$1,270 per year. The depreciation allowances upon rails were based upon

percentages on the estimated weights of rails per ton and the estimated life of a rail, put at 16 years. Allowing for tie depreciation, it was estimated that at the end of 7 years the depreciation would equal the original cost of installment, the value of each tie being put at 50 cents when placed on the track, allowing a 7-year life for each tie from the time of the estimate.

Part of the additional allowance was estimated depreciation upon buildings, upon a 25-year life with no salvage, and upon culverts and trestles, on the basis of an 8-year life, or $12\frac{1}{2}$ per cent.

While the additional depreciation allowance of \$12,694.55 per annum accords with the evidence of complainant, and seems to justify the master's finding, yet there are so many differences in the statements of the witnesses as to the estimates, all of which depend upon opinions of what should or should not be, that it appears to be just to hold to the \$10,394.15 shown on the books for 1909-10. Gathering from the evidence that different portions of the track were added at different times after 1906, and that different sidings had been built, and that some of the ties had been in the track for one, two, and three years only, estimate of wear and tear may be fairly made as of three years prior to March, 1910. The deduction for depreciation, therefore, should be three times \$10,394.15, or \$31,182.45.

[8] Value as a going concern: Briefly stated, the argument of complainant is that mere cost of reproduction is not by itself a proper measure of the value of a railroad; that there are such things as strategic position, organization, value of possible and probable development of business and property along its line, and earning capacity, to be considered and estimated by standards of pecuniary value. The master took this view, which has heretofore been expressed in the quoted testimony of Mr. Zook, and allowed \$135,000 to cover the item.

I shall not dispute the proposition that a prosperous competing railroad doing a good business, earning substantial profits, with an established popularity, affording ample facilities for moving freight or passengers, should be valued with regard to the elements just mentioned. And this to an extent is true of a railroad which is a monopoly. *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594, decided by the Supreme Court March 11, 1912. But up to the time of the inquiry into the rates involved in this case, this railroad has never paid interest upon its bonds; nor has it accumulated more than a very limited equipment; nor has it prospered to any apparent material extent. Although without a competitor, it never seems to have had to its credit a well-established business; nor did it keep up its roadbed as it should have. Its history shows that it languished and drifted into the hands of receivers. True, under complainant's ownership, it has added to its equipment and would seem to be well and economically managed, yet it is significant that its coal shipments from September, 1909, to September, 1910, were less than in the previous 12 months. Nevertheless, its principal patrons have expressed dissatisfaction with the service, and there seems to be nothing either by way of mere good will or ad-

vantage incident to the possession of a monopoly, which, although of some value, justifies present attempt to ascertain such valuation, independent of the whole structure.

Certainly the property of the Montana, Wyoming & Southern has a value independent of use or right of use. The rails, ties, switches, stations, fences, and all such things are valuable, and, unless they can be used by the complainant company in the place where they are now, their value is away below the estimates allowed by the master. It is evident, however, that, in the estimates allowed, the fact that the whole railroad is one in operation and use has been considered, and that values upon the several things have been based upon value of the railroad as in use. I am unable to see why, under the facts, at this time, there should be separation of going concern value from railroad value. *Water District v. Water Company*, 99 Me. 371, 59 Atl. 537; *Spring Valley Waterworks v. City of San Francisco* (C. C.) 192 Fed. 137. It is proper therefore that the master's finding (No. 50) should be disregarded, and it will be.

Summarizing now, and we have as the value of the physical property of the complainant used in its business for the public convenience these sums:

| | |
|--|--------------|
| Real estate..... | \$ 78,207 00 |
| Grading | 110,028 50 |
| Trestles | 11,256 00 |
| Culverts and waterways..... | 4,500 00 |
| Cattle guards..... | 500 00 |
| Road crossings..... | 170 00 |
| Signs | 120 00 |
| Riprap | 2,500 00 |
| Fencing | 4,125 00 |
| Telephone | 3,525 00 |
| Switches | 11,025 00 |
| | 139,658 00 |
| Track | 34,914 50 |
| | 39,650 46 |
| Buildings | 21,875 00 |
| Water stations..... | 3,000 00 |
| Contingencies | 46,505 44 |
| Engineering, superintendence, etc..... | 51,155 99 |
| Interest during construction..... | 28,135 79 |
| Discount on securities..... | 84,407 00 |
| Equipment | 101,000 00 |
| Supplies | 5,200 00 |
| Total | \$781,459 06 |
| To be deducted for depreciation..... | 31,182 45 |
| Total cost of reproduction..... | \$750,276 61 |

Now if we take the "gross corporate income" of the property to be \$32,474.05, and accept the valuation to be \$750,276.61, it will appear that the corporate income affords 4.3 per cent. return; and if we take the total revenue freight for the year 1909-10 at 281,907 tons, and divide the entire operating expenses, \$77,998.90 (which include depreciation, \$10,394.15, taxes, \$3,310.52, car hire, \$6,029.20, and miscellaneous expenses, \$87.80), by the total tonnage, we find the cost per ton of freight to be 27.7 cents. From these figures it is plain that

not only was the complainant unable to meet annual interest charges on its bonded debt of \$950,000, but that there was a deficit of \$15,-025.95. Complainant company would therefore find itself unable to meet its obligations upon a continuance of the rate of 35 cents per ton for coal, with a haul of, say, 251,163 tons.

[8] But we must not accept the amount of the bonded debt as a complete or accurate criterion of the value of the property. Reference to it may be had merely for purposes of argument. President Hadley, of Yale University, in the report of the Railroad Securities Commission to the President of the United States, dated November 1, 1911, says that:

"In so far as the value of the property is an element in rate regulation the outstanding securities are of so little evidentiary weight that it would probably be of distinct advantage if courts and commissions would disregard them entirely, except as a part of the financial history of the property, and would insist upon direct evidence of the actual money invested and of the present value of the properties."

[10] Having found that the operating expenses were no greater than were reasonably necessary, and that administration by this complainant has been had with due regard to the necessities of strict economy, and that the amount expended for supplies, wages, and salaries has been reasonable and necessary, we can go directly to estimates. We find then that a continuance of the present rate upon coal, which is 89 per cent. of the traffic carried, would mean that complainant would receive \$87,907.05 revenue for coal carried. Now 89 per cent. of the total operating expenses, put at \$77,998.90, is \$69,419.02; and 89 per cent. of the value, \$750,276.61, is \$667,746.18. If coal would bear its burden of contributing, let us say, to illustrate, 10 per cent. on \$667,746.18, or \$66,774.61, this, when added to \$69,419.02, would amount \$136,193.63, which coal must yield. Deducting now the actual coal receipts (on a 35-cent per ton basis), \$87,907.05, from what on our assumption coal should pay, \$136,193.63, and there is a deficit of \$48,-286.58. To make up this deficit, the rate on coal, still estimating 251,-163 tons as the tonnage to be carried, would have to be increased 19.22 cents over 35 cents per ton, or to 54.22 cents per ton.

Let us try it in another way: Accepting always that a reasonable return is one which, under honest accounting and responsible management, will attract the amount of investors' money needed for the development of railroad facilities, we have here an investment made by the owners which is evidently regarded by them as reasonably secure. They are therefore entitled to a return upon their investment which approximates the rate of interest which prevails in other lines of industry in and about that part of Montana wherein their railroad is operated. There is some uncertainty in the future of this railroad; but, on the other hand, it is proper to consider not only the coal mines, but also the probable development of the agricultural country in the valley below the coal mines, and possible strategic advantage in situation. Eight per cent. per annum is the legal rate of interest in the state of Montana, and within 2 per cent. of what bankers have testified is a rate frequently demanded upon small loans in Carbon county,

Mont., into which the railroad runs. Eight per cent. may therefore be used as a fair basis to illustrate return upon the investment. So, without fixing any rate, but merely for further illustration, we will hold to 8 per cent. Keeping to \$667,746.18 as the proportion of the value of the road upon which coal should pay interest, and increasing 89 per cent. of the operating expenses by one-fourth, thus making them \$86,773.77, to earn the 8 per cent., at 35 cents per ton, it would be necessary for the railroad to take in \$140,193.46 on coal account, or to carry 400,552 tons, which is not far from the tonnage estimate which Commissioner Stanton, of the Railroad Commission, believed would be carried upon the reduction of the rate to 35 cents per ton. Or, using 9 per cent. as a fair return upon the value of the property, it will be necessary for the railroad to earn \$146,870.92 on coal, which would require it to carry 419,631 tons at 35 cents per ton, which tonnage even more nearly approximates the estimates of Commissioner Stanton and of the mineowners themselves in estimating the effect of the reduction.

This brings out in a very strong way the fact that this controversy is the consequence of the mistaken belief of all concerned that increased tonnage would follow reduced rates.

It is recognized that, in making the above mathematical demonstration, the imposition of the burden upon coal to the entire traffic and operating expenses is necessarily arbitrary, yet it would seem to be more reasonable to reach results by the method adopted than to consider the entire road a coal road, and more accurate than to say that 89 per cent. of the traffic should pay fair return upon the entire valuation of the property.

Comparison with rates on other railroads is appropriate. The Commission fixed the rates on coal on the Yellowstone Railway Company a distance of $10\frac{1}{2}$ miles at a through rate of 25 cents per ton, and on coal transported on the Montana Railroad from Lewistown to Harlowtown, a distance of 63 miles, at 90 cents per ton; from Lewistown to Oka, a distance of 50 miles, at 80 cents per ton; from Lewistown to Straw, a distance of 29 miles, at 60 cents per ton. The Commission also allowed the Northern Pacific proportional through rate from Bridger per ton of coal to Helena, Butte, Townsend, Toston, and Prickly Pear Junction, at \$1.55 per ton, which was the same rate as was in force before the order herein assailed was made. It reduced the through rate from \$2 per ton of coal to these places to \$1.90 by deducting 10 cents per ton from the Montana, Wyoming & Southern rate per ton. Such reductions as it made in the Northern Pacific rates per ton of coal from Bridger were shown to be to places to which comparatively few coal shipments were made.

Enough has been said to demonstrate that under the order of the Commission complainant company falls far short of enjoying a reasonable return on capital invested, not to mention the element of some uncertainty which goes with the investment, and upon which the investors are justified in expecting a chance of added profit to compensate for risk.

[11] It is, however, not for the courts to assume to prescribe rates.

Their duty is generally ended when, after careful consideration of the facts of the particular case before them, and after weighing the interests of the public and of the owners of the railroad, determination is made whether the administrative authority has exceeded its constitutional power in making an order which in practical application deprives the owners of their property without just compensation. No given per cent. can be fixed by the court, as a rate to which the carrier is entitled as a matter of right. *Covington, etc., Turnpike Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560. It may use percentages to illustrate, but not as fixed measures. But there must be just remuneration. *Cotting v. Stockyards Company*, 183 U. S. 91, 22 Sup. Ct. 30, 46 L. Ed. 92; *Spring Valley Water Co. v. San Francisco (C. C.)* 165 Fed. 657.

From these views, it follows that the court must hold that the order made is an infringement of the constitutional rights of the carrier, in that it deprives it of a fair return upon the reasonable value of its property while in use for the public. In so far as it is necessary to modify the findings of the master to conform with the views herein expressed, such modification will be deemed made.

Decree of injunction will issue.

GRAND TRUNK RY. CO. OF CANADA v. MICHIGAN RAILROAD
COMMISSION et al.

DETROIT, G. H. & M. RY. CO. v. SAME.

(District Court, E. D. Michigan, S. D. August 5, 1912.)

Nos. 5,471, 5,476.

1. CARRIERS (§ 11*)—REGULATION—INTRASTATE CAR LOAD FREIGHT—RAILROAD COMMISSION LAW.

Michigan Railroad Commission Act (Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139), providing for the regulation of freight traffic within the state, requires railroads doing business in the state to receive and transport at reasonable rates all intrastate car load traffic offered for transportation under the usual conditions locally consigned between points in the same city or town, whether received from another railroad or not, and such as is offered at any junction or transfer point or intersection with another railroad within such city for delivery on team tracks or sidings therein, whether the shipment originated within or without such city or town.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

2. CONSTITUTIONAL LAW (§ 297*)—REGULATION—INTRACITY SERVICE.

Pub. Acts Mich. 1911, No. 139, amending Michigan Railroad Commission Act (Pub. Acts 1909, No. 300), provides (section 7d) that every common carrier operating within the state shall transport at reasonable rates all car load traffic offered for transportation under usual conditions locally consigned between points in the same city or town, and from any junction or transfer point or intersection with another railroad in such city or town, to team tracks or other sidings on any line operated by the delivering carrier, and shall deliver such car or cars on such team tracks or sidings where the car or cars are received from the connecting carrier when required to do so, etc. *Held*, that the service so required in a city

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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having a large number of industries and served by a number of railroads with many team, "hold," and industrial sidings used for the delivery of freight is not necessarily a mere switching service, that whether it is transportation is in a given case a question of fact, that a service does not cease to be transportation merely because the movement begins and ends within a city, or is only between an intracity junction or team track or side track, and hence such legislative requirement as to a carrier not incorporated particularly therefor was not objectionable as a deprivation of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297.*]

3. CARRIERS (§ 10*)—REGULATION—RAILROAD COMMISSION—QUALITY AND REASONABLENESS OF SERVICE—COMPENSATION.

Under Michigan Railroad Commission Act (Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139), regulating intrastate transportation, questions relating to quality and reasonableness of service and compensation therefor are primarily for the consideration of the Railroad Commission, subject to the statutory right of review conferred by the act on the state courts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 14-20; Dec. Dig. § 10.*]

4. CARRIERS (§ 18*)—REGULATION—TERMINAL FACILITIES—INTRACITY EXCHANGE OF FREIGHT.

An injunction would not be granted to restrain the enforcement of an order of the Michigan Railroad Commission to carry out Pub. Acts 1911, No. 139, requiring carriers operating within the state to receive and transport at reasonable rates car load traffic between points in the same city or town, or from a junction or transfer point or intersection with another railroad, to team or other sidings of any line, on the ground that service would entail large expense and require the acquisition of additional lands for additional terminal facilities, and would also result in congestion of traffic, the latter objection being supported only by ex parte affidavits.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

5. COMMERCE (§ 58*)—REGULATION OF LOCAL COMMERCE—INTERFERENCE WITH INTERSTATE COMMERCE.

A state Railroad Commission's order intended to enforce a state statute (Pub. Acts Mich. 1911, No. 139), requiring intracity transportation of car load freight between junction, intersection, and transfer points, and delivery sidings, could not necessarily and immediately affect interstate commerce as a matter of law, and was therefore not objectionable as a violation of the commerce clause of the federal Constitution, in that its enforcement would result in congesting the carrier's terminal facilities to the detriment of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86; Dec. Dig. § 58.*]

6. STATUTES (§ 64*)—PARTIAL INVALIDITY—PENALTY CLAUSE.

Where severe penalties were provided for violation of a statute in a section separate from the substantive part of the act, the balance of the act will not be held unconstitutional in a suit to restrain the enforcement thereof, in which no attempt is made to recover or enforce the penalty provision, on the ground that the penalties are so severe as to be invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

7. CARRIERS (§ 2*)—REGULATION—STATUTES.

Michigan Railroad Commission Act (Pub. Acts 1909, No. 300) § 7a, declaring that nothing in the act shall require any railroad to give the use

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of its tracks or terminal facilities to another railroad engaged in like business, and Pub. Acts 1911, No. 139, adding to section 7, subd. d, requiring railroads to transport car load freight consigned locally between points in the same city or town from a junction or transfer point or intersection with another railroad, to team tracks or other sidings of any line operated by the delivering carrier, etc., were consistent with each other, so that the latter subdivision was not in conflict with the former, as requiring a carrier to submit its terminal facilities to the use of another railroad.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

8. INJUNCTION (§ 22*)—EFFECT.

Injunction would not be granted to restrain the enforcement of certain orders of the state Railroad Commission where the action commanded by the orders had already been taken and suspended by order of the Commission.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 20, 21; Dec. Dig. § 22.*]

In Equity. Suits by the Grand Trunk Railway Company of Canada and by the Detroit, Grand Haven & Milwaukee Railway Company against the Michigan Railroad Commission and others. On application for interlocutory injunction. Denied.

G. W. Kretzinger and G. W. Kretzinger, Jr., both of Chicago, Ill., and L. C. Stanley, of Detroit, Mich., for complainants.

Franz C. Kuhn, Atty. Gen., of Mt. Clemens, Mich., and George S. Law, and Edward Waer, for defendants.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

PER CURIAM. The Grand Trunk Railway Company of Canada and the Detroit, Grand Haven & Milwaukee Railway Company filed each its separate bill to restrain the Michigan Railroad Commission and the Attorney General of that state from enforcing certain orders of the Commission made under the authority of the Michigan Railroad Commission Act (being Act No. 300 of the Public Acts of Michigan of 1909, as amended by Act No. 139, P. A. Mich. 1911), relating to the intracity transportation of car load freight between complainants' terminal tracks and their junctions with other roads, and to restrain the enforcement of any penalties or remedies provided for the violation of the orders of the Commission or of the acts of the state of Michigan in question. Applications for interlocutory injunctions were heard under section 266 of the New Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

Complainants contend that the statute and orders of the Commission in question are unconstitutional and void, first, as denying the equal protection of the laws, in violation of the fourteenth amendment to the federal Constitution; and, second, as contravening the commerce clause of that Constitution. These objections present the larger questions in the case. Other objections, addressed to the validity of the statute and of the proceedings involved, will be stated later. The purpose of the Commission Act, as indicated by its title, is "to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

define and regulate common carriers and the receiving, transportation and delivery of persons and property, prevent the imposition of unreasonable rates, prevent unjust discrimination, insure adequate service, create the Michigan Railroad Commission, define the duties and powers thereof, and to prescribe penalties for violation thereof." The term "railroad," as used in the act, is declared to include all railroads, whether operated by steam, electric or other motive power, except logging or other private railroads not doing business as common carriers, and street and electric railroads engaged solely in the transportation of passengers within the limits of cities or within a distance of 5 miles of the boundaries thereof. The provisions of the act are made applicable "to the transportation of passengers and property between points within this state, and to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing and mileage charges."

By section 7 of the original act, the railroads subject to its provisions are required to "afford all reasonable and proper facilities by the establishment of switch connections between one another and the establishment of depots and otherwise for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith," and to "transfer and deliver without unreasonable delay or discrimination any freight or cars or passengers destined to any point on its own line or on any connecting line" without discrimination in rates and charges between such connecting lines.

Any person delivering property for transportation is given the right of routing shipments, and of prescribing over what connecting line transportation shall be made; and it is declared to be the duty of the initial carrier to observe the direction of such shipper, and, in case such direction is not given, "to so route the freight as to give the property the benefit of the lowest rate published between points of origin and destination." By the same section the Commission is empowered, upon application, to require steam railroads and interurban and suburban railways to interchange cars, car load shipments, less than car load shipments, and passenger traffic "where it is practicable and the same may be accomplished without endangering equipment, tracks or appliances of either party," and to require the construction of physical connections upon such terms as the Commission may determine. The same section provides that:

"Every corporation owning a railroad in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation or individual having connecting tracks; Provided, such cars are of the proper gauge, are in good running order and equipped as required by law and otherwise safe for transportation and properly loaded."

With the further proviso that:

"If the corporations cannot agree upon the times at which the cars shall be drawn, or the compensation to be paid, the said Commission shall, upon petition of either party and notice to the other, after hearing the parties interested, determine the rate of compensation and fix such other periods, having reference to the interests of the corporation or corporations and the public to be accommodated thereby."

The award of the Commission is declared to be "binding upon the respective corporations interested therein until the same shall have been revised."

By sections 22 and following, provision is made for hearing by the Commission of complaints of unreasonable or unjustly discriminatory rates (joint or otherwise), regulations, or practices, and for the fixing of maximum rates, and for setting aside unreasonable or discriminatory regulations, practices, and services, and the substitution of proper action in lieu thereof.

By sections 26 and following, provision is made for action in chancery against the Commission by any common carrier or other party in interest who may be dissatisfied with any order of the Commission of the nature of that above referred to, and the court is empowered "to affirm, vacate or set aside the order of the Commission in whole or in part, and to make such further order or decree as the courts shall decide to be in accordance with the facts and the law." Either party is given the right of appeal to the Supreme Court of the state; and in all actions under this provision the burden is upon the complainant "to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be."

By the amendment of 1911 a new subdivision was added to section 7, as follows:

"(d) Every common carrier operating within this state shall receive and transport at reasonable rates any and all car load traffic offered for transportation under the usual conditions locally consigned between points in the same city or town and shall receive and transport at reasonable rates from any junction point or transfer point or intersection with another railroad in such city or town any and all such car load freight destined to team tracks or other sidings on any line operated by the delivering carrier, and shall deliver such car or cars upon such team tracks or sidings in the city or town where such car or cars are received from such connecting line when required so to do: Provided, that when delivery is requested which will involve the use of a private siding not owned or controlled by consignee, said consignee shall file with both receiving and delivering carriers written permission signed by the owner or lessee of such private siding authorizing the use of same. When the particular delivery desired cannot be accomplished owing to the congestion of cars upon such siding or team tracks, it shall be the duty of the delivering carrier to notify consignee of such conditions and it shall be the duty of such consignee upon receipt of such notice to advise upon what other siding delivery will be accepted or whether or not it is desired that such car or cars shall be held awaiting the opportunity for delivery upon the siding originally designated as the destination."

After the taking effect of the amendment of 1911, and on July 29th, the Grand Trunk Railway System filed its tariff (effective September 1, 1911) covering so-called switching charges within the switching or corporate limits of the city of Detroit, prescribing a charge of \$5 per car for switching car load traffic from one to another industry having private sidings, or from one "hold" or team track to another "hold" or team track of the Grand Trunk Railway System, and imposing an additional charge of \$3 per car in case of team track deliveries for the unloading of shipments received from or loading of shipments delivered to other carriers. Upon

complaint of a shipper made against "the Grand Trunk Western Railway Company," the Commission, after hearing, held that the charging of a greater rate for the movement of a car load shipment from a junction point with a connecting road to a team track on the Grand Trunk Western road than as charged for a like shipment from an industry to a team track upon the same line is an undue and unjust discrimination; and the railway company was ordered to make and file a tariff removing such discrimination, and making "like charges for the movement of a car load shipment when received from an industry within the city of Detroit upon the said Grand Trunk Western Railway, consigned for delivery upon team track or other siding of said road within the same city, and for a like shipment received by said Grand Trunk Western Railway from a connecting carrier at a junction point within the corporate limits of the city of Detroit, consigned to team track or other siding upon said road within the same city."

The Grand Trunk System thereupon published a new tariff, removing the discrimination by raising to \$8 the charge for movement of cars between team tracks and between industrial tracks and team tracks located on the Grand Trunk lines. Upon further complaint that the new tariff was unreasonable and exorbitant, the Commission on March 15, 1912, ordered the postponement of the effective date of the new tariff until April 29th to give the Commission opportunity to investigate the reasonableness of the proposed rate. Thereupon the Grand Trunk System issued a supplement to its tariff suspending the intrastate rates named in the tariff last referred to, and on March 30th published its new tariff, canceling all rates between industries having private sidings on the Grand Trunk System and hold or team tracks on that system, and all rates between junction points with other carriers within the corporate limits of Detroit. The Grand Trunk team tracks were thereby withdrawn from all intracity, intrastate, and interstate switching movements, except as to the Detroit & Toledo Shore Line, with which it was under contract for terminal switching. On April 10th the Commission suspended the last-named tariff supplement until May 25, 1912, to give the Commission opportunity to investigate its reasonableness. On April 12th, two days after the making of the Commission's order suspending the tariff of the Grand Trunk System canceling team track switching, the Grand Trunk Railway of Canada filed its bill in this cause, and on April 27th filed an amended bill. On the latter date the Detroit, Grand Haven & Milwaukee Railway Company filed its bill. A temporary restraining order was made in each case, and is still in force.

[1] Complainants and defendants seem to agree that the statutes in question should be interpreted as requiring complainants to receive and transport, at reasonable rates, all intrastate car load traffic offered for transportation under the usual conditions and falling within either one of two classes: First, such as is locally consigned between points in the same city or town, whether or

not the same is received from another railroad; second, such as is offered at any junction or transfer point or intersection with another railroad within the city for delivery upon team tracks or sidings therein, whether or not the shipment originated within such city or town. Defendants' brief discusses the case with reference only to such two classes. It is not entirely clear whether complainants regard as included a third class, viz., such as is offered upon team tracks or sidings within a city for delivery to a junction or transfer point or intersection with another railroad therein, whether or not the ultimate destination of such shipment is beyond such city or town. We thus find it necessary to discuss the case with reference only to the first two classes of transportation.

[2] 1. The taking of complainants' property without due process is said to result because, as contended, the required services are merely switching services, as distinguished from transportation services. It is contended that intracity switching is beyond any obligation of complainants, and cannot be imposed by the Legislature, and that a carrier not incorporated particularly for such services cannot be required to allow another carrier the use of its terminals to do switching.

An imperative obligation resting upon railroads doing business within this state, not only to furnish equal facilities for the transportation of passengers and freight to all railroads connecting therewith, but to make such track connections with connecting railroads as to permit the transfer from one to the other of loaded and unloaded cars designed for transportation upon both roads, has been too long imposed by statute and declared by the decisions of the courts to now permit of question. Such has been the settled policy of the state of Michigan for more than 30 years. By the amendment of 1879 (P. A. Mich. 1879, No. 207) to the General Railroad Act of 1873 (Pub. Acts 1873, No. 198), express provision was made for compelling such union and connection of tracks under order of the Commissioner of Railroads. The Railroad Commission Act of 1873 (P. A. Mich. 1873, No. 79) contained the provision above quoted in this opinion as contained in the act of 1909, requiring railroads at reasonable times, and for reasonable compensation, to draw over their tracks the merchandise and cars of any other corporation or individual having connecting tracks, with substantially the same provision for determination by the Commissioner of Railroads of the rate of compensation and the stated periods at which cars shall be so drawn, in case the respective railroads cannot agree thereon. Similar statutory provisions have existed ever since 1873.

In the year 1881, in a case in which a switchman sought to recover from a railroad company for injuries suffered in coupling freight cars received from another railroad, the Supreme Court of Michigan, speaking through Justice Cooley, said:

"The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its

road all the varieties of freight cars which are offered to it for the purpose and which are upon wheels adapted to its gauge. It is compelled to do so, first; * * * but, third, the statute requires it. It is provided by General Laws 1873, p. 99, that 'every corporation owning a road in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation.' The necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the state to punish could hardly fail to be speedy and effectual." *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212, 221, 7 N. W. 791, 795.

In *Michigan Railroad Commission v. Michigan Central R. R. Co.* (1911) 168 Mich. 230, 132 N. W. 1068, the Supreme Court of Michigan held valid and enforceable a provision of the Michigan Railroad Commission Act of 1907 similar to that contained in the 1909 act before the amendment of 1911, empowering the Railroad Commission to require railroads to interchange cars, freight and passenger traffic, and to require track connection upon such terms as it may determine, and sustained the order of the Commission requiring such connection and interchange of traffic between a steam railroad and an electric interurban road. That requirements of track connections and interchange of traffic between railroads, imposed by the Michigan statutes previous to 1911, do not amount to the taking of property without due process, needs no extended reference to authority. *Michigan Railroad Commission v. Mich. Central R. R. Co.*, *supra*; *Wisconsin, etc., Ry. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 263, 22 Sup. Ct. 900, 46 L. Ed. 1151. If, therefore, the requirement of the services here in question offends against the due process clause of the Constitution, it must be because such required services are not in a proper sense transportation, but are essentially distinguishable therefrom.

The nature and classification of this service may best be appreciated by considering the conditions to which it is sought to apply the orders of the Commission here in question. Detroit is a city of about 500,000 population. It has a large number of industries, and is served by a large number of railroads. For the purpose of facilitating the loading and unloading of freight, each of these railroads has established a greater or less number of team or "hold" tracks, and many of these industries are provided with sidings. These "hold" tracks, team tracks, and industrial sidings are within what are called the switching limits of Detroit. It is stated in defendants' brief, and without contradiction, that the so-called switching district of Detroit extends for a distance of about 22 miles. Such tracks are necessary to prevent the congestion which would result from requiring all car load freight, both in and out, to be delivered at the freight depots of the respective roads, and in a very proper sense are shipping stations. In *Railroad Commission v. St. L., I. M. & S. Ry. Co.*, 24 Interst. Com. Com'n R., at page 294, it was said of team tracks:

"They are analogous to freight depots in that they bear the same relation to car load freight that such depots bear to less than car load freight."

By section 6 of the Railroad Commission Act of 1909 switching connections with private side tracks are required. By section 13a the requirement is made of suitable freight depots, buildings, switches, and side tracks; and the Commission is empowered to make such orders requiring the same, including "other track accommodations," as it is deemed for the public interest and as shall be just and reasonable.

Setting to one side the question of the requirement of interchange of traffic between connecting roads, the statute, in our opinion, validly empowers the Commission to require local transportation by a railroad between its own shipping stations within a city, whether such plurality of shipping stations has been voluntarily established by the railroad, as here, or has been required by the Commission under its lawful powers, and provided such transportation is for such substantial distance and of such a character as reasonably to require a railroad haul, as distinguished from other means of carriage. It is also clear that a statute validly may, and that the statutes we are considering do, authorize the employment of such depots, side tracks, and team tracks of a railroad for transporting car load freight to or from the junction of such road with another road as a substantial part of a continuous transportation routing, where such junction is outside the city limits. Does the fact that such junction is within the city limits necessarily differentiate the two classes of service so as to make the one a transportation within the meaning of the law and the other a mere switching service? And this in view of the fact that the distances between the city depots and tracks of a railroad and its intracity junction with another road may be as great as between such city depots and tracks and junctions outside the city, or as great as the average distance between extracity freight stations in a fairly populous section. Or does the fact that such freight movement begins and ends within the limits of a city necessarily characterize its movement between junction point and the station of receipt or delivery as a switching transaction rather than as part of an actual transportation between two termini: that is to say, between the place where the movement begins and the place where the movement ends? Upon principle, there seems no necessary distinction with respect to either of the two cases suggested. In either case the shipper is not necessarily doing more than exercising the right of routing shipments between point of shipment and point of delivery. The cases relied upon by complainants are not in our judgment decisive of the question here presented. In *Stockyards Co. v. Louisville & Nashville Ry. Co.*, 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565, it was held that neither the Interstate Commerce Act of 1887 nor the provisions of the Kentucky Constitution which required railroad companies to receive, deliver, transfer, and transport freight from and to any point where there is a physical connection between the tracks imposed an obligation upon a railroad having its own city stockyards, under a lease from a stockyards company, to accept live stock from other states for delivery

at the stockyards of another railroad in the same neighborhood, although there is a physical connection between the two roads. That case differs from the one before us in these respects: There was in that case no statute in terms requiring the transfer in question. The constitutional provision was construed as referring to a case where the freight was destined to some further point by transportation over a connecting line. The statute before us permits no such construction. It is true that in the stockyards case it was said of the constitutional provision referred to that:

"It cannot be intended to sanction a snatching of the freight from the transporting company at the moment and for the purpose of delivery. It seems to us that this would be so unreasonable an interpretation of the section that we do not find it necessary to consider whether under any interpretation it can be sustained."

But the basis of the decision seems to be that there was neither requirement of public law nor of private contract that the railroad company should deliver its own cars to another road, and that delivery would accordingly have to be made either by unloading or by the surrender of the defendant's cars, and that the courts have no authority to dictate a contract to the defendant or to require it to make one. This objection again does not pertain to the case before us. The case was treated "as an ordinary case of stations at substantially the same point of delivery, and, therefore, as one to be dealt with as if they were side by side." The court, moreover, said:

"It may be that a case could be imagined in which carriage to another station in the same city by another road fairly might be regarded as bona fide further transportation over a connecting road and within the requirements of the Kentucky Constitution."

In *Louisville & Nashville Ry. Co. v. West Coast, etc., Co.*, 198 U. S. 483, 25 Sup. Ct. 745, 49 L. Ed. 1135, it was held that a common carrier may agree with such other carrier as it may choose to forward beyond its own line goods it has transported to its terminus; and, if it has adequate terminal facilities at a seaport sufficient for all freight destined for that place, it is not obliged to allow other and competing carriers to load and discharge at a wharf owned by it and erected for facilitating the transportation of through freight to points beyond that place. This case differs from the instant case in these respects: It involved a wharf which was held in a proper sense to be private, and it was said that the defendant "never became a common carrier, as to this wharf, in the sense that it was bound to accord to the public or to plaintiff a right to use it upon payment of compensation." It was further said that the wharf was "not in strictness the terminus of defendant for unloading its goods." The objection urged in that case that the commerce of the country would be cramped, if not damaged, by the uncertainty of finding quarters for the prompt loading and unloading of vessels, is guarded against in the Michigan statute by the provision authorizing the Commission to determine the rate of compensation and to fix the periods at which cars should be drawn,

and by the provision contained in the proviso of section 7d for guarding against congestion.

The case of *Louisville & Nashville Ry. Co. v. Stockyards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, was similar to the case referred to as reported in 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565. In the case reported in the 212th United States the same condition existed as in the case earlier referred to, in that there was no statute providing machinery for carrying out the provisions of the Kentucky Constitution; and it was held that, in order to deliver as demanded, the railway "would have been compelled either to build chutes or to hand over its cars to the Southern Railway," and that, in the absence of statute or contract, there was no power to compel such action. The court again expressly refrained from saying that a valid law could not be passed requiring the delivery by a railroad of its cars to another railroad. The attempt was made in that case to compel the use of the railway terminals "upon simply paying for the service of carriage," a condition which does not exist here. The action was also construed as an attempt to compel the railroad to deliver cars elsewhere than at its own terminals, while in the case before us delivery is attempted to be enforced only at places which the railroad company holds are parts of its terminal facilities. All three of the cases referred to arose previous to the 1906 amendment of the Interstate Commerce Act providing for compulsory through routing and rating.

In *Railroad Commission v. St. L., I. M. & S. Ry. Co.*, supra, it was held by the Interstate Commerce Commission that a railroad was not required to switch a car containing an interstate shipment of coal from another line connection in the city of its delivery to its own team track for unloading by the consignee, there having been no tariff charge provided therefor; but that such switching could be required between connections with other lines and industries located on defendant's tracks, as to which last service a tariff charge was provided. In the opinion it is said (page 295):

"Switching to an industrial track is a service for which a regular tariff charge is frequently made by carriers and is over tracks and spurs as to which the cost of construction is generally borne in part by owners of the plants to which they extend. Team track delivery is a service rendered by carriers in receiving and delivering car load freight in connection with their own line business and is over tracks owned by the carriers. It is a service for which no separate tariff charge is provided, and which is analogous to freight depot service for less than car load freight. A freight depot owned and maintained by a carrier is a terminal facility for use in handling business from its own line and cannot, under section 3 of the statute, be used for handling business from other lines without its consent."

It will be noted that this decision is based upon two propositions: First, that the statute does not provide for the service; and, second, that no separate tariff charge is provided. The first ground assigned does not apply in the instant case, because the statute expressly requires it. We see no reason why the Commission cannot, under the Michigan statute, require a tariff charge for

such service in connection with, and as part of, transportation by way of through routing.

We find nothing in the propositions decided in *United States v. Terminal Railroad Association*, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810, or in *State v. Terminal Railroad Association*, 182 Mo. 284, 81 S. W. 395, opposed to the validity of the legislation we are considering. The case of *Chicago, I. & L. Ry. Co. v. Railroad Commission (Ind.)* 95 N. E. 364, decided by the Supreme Court of Indiana, sustaining a statute in many respects similar to that before us, is well in point upon the question of due process, as well as upon certain of the other questions here involved.

The section of the Michigan statute here involved relates by its terms to transportation, and the defendants seek to sustain the validity of the statute with respect to the services in question upon the sole ground that they do in fact constitute transportation. While we do not say that there may not be cases distinctively of switching or team track delivery which do not amount to transportation, in our opinion, a service calling for the use of the so-called terminal facilities of a connecting railroad does not lose what would otherwise be the quality of transportation from the mere facts either that the movement begins and ends within the switching or corporate limits of a city, or that the transportation is only between an intracity junction and team track or side track. Whether a given service is delivery as incidental to and as a part of a transportation in which the delivering carrier has substantially participated, or is a delivery incidental only to a "transportation" which has been wholly performed by another carrier, is, at the last, a question of fact, to be determined in the given case as it may arise.

The conclusion we reach is that the imposing upon complainants of the duty of transportation prescribed by the statute, as we have interpreted it, is not sufficient to constitute a taking of complainants' property without due process of law.

[3] Questions relating to quality and reasonableness of service, and compensation therefor, are primarily addressed to the Commission, subject to the statutory authority of revision conferred by the act upon the state courts. No case of threatened abuse of its powers on the part of the Commission is presented.

[4] But it is urged, and the ex parte affidavits of complainants' representatives tend to show, that the performance of the class of services in question would tend to congest complainants presently existing terminals, and thus interfere with the proper handling of the traffic; that during the period in which such services were furnished more or less congestion did result; that sufficient vacant land cannot be acquired for the necessary enlargement of such terminals; and that to acquire lands now occupied would cost several hundred thousand dollars. So far as concerns the expense of enlarging and extending complainants' track facilities, it would seem that, if complainants could otherwise lawfully be required to provide the service in question, such obligation could not be avoid-

ed because attended with considerable expense. As respects temporary congestion pending such extension of facilities, we would not be warranted, upon *ex parte* affidavits, in enjoining the enforcement of the statute, especially in view of the powers given the Commission toward preventing congestion, and in view of the fact that the service seems not to have been discontinued by reason of such congestion, but immediately because of the controversy over rates.

[5] 2. The alleged violation of the commerce clause of the federal Constitution rests upon the argument that the enforcement of the statute and the orders referred to will necessarily result in congesting the terminal facilities of complainants, and thus make it impossible for them to carry on interstate business without seriously delaying and interfering with such commerce. The statute does not embrace interstate commerce. It is confined to intrastate business. It has been so construed by the Supreme Court of Michigan. *Mich. Central R. R. Co. v. Michigan Railroad Commission*, *supra*. The statute cannot be said to interfere with interstate commerce unless such is its direct, immediate, and necessary effect. *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677, 701, 16 Sup. Ct. 714, 40 L. Ed. 849; *Louisville & Nashville R. R. Co. v. Kentucky*, 183 U. S. 503, 518, 22 Sup. Ct. 95, 46 L. Ed. 298. It is not, and cannot be, claimed that such effect results as matter of law; that is to say, it can only result because and when it is established by proofs that such is in fact the direct and necessary result of the enforcement of the act and the orders of the Commission. What has already been said respecting the congestion of complainants' existing terminals, in considering the question of due process, is equally pertinent to the objection of interference with interstate commerce.

[6] 3. The statute is assailed as unconstitutional on its face, as denying the equal protection of the law because imposing, as alleged, such severe penalties for disobedience of its provisions as to deter parties affected thereby from testing its validity in the courts. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, is relied upon to support this contention. But, without regard to the question whether the penalties provided by this statute are so excessive as to be void, it is sufficient to say that we have not before us an action for the recovery of penalties, that the penalties are embraced in a section by themselves, and thus plainly separable from the provisions here involved; and the question of the constitutionality of the penalty clause may properly be left to be determined should an effort be made to enforce the same. *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53-54, 29 Sup. Ct. 192, 53 L. Ed. 382; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 417, 29 Sup. Ct. 527, 53 L. Ed. 836; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 443, 30 Sup. Ct. 535, 54 L. Ed. 826.

[7] 4. Subdivision "a" of section 7 of the statute declares that:

"Nothing in this act shall be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business."

It is urged that to require a carrier to receive or transport over its tracks the merchandise and cars of any other corporation or individual having connecting tracks is to require it to give the use of its tracks and terminal facilities to another railroad engaged in like business, and that the act is thus so inconsistent and uncertain as to be utterly null and void. We think the two provisions in question can be so construed as to give effect to both.

The provision in subdivision "a" above referred to was contained in the Act of 1907, construed by the Supreme Court in *Michigan Central R. R. Co. v. Michigan Railroad Commission*, *supra*, in which case (although the provision in question in subdivision "a" was not referred to in the opinion) the court upheld the provision requiring interchange of traffic and track connections, including the transporting of cars from another railroad. Moreover, subdivision "d" was enacted by way of amendment subsequent to the original adoption of subdivision "a." If either provision were required to give way, it would seem that the later would prevail.

5. The orders entered by the Commission are denounced as void because made in proceedings to which complainants were not parties. Neither complainant is made a party to the proceedings in which the orders of February 6th and March 15th were made; the only respondent being the "Grand Trunk Western Railway Company."

[8] But complainants need no injunction to restrain the enforcement of those orders. Such attempted enforcement could not harm them, for the action commanded by the order of February 6th has already been taken, and the tariff suspended by the order of March 15th has been canceled. It is, moreover, alleged in defendants' brief, and not denied, that both these orders were suspended by an order of the Commission of May 14th. The order of April 10th, which suspended until May 25th the tariff of April 11th (which canceled team track switching and left in effect no rates therefor), seems to have been made in the original proceeding to which neither complainants were formally made parties. All the tariffs in question were made by "Grand Trunk Railway System," to which system both complainants belong, and which system the bills allege may and does lawfully issue tariffs for the entire system, without the necessity of further action by the separate companies. The Grand Trunk Western Railway belongs to the Grand Trunk Railway System, but has no tracks in Detroit. The bills allege that in the proceedings mentioned the Grand Trunk Western Railway Company was impleaded as "Grand Trunk Railway Company." Whether under the facts stated complainants would be affected by orders in proceedings to which they were not separately made par-

ties, and by name, we need not inquire, for we gather from the allegations of the bills that the Commission is not threatening to enforce its subsisting order of April 10th without making complainants parties to the proceedings in question; the allegation being that the Commission "gives out and threatens that it will make orator a party to said proceedings brought by said John S. Haggerty, and to said order entered therein (referring to order of April 10th), and to all proceedings under said suspension of said last-named tariff," and that it will require complainants to continue local switching business and to allow the use of its terminals for the purposes hereinbefore stated. Moreover, the order of April 10th simply postponed the tariff canceling team track switching to give the Commission an opportunity to investigate its reasonableness, and it does not appear that such further investigation has been had. In spite, therefore, of later allegations of threatened injurious action, we would not be justified in assuming that the Commission would attempt to or could do anything to complainants' injury under the order of April 10th without further impleading, investigation, and hearing.

It follows from what has been said that the application for interlocutory injunction should be denied, and the existing restraining order vacated. As the questions presented are important and review may be desired, the formal entry of the orders in accordance with this opinion will be withheld until September 5th next, to give complainants opportunity to present such applications as they may desire for a continuance of the restraining order pending appeal (under the rule stated in *Hovey v. McDonald*, 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888, and *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92) in case such appeal is to be taken.

MARQUEE v. HARTFORD FIRE INS. CO.

(Circuit Court of Appeals, Second Circuit. October 15, 1912.)

No. 232.

On rehearing. Affirmed.

For former opinion, see 198 Fed. 475.

Fried & Czaki, of New York City (Frederick M. Czaki, of New York City, of counsel), for plaintiff in error.

Ivins, Mason, Wolff & Hoguet, of New York City, (Henry F. Wolff, Robert Louis Hoguet, and Randolph W. Childs, all of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. In this case the trial judge directed a verdict in favor of the defendant, which the majority of this court held should be reversed, so that the plaintiff, if able to do so, could on a new trial prove that the insured had ratified the unauthorized con-

tract made by McIntosh before the insurer withdrew. This was on the theory that the trial judge had refused to admit such proof, as the briefs of both parties show he certainly would have done. Further examination of the record shows that no such proof was offered, and that, if offered, it could not have been received, because the parties had stipulated to confine the proof to the agreed statement of facts. When we said that it might be inferred that the insured had made claim on the policy before the insurer withdrew, we were referring to moral and not to legal evidence.

As the record shows no error upon this point, the mandate must be amended, so as to affirm the judgment.

END OF CASES IN VOL. 198